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THE OTTAWA REGION *Charity & Not-for-Profit Law Seminar*

Thursday, February 16th, 2017

“RECENT DEVELOPMENTS IN THE LAW”

WELCOME

Welcome to the Ottawa Region *Charity & Not-for-Profit Law Seminar*, which is designed to assist charities and not-for-profits in understanding developing trends in the law in order to reduce unnecessary exposure to legal liability. This seminar is eligible for **5 hours substantive CPD credits** with the Law Society of Upper Canada and CPA Professional Development requirements.

The *Charity & Not-for-Profit Law Seminar*, with its related *Church & Charity Law™ Seminar* held annually in Toronto since 1994, is hosted by **Carters Professional Corporation (Carters)**, a law firm experienced in advising charities and not-for-profits, with offices in Ottawa and the Toronto area. The Seminar is presented by a number of expert speakers, including our guest speakers Tony Manconi, Director General of the Charities Directorate of CRA, Ken Goodman, Public Guardian and Trustee of Ontario, and Ken Hall, Robertson Hall Insurance.

CHECK-IN

If you have REGISTERED AND PAID the registration fee, please obtain your name tag and handout package in the Foyer of the Centurion Conference Center, and help yourself to the complimentary Continental Breakfast.

If you NEED TO PAY the registration fee or have NOT YET REGISTERED, please proceed to the “Unpaid and New Registrations” table in the Foyer where registration forms are available. The registration fee can be paid by cash or cheque payable to *Carters Professional Corporation*. Please obtain a handout package from one of our greeters for more information.

CONTINENTAL BREAKFAST & LUNCH BUFFET

A complimentary Continental Breakfast is provided in the morning. A lunch buffet is also included with your registration fee. Both of these meals will be served in the Adriatic Ballroom.

RESOURCE MATERIALS

Included in this package are copies of today’s presentation materials. These materials, along with numerous other articles, seminar materials, and newsletters of interest to charities and not-for-profits, including back issues of *Charity Law Bulletins*, *Church*

Law Bulletins, and *Charity Law Updates* are available free of charge at our websites of www.charitylaw.ca, www.churchlaw.ca, www.antiterrorismlaw.ca and www.carters.ca. A few select *Charity Law Bulletins* and *Church Law Bulletins* are on display at the Carters booth in the Foyer outside of the Auditorium.

As well, approximately 200 copies of both the 2016 Legal Risk Management Checklist for Ontario-Based Charities, as well as for Ontario-Based Not-for-Profits are available free of charge at our resource table (one per person). The checklists are also posted on our website at www.carters.ca.

CHARITY & NFP LAW UPDATE

To receive the monthly Charity & NFP Law Update, e-mail us at info@carters.ca with “mailing list” in the subject line. Alternatively, please add your name and email address to our Sign-Up List at the Carters booth indicating your consent to receive firm newsletters and information about future seminars. A limited number of copies of the [January 2017 edition](#) of the Charity & NFP Law Update are available at the Carters booth today.

QUESTION PERIOD

Questions are welcomed and will be answered just before the lunch break, and again at the end of the day. A question sheet is provided at the back of this handout and should be left at the front lectern in the Auditorium or at the Carters booth at any time during the seminar.

ACKNOWLEDGEMENTS

We would like to acknowledge and thank Tony Manconi, Kenneth Goodman and Kenneth Hall for their contribution as guest speakers at this year’s seminar. All speakers have freely volunteered their time for this event.

We would also like to recognize the sponsors and resource materials provided for the 2017 Ottawa Region *Charity & Not-for-Profit Law Seminar*: BDO Canada LLP, Carswell, A Thomson Reuters Company, Robertson Hall Insurance, and STEP Canada

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THE OTTAWA REGION
Charity & Not-for-Profit Law Seminar

Thursday, February 16th, 2017

AGENDA

7:45 a.m.	Check-In (Continental breakfast buffet provided in Adriatic Ballroom)	
8:30 a.m.	Opening Remarks and National Anthem	
8:40 a.m.	Essential Charity and NFP Law Update	Jennifer M. Leddy
9:10 a.m.	Privacy Pitfalls for Charities and NFPs (And How to Avoid Them)	Sepal Bonni
9:40 a.m.	The Top Ten Human Resources Mistakes Employers Make (And How to Avoid Them)	Barry W. Kwasniewski
10:05 a.m.	Keeping Minutes: Getting it Down Right	Ryan M. Prendergast
10:30 a.m.	Morning Break (Coffee and tea provided) (25 minutes)	
10:55 a.m.	Youth Programs: Identifying and Managing the Risks	Sean S. Carter
11:25 a.m.	Allocation Issues and CRA: The Importance of Getting it Right	Theresa L.M. Man
11:50 a.m.	Duty of Care Involving Travel and Foreign Activities	Kenneth Hall
12:20 p.m.	General Question Period	
12:30 p.m.	Lunch Break (55 minutes) – Cold Lunch Buffet served in the Adriatic Ballroom	
1:25 p.m.	Why Do Directors Get into Trouble? The Perspective from the PGT	Kenneth Goodman
2:05 p.m.	What's New at the Charities Directorate	Tony Manconi
2:45 pm	Legal Check-Up: 10 Tips to Effective Legal Risk Management	Terrance S. Carter
3:15 p.m.	Question Period	
3:35 p.m.	Program Ends	

Please see **Speaker Biographies** on the following pages.

Please take a moment to complete the **Evaluation Form** included at the back of this handout to help us make the next Ottawa Region *Charity & Not-for-Profit Law*[™] Seminar even better.

REMINDERS

PLEASE MUTE ALL CELL PHONES AND ELECTRONIC DEVICES.

For recycling purposes, return your name tag, along with your Evaluation Form, before you leave.

SEMINAR HOSTS

Carters Professional Corporation is a law firm experienced in serving charities and not-for-profits, and is able to provide specialized legal services in the following areas of charity and not-for-profit law:

- Anti-bribery Compliance
- Anti-terrorism Policy Statements
- CRA Charity Audits
- Charitable Organizations & Foundations
- Charitable Incorporation & Registration
- Charitable Trusts
- Charity Related Litigation
- Church Discipline Procedures
- Church Incorporation
- Corporate Record Maintenance
- Director and Officer Liability
- Dissolution and Wind-Up
- Employment Issues
- Endowment and Gift Agreements
- Foreign Charities Commencing Operations in Canada
- Fundraising and Gift Planning
- Gift Acceptance Policies
- Governance Advice
- Human Rights Litigation
- Incorporation and Organization
- Insurance Issues
- Interim Sanctions
- International Trade-Mark Licensing
- Investment Policies
- Legal Audits
- Legal Risk Management Assessments
- National and International Structures
- Privacy Policies and Audits
- Religious Denominational Structures
- Sexual Abuse Policies
- Special Incorporating Legislation
- Tax Compliance
- Tax Opinions and Appeals
- Trade-mark and Copyright Protection
- Transition Under the ONCA

PROTECTION FROM REGULATORY OFFENCES FOR NOT-FOR-PROFITS AND CHARITIES

Charities and not-for-profits are facing significant liability and financial challenges due to increasing enforcement of federal and provincial regulatory legislation dealing with such matters as water, working conditions and environmental issues. Carters is able to provide advice and assistance at all stages from an initial investigation through to a full defence at a trial. For more information, contact Sean S. Carter at (1-877-942-0001 x241).

SEMINAR RESOURCE EXHIBITORS

We are pleased to make resource materials from the following organizations available in the foyer.

- **BDO Canada LLP**, www.bdo.ca
- **Carswell, a Thomson Reuters business**, Tel: 800-387-5164, <http://www.carswell.com/home/>
- **Robertson Hall Insurance**, <http://www.robertsonhall.com/>
- **STEP Canada**, <http://www.step.ca/>

SPEAKER BIOGRAPHIES



Sepal Bonni, B.Sc., M.Sc., J.D., Trade-mark Agent - Called to the Ontario Bar in 2013, Ms. Bonni practices in the areas of intellectual property, privacy and information technology law. Prior to joining Carters, Ms. Bonni articulated and practiced with a trade-mark firm in Ottawa. Ms. Bonni represents charities and not-for-profits in all aspects of domestic and foreign trade-mark prosecution before the Canadian Intellectual Property Office, as well as trade-mark portfolio reviews, maintenance and consultations. Ms. Bonni assists clients with privacy matters including the development of policies, counselling clients on cross-border data storage concerns, and providing guidance on compliance issues.



Terrance S. Carter, B.A., LL.B., TEP, Trade-mark Agent – Managing Partner of Carters, Mr. Carter practices in the area of charity and not-for-profit law, and is counsel to Fasken Martineau on charitable matters. Mr. Carter is a co-author of *Corporate and Practice Manual for Charitable and Not-for-Profit Corporations* (Carswell), a co-editor of *Charities Legislation and Commentary* (LexisNexis Butterworths, 2017), and co-author of *Branding and Copyright for Charities and Non-Profit Organizations* (2014 LexisNexis Butterworths). He is recognized as a leading expert by *Lexpert* and *The Best Lawyers in Canada*, and is Past Chair of the CBA National and OBA Charities and Not-for-Profit Law Sections. He is editor of www.charitylaw.ca and www.churchlaw.ca. Email: tcarter@carters.ca.



Sean S. Carter, B.A., LL.B. – Sean Carter is a partner with Carters and the head of the litigation practice group at Carters. Sean has broad experience in civil litigation and joined Carters in 2012 after having articulated with and been an associate with Fasken Martineau DuMoulin LLP (Toronto office) for three years. Sean has published extensively, co-authoring several articles and papers on anti-terrorism law, including publications in *The International Journal of Not-for-Profit Law*, *The Lawyers Weekly*, *Charity & NFP Law Bulletin* and the *Anti-Terrorism and Charity Law Alert*, as well as presentations to the Law Society of Upper Canada and Ontario Bar Association CLE learning programs. Email: scarter@carters.ca



Kenneth Goodman, B.A., LL.B. –The Public Guardian & Trustee at the Attorney General Office. Mr. Goodman received his B.A. from York University (Toronto, Ontario) and his LL.B. from the University of Windsor Law School. He was called to the Ontario Bar in 1982. He was in private practice before joining the Ministry in 1990 and joined the Office of the Public Guardian and Trustee in 1998. While in private practice Mr. Goodman was actively involved as a director and officer of several charities. He is a member of the OBA (Ontario Bar Association) Charity and Not-For-Profit Law Section Executive. In 2007, he received the AMS John Hodgson Award, from the OBA, for contribution and development of law in the charitable sector. He has written and lectured on family law, charity and trust law matters.



Kenneth Hall, B.A. (Hons), R.F. – President, Robertson Hall Insurance Inc., Mr. Hall specializes in customized insurance programs and risk management advice for over 6,500 churches and Christian charities across Canada. He is a frequent presenter at national denominational conferences, NGO association events, the Canadian Council of Christian Charities, webinars and educational seminars for churches and para-church organizations.. His "Facing The Risk" series highlights current issues facing Christian charities and leaders, including abuse prevention, board governance, counselling services, injury prevention, transportation risk, refugee sponsorship, short-term mission safety, and many more. Email: KHall@robertsonhall.com



Barry Kwasniewski, B.B.A., LL.B. – Mr. Kwasniewski joined Carters' Ottawa office in 2008, becoming a partner in 2014, to practice in the areas of employment law, charity related litigation, and risk management. After practicing for many years as a litigation lawyer in Ottawa, Barry's focus is now on providing advice to charities and not-for-profits with respect to their employment and legal risk management issues. Barry has developed an expertise in insurance law, and provides legal opinions and advice pertaining to insurance coverage matters to charities and not-for-profits. Email: bwk@carters.ca.



Jennifer Leddy, B.A., LL.B. – Ms. Leddy joined Carters' Ottawa office in 2009, becoming a partner in 2014, to practice charity and not-for-profit law following a career in both private practice and public policy. Ms. Leddy practiced with the Toronto office of Lang Michener prior to joining the staff of the Canadian Conference of Catholic Bishops (CCCCB). In 2005, she returned to private practice until she went to the Charities Directorate of the Canada Revenue Agency in 2008 as part of a one year Interchange program, to work on the proposed "Guidelines on the Meaning of Advancement of Religion as a Charitable Purpose."



Theresa L.M. Man, B.Sc., M.Mus., LL.B., LL.M. – A partner with Carters, Ms. Man practices in the area of charity and not-for-profit law and is recognized as a leading expert by *Expert* and *Best Lawyers in Canada*. Ms. Man is co-author of *Corporate and Practice Manual for Charitable and Not-for-Profit Corporations* published by Carswell. She is chair of the Executive of the Charity and Not-for-Profit Section of the OBA and an executive member of the CBA Charities and Not-for-Profit Law Section. In addition to being a frequent speaker, she has also written articles for numerous publications, including *The Lawyers Weekly*, *The Philanthropist* and *Charity & NFP Law Bulletin*. Email: tman@carters.ca.



Tony Manconi, B.A. – Tony Manconi was appointed as Director General of the Charities Directorate with the Canada Revenue Agency (CRA) on July 25, 2016, taking over from Cathy Hawara. He is responsible for the overall management of the federal regulation of registered charities under the *Income Tax Act*. Mr. Manconi began his career in the Public Service in 1988 at the Secretary of State. Prior to joining the Charities Directorate, Mr. Manconi served as the Director General of the Collections Directorate of the CRA. Mr. Manconi holds a Bachelor's degree from Carleton University with a combined major in Law and Economics.



Ryan Prendergast, B.A., LL.B. - Called to the Ontario Bar in 2010, Mr. Prendergast joined Carters with a practice focus of providing corporate and tax advice to charities and non-profit organizations. Ryan is a regular speaker and author on the topic of directors' and officers' liability and on the topic of anti-spam compliance for registered charities and not-for-profit corporations, and has co-authored papers for the Law Society of Upper Canada. In addition, Ryan has contributed to *The Lawyers Weekly*, *Hilborn:ECS eNews*, Ontario Bar Association *Charity & Not-for-Profit Law Section Newsletter*, *Charity & NFP Law Bulletins* and publications on www.charitylaw.ca. Email: mp@carters.ca.

GENERAL DISCLAIMER

At the end of each presentation, please note the Disclaimer that applies: This handout is provided as an information service by Carters Professional Corporation. It is current only as of the date of the handout and does not reflect subsequent changes in the law. This handout is distributed with the understanding that it does not constitute legal advice or establish a solicitor/client relationship by way of any information contained herein. The contents are intended for general information purposes only and under no circumstances can be relied upon for legal decision-making. Readers are advised to consult with a qualified lawyer and obtain a written opinion concerning the specifics of their particular situation.

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LIST OF POWERPOINTS

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- ◆ **Essential Charity & NFP Law Update**
Jennifer M. Leddy, B.A., LL.B.
- ◆ **Privacy Pitfalls for Charities and NFPs (And How to Avoid Them)**
Sepal Bonni, B.Sc., M.Sc., J.D., Trade-mark Agent
- ◆ **The Top Ten Human Resources Mistakes Employers Make (and How to Avoid Them)**
Barry W. Kwasniewski, B.B.A., LL.B.
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- ◆ **Legal Check-Up: 10 Tips to Effective Legal Risk Management**
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ESSENTIAL CHARITY & NFP LAW UPDATE

By Jennifer M. Leddy, B.A., LL.B.

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2

OVERVIEW OF SELECTED TOPICS

- Key Highlights from 2016 Federal Budget
- CRA Publications and Website Updates
- Recent Tax Decisions, Rulings & Interpretations involving Charities
- Corporate Law Update
- Provincial Legislation Update
- Other Case Law of Interest
- CBA Submission on National Security

– See “Update on Charity Law” resource paper by Theresa Man and Terrance Carter available at <http://www.carters.ca/pub/article/charity/2016/tlmtsc1104.pdf>


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3

A. KEY HIGHLIGHTS FROM 2016 FEDERAL BUDGET

1. Implementation of Federal Budget

- Federal Budget 2016, announced March 22, 2016
- Subsequent legislation to implement certain portions of Budget 2016 was introduced on April 20, 2016 by Bill C-15, *Budget Implementation Act, 2016 No. 1*, that received Royal Assent on June 22, 2016
- On December 15, 2016, *A second Act to implement certain provisions of the budget tabled in Parliament on March 22, 2016 and other measures* (the “*Budget Implementation Act, 2016, No. 2*”) received Royal Assent



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4

2. Donation of Sale Proceeds of Real Estate and Shares of Private Corporations

- In Budget 2016, the Federal Government announced its intention not to proceed with the Budget 2015 proposal to provide a capital gains tax exemption for dispositions involving private corporation shares or real estate where proceeds were donated to a qualified donee within 30 days of disposition
- The decision of the current Federal Government not to proceed with these capital gains tax exemptions has been disappointing for the charitable sector
- However, the proposed rules were complicated and fraught with practical and implementation problems

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5

3. Consultation with Sector on Political Activities

- By way of background, the PM Mandate Letter to the Minister of Finance dated November 13, 2015, asked the Minister to “[w]ork to allow charities to do their work on behalf of Canadians free from political harassment, and modernize the rules governing the charitable and non-for-profit sectors. This will include clarifying the rules governing ‘political activity.’”
- This announcement was followed by the wind-down of the audit program directed at political activities of charities as announced by the Minister of National Revenue on January 20, 2016

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6

- The March 22, 2016, Budget announced that the Government would engage with the public through “stakeholder groups and online consultation” to clarify the rules involving political activities
- On September 27, 2016, the Minister of National Revenue announced the launching of public consultations concerning political activities by charities
- The consultations ended on December 14, 2016, the outcome has yet to be announced

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7

4. Acquisition of Interest in Limited Partnerships by Registered Charities

- Budget 2016 confirms the announcement in Budget 2015 and now allows registered charities, including private foundations and RCAAAs, to passively invest in limited partnerships without being considered to be carrying on the business of the partnership, provided that:
 - The charity must be a "limited partner" of the partnership (i.e. limited liability);
 - The charity deals at arm's length with each general partner of the partnership; and
 - The charity - together with all non-arm's length entities - holds 20% or less of the fair market value of all interests in the partnership

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8

B. RECENT CRA PUBLICATIONS AND WEBSITE UPDATES

1. Charities Directorate Report on the Charities Program 2015-2016

- The report includes a range of statistics on the charitable sector, applications for charitable registration, audit outcomes, revocations of charitable registration and the objections process
- The Director General of the Charities Directorate will be speaking about details of this report later in his presentation

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9

2. New Guidance on Becoming a Qualified Donee for Low Cost Housing Corporations ("LCHCA")

- On April 23, 2016, CRA released new Guidance CG-025, *Qualified Donee: Low-Cost Housing Corporations for the Aged*
- A LCHCA is "a corporation that is constituted exclusively for the purpose of providing low-cost housing accommodation for the aged (55+), no part of the income of which was payable to, or was otherwise available for the personal benefit of, any proprietor, member or shareholder thereof"
- Such accommodation "includes comfortable but modest rental accommodation" at rents that are low relative to rents generally

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10

3. New CRA Guidance on Charities That Assist the Aged

- On December 8, 2016, a new CRA Guidance entitled: *Relieving Conditions Attributable to Being Aged and Charitable Registration* (CG-026) was released
- Simply having attained a certain age is not a condition that is eligible for charitable relief
- Consistent with common law, the eligible beneficiary group to be served must be those affected by one or more conditions attributable to being aged
- Although the list is not exhaustive, generally the following conditions attributed to being aged are recognised by CRA:

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11

- Frailty
- Social isolation
- Decline in motor skills, flexibility, strength, speed of execution, or hand-eye co-ordination
- physical or mental health conditions attributable to being aged
- Some examples of purposes that could be charitable
 - Providing specially adapted accommodation
 - Providing personal care, nursing, housekeeping
 - Providing specialized care for everyday tasks

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12

4. Updated Charities Audit Statistics for 2015-2016

- On May 12, 2016, CRA updated its webpage *The Audit Process for Charities*
- CRA audits roughly 1% of charities each year

Audit Outcomes in 2015-2016

No Change	40
Education Letter	444
Compliance Agreement	111
Voluntary Revocation	22
Penalties and Suspensions	4
Notice of intent to Revoke Issued	21
Annulment	59
Other (includes pre-registration/Part V audits)	25
Total	726

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13

5. New Guidance on Requirements for Foreign Charities to become Qualified Donees:

- On June 16, 2016, CRA issued Guidance CG-023, *Qualified donee: Foreign charities that have received a gift from Her Majesty in right of Canada*, which outlines process for a foreign charity to become a qualified donee ("QD") that has the ability to issue official donation receipts
- If a foreign charity meets the criteria in the Guidance (see below) and has been registered, it will be a QD for a period of 24 months as of the date it received the gift from the federal government
- Foreign charity QD status therefore has limited "shelf life"

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14


- For registration as a QD, a foreign charity must:
 - Be established or created outside Canada and not be resident in Canada;
 - Have exclusively charitable purposes and activities;
 - Ensure that its income is not payable or otherwise available for the personal benefit of any owner, member, shareholder, trustee, or settlor of the organization;
 - Be the recipient of a gift from Her Majesty in right of Canada; and
 - Currently be undertaking at least one of the following:
 - relief activities in response to a disaster
 - urgent humanitarian aid
 - activities in the national interest of Canada

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15

6. Length of Retention for Church Offering Envelopes Changes

- Effective 2016, but also applicable to the 2015 tax year, church offering envelopes are required to be kept for a 6 year period from the end of the tax year to which the envelope relates, a change from the previous 2 year requirement
- CRA indicated that this change was made to reflect consistency with the ITA provisions related to retention of source dc



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16

7. Update to the Guide for the T3010

- Updated November 11, 2016 to reflect the most recent changes to the T3010
- These changes reflect charities new ability to invest in limited partnerships that was introduced by the 2016 Budget and the reporting requirements that accompany this ability

8. Informational Video on Gifting and Receipting

- On October 26, 2016 CRA posted a new video series to assist registered charities make sense of donation receipts
- Explains the conditions for making a gift and how to determine the amount to report on a donation receipt, including helpful examples

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17

9. New Form for Changing Information on Directors

- As of January 27, 2017 registered charities can now advise the Directorate of changes to their directors, trustees, or like officials' information by faxing, emailing, or mailing the changes to the Directorate using a new form available on CRA's website

10. Update to the Sponsorship Website

- Updated on October 28, 2016, the webpage contains a definition of sponsorship compared to donations, information on acknowledgement and receipting, factors to consider in sponsorship situations, and some scenarios as examples

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18

C. RECENT TAX DECISIONS, RULINGS & INTERPRETATIONS INVOLVING CHARITIES

1. FCA Confirmed Revocation of Charitable Status For Failure to Maintain Books & Records

- In *Al Uloom Al Islamiyyah Ontario v The Queen* (Feb 2016), the FCA confirmed decision of Minister of National Revenue to issue a Notice of Intent to Revoke a charity's registration for failure to maintain books and records and failure to file an annual information return
 - The charity asserted that, given the remedial action that it had taken, revocation was too extreme
 - The FCA disagreed and found that failure to maintain books and records was serious and, therefore, revocation was justified
 - Underscores the importance of maintaining books and records

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19

2. FCA Confirmed Revocation for Failure to Follow Compliance Agreement

- In *Opportunities for the Disabled Foundation v Minister of National Revenue* (March 2016), the FCA dismissed an appeal of the Minister's proposed revocation
- Previous audit of the charity led to compliance agreement, with same compliance problems again identified in its current audit
- The FCA did not give the charity a second chance given its failure to comply with the compliance agreement and, therefore, upheld the Minister's decision to revoke
- Decision underscores the importance of charities complying with compliance agreements and the need for all board members to monitor compliance
- Loss of charitable status for failure to comply with compliance agreements can lead to applicable directors being found to be "ineligible individuals"

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20

3. CRA Does Not Owe Duty of Care for Disallowed Tax Shelters

- In *Deluca v The Queen* decision (June 2016), the Plaintiff had filed a claim against the Crown and two CRA employees for failing to take prompt actions to warn the public about problems they knew of with a tax shelter and the risks involved in dealing with them
- Ontario Superior Court rejected this claim, stating that the ITA does not impose a duty on the Minister to administer the registration and supervision of registered charities in order to protect taxpayers and that there is no duty to warn taxpayers away from participating in tax shelter schemes that prove unsuccessful

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21

4. FCA Holds That Prevention of Poverty is Not a Charitable Purpose

- In *Credit Counselling Services of Atlantic Canada Inc. v Minister of National Revenue* (June 2016), FCA found that the "prevention of poverty" was not charitable at law
- The FCA stated, in order to satisfy the requirement that a purpose is for the relief of poverty, the person receiving the assistance must then be in poverty
- Absent "an act of Parliament to add prevention of poverty as a charitable purpose", it was not possible for the FCA to take such a step on its own
- The Court confirmed that the Notice of Annulment would be assessed by the same review standard as a revocation of charitable status

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22

D. CORPORATE LAW UPDATE

1. Technical Amendments to the CNCA

- On September 28, 2016, the Minister of Innovation, Science and Economic Development tabled Bill C-25, *An Act to Amend the Canada Business Corporations Act, the Canada Cooperative Act, the Canada Not-for-profit Corporations Act and the Competition Act*
- Bill C-25 includes minor technical amendments for CNCA corporations including:
 - New definition of person who has become "incapable";
 - New section requiring the Director to publish a notice of certain decisions by the Director under the CNCA, including when a corporation is deemed non-soliciting, when a corporation is permitted to delay calling of AGMs and when the Director relieves the corporation from certain parts of the CNCA

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23

2. Update on Ontario Not-for-Profit Corporations Act ("ONCA")

- As background, on September 17, 2015, the Ontario Ministry of Government and Consumer Services announced that ONCA cannot come into force until:
 - The Legislative Assembly passes a number of amendments to the legislation and related acts
 - Technology is upgraded to support these changes
- The Ontario government will bring the ONCA into force at the "earliest opportunity and will provide the sector with at least 24 months' notice before proclamation"
- This means that proclamation cannot occur any earlier than sometime in 2019
- Organizations that need to update their by-laws and letters patent should move forward under OCA instead of waiting for implementation of the ONCA

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24

3. Ontario Corporations Now Required to Keep Records of Land Ownership

- On December 10, 2016, certain provisions of Bill 144, the *Budget Measures Act, 2015* enacted the *Forfeited Corporate Property Act, 2015* and the *Escheats Act, 2015* and amended the *Business Corporations Act, 2015* and the *Corporations Act (OCA)*, and the *Not-for-profit Corporations Act (ONCA)*
- All Ontario corporations, including those incorporated under OCA and ONCA are now required to maintain a register of ownership interests in land in Ontario at its registered office

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25

- The required records are:
 - The identity of each property in Ontario in which the corporation possesses an “ownership interest”;
 - The date on which the corporation acquired the property and, if applicable, the date on which it disposed of it; and
 - A copy of any deed, transfers or similar documents that contain the municipal address, the registry or land titles division and the property identifier number, the legal description, and the assessment roll number of each property listed on the register, if any

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26

4. Proxy Form for Members’ Meeting Revised by Court:

- In *Jacobs v Ontario Medical Association decision* (August 2016), the Ontario Superior Court reviewed issues related to members’ meeting to ratify/reject agreement with Ministry of Health and Long Term Care
- Court ordered proxy form be revised because it was unhelpful and unfair, i.e. it contained one restriction to compel a vote for or against 1 of 3 resolutions and recommended vote “for” one resolution with no similar recommendation for other resolutions
- Court held that it was “far fairer” to provide no instructions/no recommendations for three resolutions, or to provide instructions but no recommendations
- Underscores that courts will intervene if a proxy will compromise the fair conduct of a meeting

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27

E. PROVINCIAL LEGISLATION UPDATE

1. Ontario Legislation on Forfeited Property:

- New legislation passed to address situations where corporations, charities and not-for-profits dissolve without properly disposing all their assets
- New legislation came into force on December 10, 2016:
 - *Forfeited Corporate Property Act, 2015* (“FCPA”)
 - *Escheats Act, 2015* (“EA”)
- The FCPA gives the Minister of Economic Development, Employment and Infrastructure sole jurisdiction over forfeited corporate real property
- The PGT under the EA retains discretionary authority to take possession, and dispose of, forfeited corporate personal property, and the property of heirless deceased persons
- The new legislation also changes the processes by which claimants can recover forfeited corporate property, including failure to continue under the CNCA

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28

2. Quebec Ends Duplicate Registration Process for Registered Charities

- On March 17, 2016, the Québec Budget provided that, effective 2016, charities registered by CRA under the ITA will no longer be required to file a separate application for charitable registration in Québec
- Previously, Quebec required that separate charitable registration be obtained if donations were received from Québec residents
- Donations made prior to January 1, 2016 to a charity registered by CRA will be deemed to have been made to a charity in Québec
- Québec, though, has retained its power to “refuse, cancel or revoke a registration or to modify a designation”

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29

3. Amendments to Ontario Lobbyists Registration Act

- On July 1, 2016, amendments to the *Ontario Lobbyists Registration Act, 1998* (“OLRA”) took effect
- Under OLRA, lobbying defined as a paid individual communicating with a public office holder in order to influence a decision with regards to legislation, policy, programs, decisions of the Executive Council, or financial benefits from the Crown
- “In-house lobbyist” is redefined in the OLRA to include any organization, including a charity or not-for-profit, which had employees collectively spending 50 hours a year or more on lobbying

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30

- Where threshold met, then organization must register, with the duty to register being placed upon the senior officer of the organization, not an individual
- A section was added granting the Integrity Commissioner of Ontario investigative powers for matters of suspected non-compliance
- Punishment for committing an offence was increased to a fine of not more than \$25,000 for the first offence and not more than \$100,000 for subsequent offences
- The amended rules provide protection to any person who discloses information to the Registrar or gives evidence in a proceeding or investigation by prohibiting various forms of retaliation (i.e. “whistle blower” protection)

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31

4. Employer Health Tax

- As of January 1, 2017, amendments to the *Employer Health Tax Act Regulations* came into force whereby registered charities with two or more qualifying “charity campuses” are now permitted to claim an EHT exemption for each qualifying “charity campus”
- A “charity campus” is “all of a registered charity’s locations that are in one building, or on one parcel of land (property), or on contiguous properties (properties that touch along a boundary or at a point)
- If a registered charity has branches, sections, parishes, congregations or other divisions (internal divisions), a “charity campus includes all of the locations of the registered charity and all of the locations of any of its internal divisions that are in one building, or on one property or on contiguous properties”

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5. Amendments Proposed to Child Protection Laws in Ontario

- On December 8, 2016, Bill 89, *Supporting Children, Youth and Families Act, 2016* received first reading
- It would replace the *Child and Family Services Act* that has been in place since 1985
- Some of the changes proposed include:
 - Increasing the age of children under the Act from under 16 to under 18 years old
 - Showing respect for the culture of the children under protection by keeping children in their home communities as much as possible; and
 - Providing greater accountability and oversight over child protection service providers, such as children’s aid societies

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F. OTHER CASE LAW OF INTEREST

1. Trinity Western University (“TWU”)

- In *Trinity Western University v Law Society of Upper Canada* (“LSUC”), the Ont. Court of Appeal on June 29, 2016, upheld the LSUC’s decision to deny accreditation to the proposed law school on the basis of institutional discrimination
- On July 26, 2016, the Nova Scotia Court of Appeal affirmed the lower court decision that the N.S. Barrister Society did not have the jurisdiction to refuse accreditation
- On November 2, 2016, B.C. Court of Appeal upheld decision of B.C. S.C. to quash Law Society of B.C.’s decision to reject TWU as approved faculty of law
 - BCCA found the Benchers fettered their discretion by agreeing to be bound by a members’ referendum without considering Charter rights of equality and freedom of religion

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34

2. Affiliation Agreement Upheld by BC Court of Appeal

- On May 20, 2016, the B.C. Court of Appeal upheld a claim for specific performance pursuant to an affiliation agreement in the appeal of *Habitat for Humanity Canada v Hearts and Hands for Homes Society* (“HHHS”)
- As an affiliated member, HHHS was required to enter an affiliation agreement with Habitat, but a dispute arose when HHHS failed to comply with the requirements under the agreement
- As a result, Habitat disaffiliated, HHHS and proceeded to enforce the provision of the affiliation agreement to require the net assets of HHHS be transferred to Habitat

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- Lessons Learned from this Case:
 - Courts are willing to uphold reasonable provisions set out in an affiliation agreement
 - It is important for parties to comply with disaffiliation process set out in own policies/agreements
 - When structuring the disaffiliation mechanism, consider the purpose and fairness of the process, as well as how a disaffiliation policy can assist affiliates experiencing difficulty by providing a defined way for them to remain in or return to good standing
 - Before entering into an agreement, affiliates should be given an opportunity to provide input to the terms
 - Parties should confirm in the affiliation agreement and constating documents their respective purposes and how they align with each other

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3. Alberta Court of Appeal Affirms Court’s Jurisdiction to Review Unfair Church Discipline

- On September 8, 2016, the Alberta Court of Appeal (“ABCA”) in *Wall v Judicial Committee for the Highwood Congregation of Jehovah’s Witnesses* followed a line of cases affirming that courts have jurisdiction to review decisions made by a religious organization where discipline or expulsion is carried out in a manner inconsistent with natural justice principles
- This case involved the expulsion of Mr. Wall, for “alleged wrongdoing involves drunkenness”
- In making its decision, the ABCA noted that Mr. Wall was not provided with the details of the allegations against him or an explanation of the discipline process, and he did not receive any written reasons for the decision for him to be “disfellowshipped”

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37

G. CBA SUBMISSION ON NATIONAL SECURITY

- Submission in response to the Justice and Public Safety Ministers' study of national security in Canada, and is a response to "Our Security, Our Rights: National Security Green Paper, 2016"
- The recommendations in the submission are designed to ease some of the tensions that exist between the law and the practical operational necessities of charities operating abroad
- Of particular interest to charities are recommendations 18-20 dealing with procedures for listing terrorist entities and issues involving terrorist financing
- CBA submission available at:
<http://www.cba.org/CMSPages/GetFile.aspx?guid=82a13ac6-df5c-472a-969b-b832bb18f87d>

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The Ottawa Region 2017 *Charity & Not-for-Profit Law Seminar*


Ottawa – February 16, 2017

PRIVACY PITFALLS FOR CHARITIES AND NFPs (AND HOW TO AVOID THEM)

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**Privacy Pitfalls for Charities and NFPs
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2

OVERVIEW

- Privacy law is a highly nuanced area and the law is continually changing - this presentation only can cover the “tip of the iceberg “
- This presentation will not discuss the intricacies of each type of privacy law or the numerous obligations the various pieces of legislation impose on organizations, or the interrelationship between privacy, and other related laws such as Canada’s anti-spam legislation or social media law
- Instead the presentation will focus on:
 - An overview of the key relevant privacy laws
 - Some common pitfalls that charities and NFPs may encounter and strategies on how to avoid those pitfalls

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3

A. WHY PRIVACY MATTERS

- As Canadians, we value our privacy
- Privacy is a basic human right
- The right to control who sees our personal information is recognized by our legal system
- Canadian laws recognize that individuals have a right to privacy in many different contexts

“Recent inventions and business methods call attention to the next step which must be taken for the protection of the person, and for securing to the individual ... the right ‘to be let alone’ ... Numerous mechanical devices threaten to make good the prediction that ‘what is whispered in the closet shall be proclaimed from the house-tops.’”
Warren and Brandeis, “The Right to Privacy”, 1890 (4:5) Harv. L. Rev. 193

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1. Why Charities and NFPs Should Care About Privacy

- Charities and NFPs may collect or have access to personal information about many different individuals, including clients, volunteers, employees, patients, and donors
- This personal information may be necessary for the charity or NFP to do its work, but the personal information is protected by privacy laws
- Privacy laws aim to strike a balance between an individual’s right to privacy and organizations need to collect, use, and disclose personal information in order to operate
- With the collection and use of personal information comes risks and obligations that charities and NFPs must consider


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5

2. Privacy As A Risk

- Breach of privacy is one of the key risks facing organizations today
- Personal information can contain highly sensitive information and the implications of a breach can be serious
- Rapidly evolving technology is one of the main drivers of privacy breaches - faxes, email, computers, smart cards, internet



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3. Privacy Risks and Obligations For Charities and NFPs

- These risks may include:
 - Privacy law suits and class actions
 - Privacy complaints to the relevant Privacy Commissioner
 - Financial costs
 - Operational loss
 - Reputation damage
- In order to manage these risks, charities and NFPs must consider:
 - Legal obligations
 - Regulatory obligations
 - Fiduciary duty

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7

B. PERSONAL INFORMATION

- All privacy laws hinge on the definition of "personal information"

1. What is Personal Information?

- "Personal information" is defined in privacy legislation as "any information about an identifiable individual"
- It does not include anonymous or non-personal information (i.e., information that cannot be associated with a specific individual)
- Examples of personal information include an individual's name, address, social insurance number, and photos or videos of individuals
- Personal health information is a subset of personal information

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8

2. Examples of Personal Information


- Person's name
- Address
- Phone number
- Gender
- Race
- Credit card number
- Photograph of an identifiable individual
- Video of an identifiable individual
- Photograph of an individual's home that displays the house number
- OHIP number
- Family health history

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9

C. KEY CANADIAN PRIVACY LAWS THAT CHARITIES AND NFPS SHOULD BE AWARE OF

- There is not a single national omnibus privacy law in Canada
- Instead, there are complicated, integrated, and highly nuanced privacy laws in place depending on the nature and use of the personal information
- The main privacy laws of interest for charities or NFPs are:
 - Federal private-sector legislation (PIPEDA) and "substantially similar" provincial legislation, e.g., PHIPA
 - Ontario public-sector privacy legislation
 - Privacy torts and privacy class actions



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10


1. PIPEDA and "Substantially Similar" Provincial Legislation

- The *Personal Information Protection and Electronic Documents Act* (PIPEDA) is the main private-sector legislation for protecting privacy in all provinces that have *not* enacted "substantially similar" legislation
- An organization may be exempt from PIPEDA if the province has enacted privacy legislation "substantially similar" to PIPEDA - in that case, the substantially similar provincial legislation would then apply instead of PIPEDA
- Alberta, British Columbia, and Quebec have passed substantially similar legislation
- Ontario, New Brunswick, and Newfoundland have passed substantially similar legislation with respect to personal *health* information (e.g. in Ontario, the legislation is the *Personal Health Information Protection Act* (PHIPA))

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11

- Organizations dealing with personal health information need to consider this legislation
 - Note: In Ontario, the public-sector FIPPA governs "institutions" (e.g. universities) use of *non*-health personal information (discussed later)
- PIPEDA applies to the collection, use or disclosure of personal information in the course of a "commercial activity" - broadly defined as any transaction, act or conduct of a commercial character and includes the sale, lease, or exchange of donor, membership or other fundraising lists



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12

2. Application of PHIPA

- Generally applies to collection, use and disclosure of personal *health* information in Ontario by health information custodian or agents of the them, and to anyone that receives information from a health information custodian
- The definition of "health information custodian" is central to the application of PHIPA and is deceptively complex - it extends to organizations that have, "custody or control over personal health information as a result of or in connection with that person or organization's powers, duties or work"
- Examples include practitioners, hospitals, CCACs, psychiatric facilities, long term care homes, pharmacies, laboratories, ambulance services, and a centre, program or service for community health or mental health whose primary purpose is the provision of health care, and others

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13

3. Application of FIPPA

- Freedom of Information and Protection of Privacy Act (FIPPA) applies to the provincial government and many "institutions", e.g., hospitals, universities, and governs the use of *non-health* personal information held by hospitals
- As discussed above, personal *health* information held by hospitals is governed by PHIPA (and not FIPPA)
- Although hospital foundations are not directly subject to FIPPA, it has an impact on hospitals' ability to disclose information to associated foundations for fundraising
- Foundations may collect personal information independently from the hospital – such personal information will not be subject to FIPPA (though it may be subject to other privacy legislation)

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14

- FIPPA has two main purposes. It establishes:
 - a privacy protection regime for personal information held by "institutions" - applies to the sharing of information by hospitals with foundations, e.g., for fundraising
 - a freedom of information regime requiring institutions to respond to requests for access to records - may include any hospital records about a foundation, and any foundation records held by a hospital (subject to certain exclusions, e.g., records relating to the operations of a hospital foundation and to charitable donations made to a hospital)

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15

4. Key Principles From Privacy Legislation

- Despite their differences, all privacy legislation in Canada generally imposes two main categories of obligations on organizations regarding the collection, use and disclosure of personal information:
 - First - the requirement for consent of an individual be obtained prior to any collection, use or disclosure of their personal information, subject to certain specified exemptions

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16

- Second - each organization is required to comply with various administrative obligations including with respect to:
 - Appointing a privacy officer to oversee compliance
 - Developing public privacy policies and internal practices
 - Maintaining the security of the information
 - Responding to complaints and access requests
 - Developing contracts with any third parties
 - Identifying purposes for using the information
 - Ensuring the purposes for use are reasonable
 - Limiting the collection to what is necessary
 - Limiting the use, disclosure, retention of information
 - Ensuring the accuracy of the information

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17

5. Privacy Torts

- There are also "judge-made" privacy torts (i.e., a civil personal wrong) in Ontario
- In *Jones v. Tsige*, 2012, the Ontario Court of Appeal recognized the tort of "intrusion upon seclusion" which is essentially, breach of privacy
- The Court stated that the tort occurs when:
 - "The conduct complained of is intentional or reckless, the person's private affairs or concerns were unlawfully invaded, and a reasonable person would regard the invasion as highly offensive, causing distress, humiliation or anguish"

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18

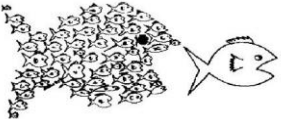
- In *Doe 464533 v. N.D.*, 2016, the Ontario Superior Court of Justice recognized the tort "public disclosure of private facts"
- The Court stated that the tort occurs when:
 - "One who gives publicity to a matter concerning the private life of another is subject to liability to the other for invasion of the other's privacy, if the matter publicized, or the act of the publication (a) would be highly offensive to a reasonable person, and (b) is not of legitimate concern to the public"

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19

6. Privacy Breach Class Actions

- A class action is a lawsuit that allows a large number of people with a common interest in a matter to sue or be sued as a group
- Public notice of the privacy breach is what triggers the class action, the privacy breach itself, or actual harm



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20

- Rouge Valley Health System
 - Larger class action launched on behalf of 14,450 new mothers
 - Significant media attention, reputational damage
 - \$412 million class action lawsuit
- Chasles v. Bell Canada Inc.
 - Bell used its Relevant Ads Program to track, collect and sell customers' sensitive personal information to "affiliate" advertisers - Bell was using "opt-out" consent
 - Explicit "opt-in" consent required for targeted advertising
 - Lawsuit seeks damages for breach of privacy amongst other claims
 - Plaintiff's claiming \$750 million

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21


- Evans v. The Bank of Nova Scotia
 - Bank employee allegedly provided 643 Bank customers' information to girlfriend who disseminated it to third parties for fraudulent purposes
- Condon v. Canada, 2014 FC 250
 - First Federal Court intrusion upon seclusion class action certified
 - Federal Government lost a hard drive containing personal information of approximately 583,000 individuals in connection with the student loan program administered by the Human Resources and Skills Development Canada

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22

7. Overlapping Privacy Laws

- Several privacy acts may apply to one organization
- E.g., in Ontario, hospitals are governed by:
 - PHIPA with respect to personal health information
 - FIPPA with respect to non-health personal information
 - PIPEDA with respect to activities that are not core to its operations, e.g., personal information collected by a hospital while operating a parking garage




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23

D. COMMON PRIVACY PITFALLS AND HOW TO AVOID THEM

- Given the various complexities of privacy law, the second half of the presentation will focus on some common privacy issues that charities and NFPs may encounter, and strategies on how to manage the risk



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24

1. Failure to Ensure Adequate Contracts with Third-party Service Providers

- Contracts which provide for protection of personal information should be in place with any third party, e.g., data processors, partners, affiliates
- These contracts should consider:
 - The "ownership" of personal information of donors, beneficiaries, etc.
 - The storage of personal information
 - A comparable level of protection of personal information while the information is being processed by the third party
 - Consequences of a data breach by the service provider

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25

2. Failure to Update and Implement a Privacy Policy at the Operational Level

- Simply drafting and posting a privacy policy is not enough
- The privacy policy is an organic document that needs to be updated frequently
- The privacy policy should be very specific to your organization and implemented at the operational level
- Failure to implement the privacy policy can lead to exposure to liability for deceiving the public
- Be cautious not to include misleading claims in the privacy policy
 - E.g. “we will never ever share your personal information no matter what”

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26

3. Sharing Personal Information With Separate Corporations That Form Part Of A “Federation”

- Subject to limited exemptions, the knowledge and consent (implied or express depending on circumstances) of the individual are required for the collection, use, or disclosure of personal information
- Personal information collected from a donor cannot be transferred to another charity without express consent - this includes separate corporations that form part of a “federation” or an “association”
- When personal information that has been collected is used for a new purpose, the express consent of the individual is required before information can be used for that new purpose

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27

4. Sharing Of Personal Information With A Hospital Foundation For Fundraising

- The two main pieces of privacy legislation that govern the relationship between hospitals and their associated foundations are PHIPA and FIPPA
- If hospitals are intending to share personal information with their associated foundations this must be done in accordance with these two pieces of legislation
- Although FIPPA does not directly apply to hospital foundations, it is important for foundations to address the indirect impact of FIPPA on their relationship with hospitals
- Hospital foundations should work with associated hospitals and legal counsel to develop policies for the sharing of foundation information generally, as well as the exchange of records between foundations and hospitals

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28

- This can help to clarify and standardize information-sharing practices and minimize the risk that sensitive foundation records will be unnecessarily or unintentionally disclosed
- FIPPA provides that a hospital may use personal information for fundraising if the use is “reasonably necessary” for its fundraising
- FIPPA outlines requirements that the hospital must abide by in using personal information for fundraising, including:
 - notice requirements for the hospital and foundation; and
 - that hospitals have fundraising agreements with any persons to whom personal information will be disclosed for fundraising (e.g., hospital foundation)
- The application of PHIPA will be discussed in the next example

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29

5. Fundraising In The Health Sector

- For fundraisers in the health sector, PHIPA is the key focus
- Sets out preconditions pursuant to which a health information custodian may collect, use or disclose personal health information for “fundraising activities”
- Ontario Privacy Commissioner defines “fundraising activities”:
 - any activity undertaken for a charitable or philanthropic purpose re operations of the HIC, including contacting patients or former patients through mailings
- PHIPA is structured on key principle of:
 - Circle of care = implied consent
 - Other use (e.g., disclosure to a non-health information custodian or to another health information custodian not for the purposes of providing health care) = express consent

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30

- But, special rules apply for fundraising
- Personal information may be collected, used, or disclosed for the purpose of fundraising activities undertaken for charitable or philanthropic purpose related to the health information custodian’s operations, if:
 - Consent is obtained
 - Express consent - “gold standard” and recommended form of consent
 - Implied consent is sufficient provided the personal information consists only of the individual’s name and mailing address - Note that where the information is more than name and mailing address (e.g. telephone number, or email address), express consent is required

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31

- Notice requirements are met as applicable
- The individual has not withheld or withdrawn consent
- The solicitations for fundraising provide the individual with an easy way to opt-out of receiving future solicitations
- Fundraising communication must not include any info about individual's health care or state of health
 - Note that this latter requirement can pose some challenges, in that it means that the communication cannot reference the fact that the solicited individual recently received treatment at the hospital and therefore might wish to contribute

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32

- Recall, PHIPA applies to a "health information custodian" and to "a person who is not a health information custodian and to whom a health information custodian disclosed the information" - a foundation would fit this category
- This would suggest that a foundation can only use and disclose the information for fundraising to the extent that their sponsoring hospital can also do so under PHIPA
- A foundation could also be characterized as an "agent" acting for its associated hospital and thus subject to PHIPA
- Health care charities, hospitals, and their associated foundations should be vigilant of PHIPA requirements in the context of fundraising

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33

6. Posting On Social Media

- The evolution of information sharing online has called into question how social media impacts individuals' privacy
- Social media has spurred a change in how individuals and organizations view and protect personal information
- Content posted on social media sites often includes personal information and may be subject to privacy laws
- To help manage risk charities and NFP should consider:
 - Implementing a social media policy
 - Requiring consent for the posting of photographs and videos

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34

7. Employees Snooping Into Health Records

- Several legal consequences :
 - Employee discipline
 - Professional regulatory discipline
 - Offence prosecutions, fines (FIPPA, PHIPA)
 - Statutory (PHIPA) or common law (tort) proceedings
- Privacy Commissioner makes it clear that hospitals are liable for actions of its "rogue" staff
- Privacy Commissioner has ordered hospitals to upgrade its systems to permit auditing and detection of snooping

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35

- Privacy Commissioner has referred six individuals to Attorney General for PHIPA offence prosecutions:
 - 2011: nurse at North Bay Health Centre
 - 2015: two radiation therapists at Toronto's UHN
 - 2015: social worker at a family health team
 - 2016: regulated professional at a Toronto hospital
- In deciding whether to refer to the Attorney General, the Privacy Commissioner considers the following which are strategies hospitals should use to prevent snooping:
 - Recent privacy training
 - Recently signed confidentiality agreement
 - Privacy warnings on the system
 - Number of occurrences
 - Disciplinary action taken

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36

8. Using Cloud Computing And/ Or Servers Outside Of Canada

- With the emergence of cloud technology, a huge amount of our personal and business information has migrated from hard drives we own to remote servers managed by various companies
- In particular, since cloud computing almost inevitably involves cross-border transfers of information, if the data involved includes personal information, organizations should be cognizant of privacy laws applicable to such transfers
- Before "moving to the cloud", charities and NFPs should be aware of applicable laws and guidance from the privacy commissioners respecting cross-border transfer of personal information

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37

- Some legislation contains specific requirements or restrictions related to such activities. For example, privacy legislation in:
 - Quebec provides that enterprises that communicate personal information outside Quebec must first take all reasonable steps to ensure that the information will not be used for unauthorized purposes
 - Alberta contains certain notice and policy requirements if an organization uses a service provider outside Canada
 - Public sector privacy legislation in British Columbia and Nova Scotia generally requires that personal information be stored and accessed only in Canada (subject to certain exceptions, including where consent is obtained)

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38

- Health information privacy legislation in Ontario, Nova Scotia and Newfoundland & Labrador also contains some limitations on cross-border transfers of personal information without consent
- PIPEDA does not prohibit the storage of data outside Canada, but there are administrative hurdles that must be met, including a requirement to obtain knowledgeable consent to collection, use and disclosure of personal information, as well as general security, openness and accountability obligations
- Charities and NFPs must consider applicable legal requirements and restrictions, as well as the sensitivity of the information and the reasonable expectations of affected individuals, and carefully review and consider contracts governing cloud computing and/or server arrangements

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39

BUT... WAIT...

- Importantly, the *Income Tax Act* states that books and records must be kept "at an address in Canada recorded with the Minister"
- CRA's position is that servers outside of Canada are problematic
- For more information see:
 - [Guidance CG-002, Canadian registered charities carrying out activities outside Canada](#)
 - <http://www.cra-arc.gc.ca/chrts-gvng/chrts/prtnng/bks-eng.html>
 - <http://www.carters.ca/pub/seminar/chrchlaw/2015/8rains/booksandrecords.pdf>

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9. Failure To Manage Data Breaches Properly

- One of the fastest growing areas of class actions involves data breaches - this includes insecure disposal of records, lost or stolen devices, unauthorized access, etc.
- Lost or stolen data from organizations is now, unfortunately, a regular occurrence
- Most charities and NFPs have vast amounts of stored electronic data, and typically, that data will include confidential or private information about individuals
- The consequences of a data breach can be very serious and result in enormous potential liability
- The appropriate responses to a data breach are of critical importance - if appropriate and timely, such responses can pre-empt, at times defeat, and mitigate the organization's exposure to liability

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- Some prudent steps to help mitigate the chances of a data breach:
 - Implement written information security and privacy policies
 - Promote awareness by regularly training employees
 - Keep paper documents in locked cabinets
 - Shred paper documents and securely destroy/erase portable devices (once acceptable in accordance with CRA's record keeping policies)
 - Limit who has access to building keys or alarm codes
 - Use anti-virus software and stay current with security patch updates
 - Use strong passwords that are often changed

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- Best practices for responding to a data breach to help mitigate liability:
 - Don't have one!
 - Have a data breach response plan
 - Understand the scope of the breach
 - Make appropriate notifications
 - Conduct post-breach analysis
 - Contact legal counsel to determine which laws govern your next steps, such as any obligations to report the breach to the relevant privacy commissioner

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43

CONCLUSION

- With the advent of modern technologies and social media, Canadian courts are continually carving out new privacy laws to keep up with the changing landscape
- In order to avoid potential privacy pitfalls, charities and NFPs should be aware of their privacy obligations and implement a proactive approach to privacy compliance

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**The Ottawa Region 2017 *Charity
& Not-for-Profit Law Seminar***

Ottawa – February 16, 2017

**THE TOP TEN HUMAN RESOURCES
MISTAKES EMPLOYERS MAKE
(AND HOW TO AVOID THEM)**

By Barry W. Kwasniewski, B.B.A., LL.B.

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**The Top Ten Human Resources Mistakes Employers Make
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Overview of The Top Ten HR Mistakes Employers Make

1. Hiring an Independent Contractor Who is Really an Employee
2. Not Having a Written Employment Contract
3. Drafting Your Own Contracts
4. Incorrect Use of Fixed Term Employment Contracts
5. Incorrect Use of HR Policy Manuals
6. Not Keeping Employee Policies Up to Date
7. Not Having/Implementing a Vacation Policy
8. Not Keeping Written Record of Employees' Performance Issues
9. Misunderstanding the Duty to Accommodate
10. Not Having Insurance for Employee Related Claims


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1. HIRING AN INDEPENDENT CONTRACTOR WHO IS REALLY AN EMPLOYEE

A. Reason for Hiring as an Independent Contractor

- Not required to remit statutory payroll taxes and deductions
 - Income Tax
 - Canada Pension Plan
 - Ontario Employer Health Tax
 - Employment Insurance
- Administrative convenience



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**B. Risks of Incorrectly Characterising an Employee
Canada Revenue Agency (“CRA”)**


- Employers that fail to deduct income tax may be ordered to pay:
 - Unremitted taxes;
 - Employer’s share of premiums owing;
 - Employee’s share of premiums owing;
 - Penalties; and
 - Interest
- CRA Guidance: <http://www.cra-arc.gc.ca/E/pub/tg/rc4110/rc4110-e.html>

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Workplace Safety and Insurance Act, 1997 (“WSIA”)

- When the Workplace Safety and Insurance Board determines that an independent contractor is actually an employee under the WSIA the employer can be:
 - Charged with breaching the WSIA by not remitting premiums for the worker(s) leading to:
 - Investigation by the Board;
 - Charging the employer the outstanding WSIA premiums amounts plus interest
 - Being found guilty of a provincial offence and having fines levied



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C. Recent Cases – “Independent Contractors” held to be Employees

- *Hawkwind Farms Ltd v Hurley-Maloney*, 2016 CanLII 47888 (ON LRB)
 - Horse breeding operation hired an independent contractor but OLRB found worker to be an employee
- *2403986 Ontario Ltd (operating as Milano Pizza and Wings) v Beauchamp*, 2016 CanLII 55238 (ON LRB)
 - Beauchamp hired as an independent contractor but OLRB found worker to be an employee
- Employees owed:
 - ESA minimum wage entitlements
 - ESA vacation and holiday pay

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- *Sistema Toronto Academy Inc v MNR*, 2016 TCC 193
 - Charity hired instructors to teach music to disadvantaged youth
 - Hired as independent contractors
 - CRA determined that they were employees
 - Tax Court of Canada upheld Ministry of National Revenue ruling that 6 “contractors” were employees for EI and CPP purposes and the charity should have made EI and CPP source deductions



Employee
 Independent Contractor

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D. Factors for Determining Employees versus Independent Contractors


- The level of control the payor has over the worker;
- Whether or not the worker provides the tools and equipment;
- Whether the worker can subcontract the work or hire assistants;
- The degree of financial risk taken by the worker;
- The degree of responsibility for investment and management held by the worker;
- The worker's opportunity for profit; and
- Any other relevant factors, such as written contracts

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2. NOT HAVING A WRITTEN EMPLOYMENT CONTRACT

- Why is it important:
 - Potential to misunderstand one another
 - Avoid long-term monetary liability to employees in event of termination of employment
- Essential terms need to be laid out:
 - Hours of work
 - Duties
 - Amount and details of compensation
 - Reporting structure
 - Mechanics for ending the relationship




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3. DRAFTING YOUR OWN EMPLOYMENT CONTRACTS

- “Do it yourself” contracts are frequently unenforceable due to violation of minimum prescribed standards from the *Employment Standards Act, 2000*
- Section 5(1) of the ESA states that no employer or employee can contract out of or waive an ESA standard
- Should have contracts professionally reviewed to avoid future problems



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Example: Termination Clauses

- ESA s. 57 contains the minimum termination notice or termination pay requirements based on years of service
- If the clause in the contract provides less than the s.57 requirement it will not be enforced by a court
- Common law rights, which are usually more generous than the ESA minimums, would apply instead of the contract clause


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12

4. INCORRECT USE OF FIXED TERM EMPLOYMENT CONTRACTS

A. Correct Uses of Fixed Term Contracts

- Parental leave replacement
- Hiring for specific tasks or projects
- Grant-based projects with definite completion dates
- Time-limited transition requirements (e.g. after the sale or acquisition of a business)



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B. Unintended Liability

a) Continuing to Work after the Expiration of the Term


- Employees on a fixed term contract often continue to work after the end of the term, with no new contract
- If the an employee continues to be employed after the end of the contract they become an indefinite term employee
- Employee can then rely on their common law rights in the event of termination = unexpected liabilities

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b) Consecutive Fixed Term Contracts

- Court may see such contracts a ruse to avoid termination obligations
- The longer the employee remains on consecutive fixed term contracts the greater the risk that the employee will be declared an indefinite employee
- Employee can then rely on their common law rights



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c) Termination Damages to End of Term


- If an employee on a fixed term contract is terminated on a without cause basis the cost may well exceed what would be owed under an indefinite term contract
- *Howard v Benson Group*, 2016 ONCA 256
 - Fixed term employee terminated without cause owed damages equivalent to the remainder of his contract term because the contract was unclear about termination rights

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5. INCORRECT USE OF HR POLICY MANUALS

- If intention is to have the employee bound by the obligations and rules contained in the policy manual the employee must:
 - Be made aware of its contents
 - Be required to sign off and agree as a condition of employment
- An employee should be provided with a copy of the manual and sign an acknowledgement form in the manual agreeing to terms
 - Terms include the employer's right to amend the policies as needed



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- In *Cheong v Grand Pacific Travel & Trade (Canada) Corp* (2016 BCSC 1321) the termination policy of the corporation was contained in the policy manual rather than the employment contract
- The termination policy was held not to be enforceable because the employer could not provide evidence that the employee agreed to its terms
- Employee could rely on common law rights re termination entitlements

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6. NOT KEEPING EMPLOYEE POLICIES UP TO DATE

- Employers, including charities and NFPs, are legally required to adopt/implement a variety of HR policies
- Example:
 - Ontario *Occupational Health and Safety Act* (OHSA)
 - Mandatory health and safety awareness training
 - Mandatory workplace violence/harassment policies
- Latest OHSA amendments re: sexual harassment in force as of September 8, 2016



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- Policies need to be kept up to date to keep up with legislative changes
 - Board of Directors has the legal responsibility to remain compliant with changing laws
 - Annual policy review should be on the directors' agenda
 - Ontario Ministry of Labour Website has useful information/training modules: <https://www.labour.gov.on.ca/english/hs/training/>

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7. NOT HAVING/IMPLEMENTING A VACATION POLICY

- Employees commonly do not use all their annual vacation time
- What happens to unused vacation time?
 - Accrue to the next year?
 - Time lost?
 - Monetary payout?
- Without a policy:
 - Potentially accruing a large contingent liability to the Employee



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- The potential liability can be easily resolved through:
 - Employment contract vacation provision
 - Vacation policy
- Policy could stipulate:
 - Unused vacation beyond the ESA minimum (2 weeks vacation per year) will not be paid out and that vacation is provided on a “use it or lose it” basis
- Employees should not be allowed to assume that their unused vacation time will accrue year after year

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8. NOT KEEPING WRITTEN RECORD OF EMPLOYEES' PERFORMANCE

- “Dos and Don'ts of Employee Acquisition and Termination for Charities and Nonprofit Organizations” - <http://sectorsource.ca/resource/video/dos-and-donts-employee-acquisition-and-termination-charities-and-nonprofit>
- Termination for cause is difficult to prove



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A. Justifying “For Cause” Terminations


- Though a single event may not justify termination for cause multiple infractions can
- However, the infractions must be part of a written record and a progressive discipline process
- Things to include:
 - Performance issues
 - Past incidents of misconduct
 - Verbal or written warnings
 - Other forms of discipline short of termination
- Positive actions can also be recorded

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9. MISUNDERSTANDING THE DUTY TO ACCOMMODATE

- “Human Rights Challenges in the Workplace” - <http://www.carters.ca/pub/seminar/chrchlaw/ott/16/Human-Rights-2016.pdf>
- Caution is required when dealing with employees absent for medical reasons
- Employees are protected by the *Ontario Human Rights Code* (“OHRC”) including the right to “reasonable accommodation” in the workplace
- Reasonable accommodation may include time off work, a gradual return to work plan, use of adaptive devices, etc.



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- Employer has legal duty to make bona fide efforts to accommodate employees with disabilities to the point of undue hardship - s.17 OHRC
- Do not assume an employee may be dismissed for being off work for a certain time period
- Unless it is clear (based on available medical information) that there is no reasonable likelihood of a return to work in the foreseeable future, it is unlikely a court will deem an employment contract frustrated

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10. NOT HAVING INSURANCE FOR EMPLOYEE RELATED CLAIMS

- Employment Practices Liability Coverage
 - Could be included as part of an organisation's directors and officers insurance policy or its general liability policy
 - Provides coverage for a variety of employment related claims
 - If you are not sure if you have this coverage speak to your broker or insurer to find out
 - Remember that there are conditions and limitations
 - This coverage is typically limited to legal defence costs




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Conclusion

- HR mistakes can be avoided by exercising due diligence
- Protect your organization - take the time to review your HR practices
- If in doubt, seek professional advice

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The Ottawa Region 2017 *Charity & Not-for-Profit Law Seminar*


Ottawa – February 16, 2017

KEEPING MINUTES: GETTING IT DOWN RIGHT

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OVERVIEW OF TOPICS

- Why Keep Minutes?
- What to include in Minutes?
- How to Keep Minutes?
- Issues in Minutes for Board Meetings
- Issues in Minutes for Members' Meetings
- Concluding Comments

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A. WHY KEEP MINUTES?

1. Legislative Requirements

- Incorporated registered charities and not-for-profits are generally required to maintain minutes of meetings:
 - *Corporations Act* (Ontario) ("OCA"), s. 299(1)
 - *Not-for-Profit Corporations Act, 2010* (Ontario) ("ONCA"), s. 92(1)
 - *Canada Not-for-profit Corporations Act* ("CNCA"), s. 21(1)
- e.g., Both the ONCA and CNCA require records containing:
 - The minutes of meetings of members and any committee of members
 - Minutes of meetings of directors and any committee of directors
- Special act corporations should also review their legislation for any additional requirements

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- In addition to legislated requirements under corporate statutes, other statutes may also have books and records requirements that include minutes
- Income Tax Act* (Canada) ("ITA")
 - registered charities must keep books and records (s. 230(2))
 - NPOs are required to keep books and records in accordance with s. 230(1))
 - Regulation 5800 requires incorporated registered charities or non-profit organizations to keep meeting minutes of directors and members
- Generally, a CRA auditor will review the minutes of the corporation during an audit - a lack of minutes may put into question whether or not an organization can demonstrate compliance with the ITA

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- Examples:
 - Complete and detailed records will make it easier for the charity to demonstrate to CRA that its fundraising complies with the ITA
 - e.g., minutes of board meetings or other meetings where decisions on a fundraising contract were made
 - CG-002 *Canadian Registered Charities Carrying Out Activities Outside Canada* recommends good minutes in demonstrating direction and control
 - CRA states that minutes of meetings or other written records of decisions are one way to show that a charity has given instructions
 - Evidencing compliance with the *Trustee Act* (Ontario) in making investment related decision, i.e., consideration of mandatory criteria

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2. Evidence of Decision Making by the Board and Membership

- Clear minutes must be kept for all board meetings and members' meetings
- Purpose of minutes
 - Provide a concise record of deliberations and decisions
 - Inform directors, members and agents of the organization
 - Inform the courts of decisions made by the organization in future litigation
- In the absence of evidence to the contrary, minutes of meetings are records of proof as to what transpired at the meeting

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B. WHAT TO INCLUDE IN MINUTES?

1. General Recommendations

- What goes into minutes?
 - Date, time, place of meeting
 - Nature of meeting
 - Who attended the meeting - include guests, when a person departed, etc.
 - Procedural formalities - e.g., call to order, quorum, etc.
 - Order of agenda or topics
 - Mover, seconder, presenter (not legally required)
 - Summary of key points of discussion
 - Decisions made, any dissents recorded, any conflicts declared
 - Termination of meeting

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2. Finding the Right Balance

- Minutes can serve as a double-edged sword
- Generally, access to minutes may be limited
 - e.g., minutes of board meetings are generally confidential and only accessible by other board members
- However, minutes can also be viewed by others in various circumstances:
 - Courts;
 - Litigation
 - Other regulators, e.g., Ontario Public Guardian and Trustee;
 - Audit, or other contractual obligations with third-parties, i.e., funding agencies, government ministries, etc.

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- Overly detailed minutes may have adverse consequences should they be reviewed in the course of litigation or an audit
 - Inadvertent omissions may create an inference that it was purposefully omitted
- Minutes with few details or specifics may not be sufficient to demonstrate the consideration of the meeting
- The type of detail may depend upon whether the meeting is a board meeting, a members meeting, or a committee meeting
- However, minutes should generally not include:
 - Verbatim records of discussion, emotional or personal interjections, legal advice
 - Consider what you would not want appearing on the front page of a newspaper

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C. HOW TO KEEP MINUTES?

1. Form of Minutes

- OCA requires that minutes be “entered in books kept for that purpose”
- However, modern not-for-profit corporate legislation like CNCA and ONCA require that minutes, “may be in any form, provided that the records are capable of being reproduced in intelligible written form within a reasonable time.”
- Under the ITA, records (including minutes) can be kept electronically if they are retained in “an electronically readable format” (s. 230(4.1))

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2. Where to Keep Minutes

- Both CNCA and ONCA require the corporation to:
 - “take reasonable precautions to prevent the loss or destruction of the registers and other records required by or under this Act, to prevent the falsification of entries in those registers and records and to facilitate the detection and correction of inaccuracies in them”(ONCA s. 100(2), CNCA s. 26(2))
- Therefore, minutes need to be kept in a secure place
- Minutes belong to the corporation, not to the person who drafted them, e.g., the secretary, or any other person
- While minutes may be kept electronically, a good practice would be to maintain physical copies in minute books
- The board should also give consideration to the security of minutes if stored electronically

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- Generally, minutes are to be kept at the registered office of the corporation
- While CRA permits electronic record keeping, it does not consider electronic records kept outside Canada, but accessible electronically from within Canada, to comply with the ITA, i.e. the server must be located in Canada
- Minutes of directors meetings should only be available for review by directors, but special act corporations may have different requirements
- However, minutes of members meetings are to be available to members, and creditors, on payment of a reasonable fee

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- Corporate legislation does not generally deal with reports, or other documents made at meetings
 - e.g., the report of the president provided at an annual meeting of members, a report to a committee of the board, etc.
 - Documents referred to in meetings should be kept as records of the corporation with the minutes
 - Be careful when referencing sensitive documents, e.g., legal advice, etc.
 - Privilege attached to legal opinions may be waived in minutes that are disclosed to third parties

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3. Signing and Approval of Minutes

- Do we need to have the minutes signed?
 - There is no legal requirement for the minutes of a directors or members meeting to be signed
 - However, special act corporations may have mandatory requirements, e.g., *Boards of Trade Act* (Canada) requires signature and prescribes who can sign, etc.
 - However, a general practice would be for the chair and secretary to sign the minutes once they have been approved by the meeting
 - Unsigned minutes may still be valid, but the signature by the chair or secretary meeting may enhance the evidentiary use of the minutes

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- Do minutes need to be approved at the subsequent meeting?
 - There is no legal requirement for minutes to be approved at the next meeting
 - Lack of approval of minutes may lessen the evidentiary use of the minutes
- How quickly after a meeting should minutes be prepared?
 - Minutes should be promptly drafted following the meeting while the content of the meeting remains fresh in the mind of the secretary
 - Waiting too long to have minutes prepared may appear self-serving

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4. Ensuring the Minutes are Accurate

- How to amend minutes once approved
 - Minutes that have been signed by the chair or secretary, and approved by the meeting should not be changed again
 - A resolution rescinding or amending the previous resolution should be passed in order to permit the minutes to be amended
 - Generally, only people who were present at the meeting should be voting on the amendment or verification of minutes
- Note that the court may also be called upon to rectify the minutes:
 - See CNCA s. 255, and ONCA s. 186

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D. ISSUES FOR BOARD OF DIRECTOR MINUTES

1. Purpose of Board of Director Minutes

- Directors generally have a common law or statutory duty to manage or supervise the management of the corporation
- In addition, directors must demonstrate due diligence in exercising the care, care, diligence and skill that a reasonably prudent person would exercise in comparable circumstances
- Therefore, minutes should reflect:
 - The engagement of the board in the issues;
 - The deliberations of the board; and
 - The process of the board in its decision making

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2. Recording of Dissent

- Under the CNCA and the ONCA, directors who are absent from a meeting of directors are "deemed to have consented to the resolution or action" unless they:
 - cause a dissent to be placed with the minutes of the meeting; or;
 - they submit their dissent to the corporation. (CNCA s. 147(3), ONCA s. 45(3))
- It is in the interests of the board to have minutes circulated as soon as possible after a meeting so that a board member who was not present can exercise his/her dissent rights
- Where a board member attended a meeting and dissented, also important to confirm that it was recorded

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3. Recording Conflicts of Interest

- Many corporate statutes include procedures where directors or officers are to declare their conflicts in relation to any contract or transaction with the corporation
 - See:
 - CNCA s. 141;
 - ONCA s. 41;
 - OCA s. 71
- Generally declarations of conflicts are to be entered into the minutes of the meeting
- It is important to note on review of the minutes that such conflicts have been declared

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4. Do Directors Need to Provide Reasons for their Vote?

- Directors do not generally need to provide any reasons concerning how they voted
- Generally, boards vote collectively, rather than individually
- The minutes may, however, include recitals which would demonstrate how/why the board made a particular decision

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5. Individual Notes Taken by Board Members

- Some commentaries recommend that board members maintain their own notes for liability reasons
 - May help to protect the board member from liability
 - May assist the director in reviewing the minutes once available to confirm that they were accurate

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- However, the generation of notes by board members may also create issues
 - Which record of the meeting is accurate? The minutes produced by the corporation or those kept by the director?
 - May be produced during litigation
- Corporation may wish to implement policy whereby once the minutes of a previous meeting have been approved that personal notes are to be destroyed
- May also want to consider the same approach with notes/drafts taken by secretary

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6. Audio/Video Recording of Minutes?

- Corporate statutes do not generally address the use of audio or video recording of meetings
- In the absence of anything in the by-laws or other rules of procedure, use of such devices generally requires the consent of the meeting
- As with personal notes, electronic audio/video recordings of a meeting may have the same concerns
- The same issue may arise with respect to a recording made by the secretary to assist in preparing minutes later
 - Board members may try to get access to such records if they don't trust the minutes generated

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7. Minutes of Committees

- Minutes of committees may be just as significant as minutes of board meetings
- Courts and other regulators have in the past taken minutes of committees in consideration to determine whether directors have met their fiduciary duties
 - Deliberations by an audit committee or similar committee are important to record as minutes

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8. In Camera Meeting Minutes

- Just because a meeting is *in camera* does not mean that no minutes are to be maintained
- Minutes of *in camera* meetings should still be maintained
 - Same balanced approach should be used, do not include comments you would not want on the front page of the news
- The board may want to consider implementing a policy to address the storage of *in camera* minutes and their access
- The use of *in camera* meetings should not be abused, generally, decisions of directors should be open and transparent

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E. ISSUES FOR MEMBERSHIP MEETINGS

1. Audio/Video Recording

- May be important for contested annual meetings
 - Can serve as evidence that an election was properly conducted
 - Can be relied upon later in court if a party to a meeting wishes to challenge the results
 - As with directors meetings, generally the consent of the meeting should be obtained in the absence of any legislative authority or basis in the by-laws
- However, audio/video recording of a meeting may have a negative effect on the meeting
 - e.g., members may feel less willing to express themselves during the meeting because of the recording

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2. Contested Annual Meetings of Members

- Preparation of minutes of meetings of members at an annual general meeting or special meeting at which an election or other action is contested need to be carefully considered
- Minutes should be objective in recording decisions or other determinations made by members
- Need to review how minority or aggrieved members would consider the minutes once available

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28

CONCLUDING COMMENTS

- Important to ensure that accurate minutes of member, director, and committee meetings are maintained
- While the rules of corporate minute taking are generally the same as with other corporations, there are select issues for the NFP sector that require due consideration
- Good minutes can protect the board of directors, and provide an open and transparent record of decisions made by the members

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**The Ottawa Region 2017 *Charity
& Not-for-Profit Law Seminar***


Ottawa – February 16, 2017

**YOUTH PROGRAMS:
IDENTIFYING AND MANAGING
THE RISKS**

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Identifying and Managing the Risk**

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OVERVIEW OF SELECTED TOPICS

- Types of Youth Programs
- Types of Risks
- Who Can Be Liable
- Identifying and Managing the Risks

“We cannot always build the future for our youth, but we can build our youth for the future.”

–Franklin D. Roosevelt

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A. TYPES OF YOUTH PROGRAMS

1. Who are the “youth”?

- Generally, in Ontario, any program run by a not-for-profit, charity or for-profit organization (“**Organization**”) where the participants have not yet reached the age of 18 is a program involving “minors”, “youth” or individuals not having attained the “age of majority”
- This varies by province in Canada, depending on the legislation and the provincial “age of majority” (generally 18 or 19 years of age) or “child”. Therefore there is different provincial legislation re: child protection and consumption of alcohol or other controlled substances across the country

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- For child protection purposes (*mandatory reporting*), in Ontario, any programs involving children under the age of 16 require heightened attention/training (*Child and Family Services Act* “CFSA”)
- Also, in Ontario, the enforceability of contracts entered into by youth under the age of 18 is highly restricted. Absent the contract specifically being about the “necessities of life” or that the contract solely “benefits” the youth, the court is likely to rule the contract is void. Otherwise, all other contracts are subject to the youth choosing to cancel it at anytime or upon turning 18

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- NOTE:** The CFSA may be subject to a complete overhaul by Bill 89 (currently before the Ontario legislature) and be renamed the *Child, Youth and Family Services Act, 2016*
- In terms of notice and limitation periods, it could be a *long* time before you get notice of a problem involving youth
- In Ontario, under the applicable limitation period legislation, mainly the *Limitations Act, 2002*, a youth has 18 plus 2 years to launch an action, and generally sexual assault has *no* hard-line limitation period

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- Federally and internationally, “youth” or “minors” are generally defined as persons under the age of 18:
 - *Youth Criminal Justice Act, Citizenship Act, Canada Elections Act*
 - *U.N. Convention on the Rights of the Child*
 - de facto definition is under 18 (unless age of majority is differently defined nationally)




United Nations

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- Also, persons under the age of 18 may well constitute a “vulnerable person” (*Criminal Records Act*):
 - A person who, because of his or her age, a disability, or other circumstances, whether temporary or permanent:
 - Is in a position of dependency on others; or
 - Is otherwise at a greater risk than the general population of being harmed by a person in a position of trust or authority towards them




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2. Types of typical youth programs

- Overnight trips - (youth festivals, inter-faith events, field trips)
- Mission trips - (often out of country, youth engagement and building/infrastructure programs)
“Jimmy hammered a nail through his foot... how do you say ‘hospital’ in Haitian Creole?”
- Day trips - (youth concerts, festivals, volunteering in the community, field trips to historical/religious sites)



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- Sports programs - (inter-organization field day or intermural sports programs put on by the Church/Temple/Mosque - floor hockey, dodgeball)
 - *“Because competitiveness and the energy of youth never ends up with someone crying”*
- Social Events - (Youth group meetings, fundraisers, socials)
- Religious or other types of instruction (from Sunday school to lessons at the Mosque or Temple)

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B. TYPES OF RISKS

- Sexual abuse - A new and expansive range of new criminal offences dealing with not only inappropriate physical contact with youth, but now even just communication (digital or otherwise)
 - Several provisions are directed specifically at “a person in a position of trust or authority towards a young person”:
 - Invitation to sexual touching (*s. 152 of CC*)
 - Sexual exploitation (*s. 153 of CC*)
 - Corrupting children (*s. 172 of CC*)
 - Making sexually explicit material available to a child (*s. 171 of CC*)
 - Luring a child (*s. 172.1 of CC*)

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- Physical - Assault and battery (both civil and criminal), amongst many others can arise. Remember that even when some action may not rise to level of a criminal offence, the evidence may support a civil claim (beyond a reasonable doubt vs. balance of probabilities)
It’s why O.J. is broke, but not (initially) in jail...
- Emotional - Most of these offenses are regulatory or civil rather than criminal but include “intentional infliction of emotional distress”, “uttering threats of bodily harm”, “harassment”

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- In Ontario and dealing with children under 16? The CFSA (among other legislation) ensures individuals have a mandatory obligation to report to the local Children’s Aid Society *if they have reasonable grounds to suspect* a child is in need of protection (which includes):
 - a guardian of a child has neglected to protect, supervise or care for that child
 - there is a risk the child will suffer emotional or physical harm because of the guardian’s neglect, etc.



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- The child has suffered emotional harm demonstrated by serious aggressive behaviour, anxiety or depression and there are reasonable grounds to believe that the emotional harm results from neglect of the guardian of the child
- The CFSA specifically contemplates those with a duty to report who received that information as a "youth or recreational worker", "mediator" or "religious official", et. al. "Volunteers", however, are excluded from the duty to report under the CFSA
- The fine, is currently a maximum of \$1,000, but once the amendments are proclaimed in force, the maximum will be \$50,000 fine and up to two years in jail

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C. WHO COULD BE LIABLE


1. Adults

- Personal civil liability
 - Assault and battery
 - Intentional infliction of emotional distress
 - could face significant legal fees, damages awards (including aggravated and punitive)
- Criminal liability
 - Invitation to touching, sexual exploitation, etc. (as set out above), and the duty (of those who have the authority to dictate tasks/work) to take reasonable steps to ensure the persons performing the tasks do not suffer bodily harm (discussed below)
 - May result in fines, imprisonment, national sex offender registry

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- CFSA/ Regulatory
 - As a person in a position of trust, pursuant to the CFSA, you have a specific positive duty to report if a child (under 16) is in need of protection (widely defined). This duty to report is ongoing and personal (cannot be passed to an organizations or assume that others will do it).




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2. Organizations

- All Organizations are liable in the same way
- Negligence - Organizations particularly could be held to be negligent if a duty of care is owed to the youth and there is a failure to take reasonable steps to provide that standard of care. Case law has confirmed that reasonable standard of care has changed overtime, and the 'bar' is simply much higher than it was even a few decades ago



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- Vicarious liability - Organizations can be liable for the wrongful, negligent or intentional tortious actions of their employees, volunteers and even agents, while they are acting in the course of their duties/responsibilities to the Organization
- Courts will focus on the care in selecting, training and supervision of individuals, as the court has discretion in assigning liability in this instance
- Board Liability - In certain circumstances, the board of directors might be held personally liable if they have failed to manage or supervise the management of the corporation

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- Criminal Liability - With the advent of Bill C-45, the sections of the *Criminal Code* (s. 215 to s. 218) which address the few select situations where a positive duty in criminal law exists "towards the preservation of life" was amended to add the following:
 - S. 217.1 "Every one who undertakes, or has the authority, to direct how another person does work or performs a task is under a legal duty to take reasonable steps to prevent bodily harm to that person, or any other person, arising from that work or task"

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D. IDENTIFYING AND MANAGING THE RISKS

1. How to Proactively Prepare Effective Youth Policies and Procedures:

Screening Policies: Employees, Volunteers, Agents


- Demonstrating due diligence in selecting those who will have contact with youth, something that may be critical in a defence at a later date
- Potential use of a type of 'risk matrix' to help determine when more invasive and thorough background, reference and police checks are called for (or not), and recognizing when they are not (e.g. overnight trip chaperone vs youth group assistant)
- Different types of police checks (vulnerable sector checks - normal CPIC) will be necessary depending on the position, and varying need for a renewal

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Child Protection Policies

- Ensuring a comprehensive but understandable policy is put in place to help address child protection and risk management procedures within the organization (e.g. background checks, progress reports, risk management checklists, etc.)
- Ensure the policy not only addresses how to try and avoid situations (e.g. two adult rule) but also procedures that address what to do if something happens (and properly record it)
- Questions to be addressed include: should the Children's Aid Society be contacted, should legal advice be sought, what duties might the organization have to preserve evidence?



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Companion handbooks and ongoing training

- Static policies that are not implemented or practical (e.g. simply stating grand principles) is not only wasteful, but exposes the organization and the board of directors to potential liability
- Given the turn-over in staffing and volunteers, it is critical not only to retrain on a regular basis but also to have a policy regarding youth protection and risk management, but also practical "what if" publications (often a companion handbook to the policy), along with reporting forms, recommendations for handling incidents
- Best Practice: Ongoing training and an annual review of policies and procedures by all staff/volunteers/management

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Policy Writing Tips and Best Practices

- Prepare the policy in hardcopy - build from previous policies, review other Organizations policies, amend the policy as knowledge and experience are gained
- Schedule an annual (or semi-annual) review of the policy and procedures (e.g. by the board, staff, legal counsel, etc.)
- Look for input on the policy from staff, volunteers, management, other Organizations, and legal counsel
- Know your legal obligations prior to preparing / implementing a policy, and stay up-to-date with the law (e.g. task a specific individual(s) to stay current with the law and update the policy accordingly)
- Make sure the policy is readily available to all staff and volunteers

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- Not only is retraining and refreshers important for employees and volunteers because of turn-over and the reality of the complex details that may be contained within the policies, the policies and procedures need to be reviewed with legal counsel for changes in legislation and case law as well
- Youth policies and procedures are very much a "growing tree", evolving and expanding as necessary to meet new risks and jettison parts that are no longer necessary



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2. Insurance

- Insurance - for each type of activity (from mission trips to religious instruction), the question must be asked, among other things:
 - If existing insurance coverage is in place and does it cover the activity, is it sufficient and what are the limitations and requirements for coverage?
 - What additional insurance coverage might be necessary for the activity (considering again the limitations and requirements for a successful claim are fulfilled if required)?

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3. Indemnification


- Most organizations will have a bylaw provision that the organization will indemnify and hold harmless directors/officers for claims made against them while in the course of their duties to the organization
- This is very much an avenue of last resort, not only because it is contingent on the assets of the organization, but director's and officer's insurance in addition to the general insurance provisions may well provide coverage to avoid the need to resort to the indemnification provision

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4. Employee Volunteer Contracts


- Employee and volunteer contracts are becoming more common (including volunteers) as it can address many critical matters at the very beginning of the relationship to reduce risk:
 - the contract can have an acknowledgement of the employee/volunteer's review of relevant youth policies
 - the contract can address the potential privacy concerns involved in screening (e.g. maintaining a record of the results of the police screening, references, etc.)



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- It is important to include a statement in the contract that the information collected during the vetting process can be kept indefinitely at the discretion of the Organization and that some information (results of reference interviews) will not be considered apart of the volunteer file for the purposes of disclosure requests
- This means that the organization will not have to destroy the personal information when the employee/volunteer leaves and anything kept (e.g. private reference comments) could be kept from disclosure if requested



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5. Youth Waivers

- Youth Waivers, Permission Forms and/or Releases
 - as discussed above, the bottom line is that particularly waivers or releases signed by a youth will most likely be unenforceable - **so why bother?**
For an organization, it's about what reasonable steps were taken in advance to avoid the tragedy or damage - so this is why these forms could be useful evidence for a judge's decision
- Know your youth's vulnerabilities/special needs (e.g. allergies). It is proof that steps were taken in advance to identify vulnerabilities and what steps were taken to identify risks or address vulnerabilities

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- The waiver (which should include a reference to the risks) may exist at least as proof that the youth and their guardian purported to understand the risks and were as informed as possible. It helps support a positive and proactive narrative which can be essential to the success of the case
- Jurisdiction/governing law clause in waiver - particularly for trips outside of Ontario, and especially Canada. What law is applied and what jurisdiction the case is heard in can be definitive in a case. A judge may decide that while the waiver of liability section isn't binding, he/she will uphold the jurisdiction and governing law provision

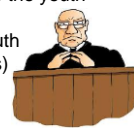
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“Judges are like Almighty God, completely unpredictable”

Rumpole of the Bailey (by: John Mortimer)

- While the chances are slim to none that the entirety of the waiver/release will be upheld, there is no caselaw binding a judge from finding some portions valid (e.g. jurisdiction)
- At the very least it, may be evidence that the organization took its duties of care owed to the youth seriously, it attempted to educate the youth as to the risks, and it may demonstrate that steps were taken to protect the youth (particularly if vulnerable - e.g. allergies)



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CONCLUSION

- The youth demographic are a cross-section of potentially the most in need and vulnerable, and yet one of the hardest groups to minister to given the state of the law
- As with most things in life, it is not about eliminating risk, its about managing and reducing the risks to an acceptable level for your Organization
- Every organization needs to address this demographic (future donors, volunteers and employees) in its own way, but in knowing the risks and what you can do about it, you can more fully embrace the future lifeblood of your Organization

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ALLOCATION ISSUES AND CRA: THE IMPORTANCE OF GETTING IT RIGHT

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2

A. CATEGORIZATION OF EXPENSES

- A charity is required to devote all of its resources to charitable activities – i.e., expenses on charitable activities must constitute the majority of the expenses and all other types of expenses must be on an ancillary basis
- T3010 requires each charity to report all expenses on lines 4800 to 4950, and then categorize them into the following categories
 - Charitable activities (line 5000)
 - Management and administration (line 5010)
 - Fundraising (line 5020)
 - Political (line 5030)
 - Others (line 5040)
 - Gifts to qualified donees (line 5050)

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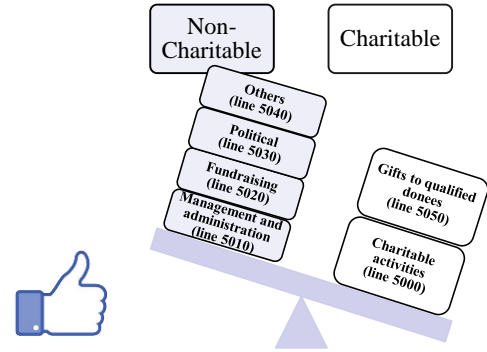
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- Lines 5000 and 5050 should constitute the majority of the expenses
- Where an expense is partly one type of expense and partly another type of expense, it would need to be allocated accordingly

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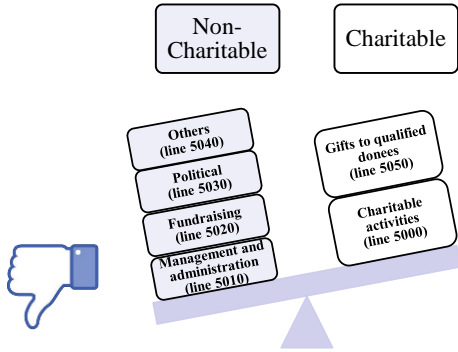
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B. IMPORTANCE OF CORRECT CATEGORIZATION AND ALLOCATION

- Ensures compliance with CRA's requirements on amount of resources a charity may spend on a certain type of activity
- Ensures T3010 is completed accurately
 - One of the basis for a charity to be selected for CRA audit
 - Most of the form is available to the public on CRA's website
- Affects calculation of fundraising ratio
- Affects calculation of whether disbursement quota is met
- Affects CRA's assessment of T2050
- Affects corporate governance/structure

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C. LACK OF CLEAR CRA GUIDANCE

- CRA does not have a clear policy or guidance on how charities are to allocate their expenses – only passing comments in a number of CRA publications

1. Guide T4033 how to complete T3010

- Only 2 brief references on pages 12 and 18
- Divide the expenditure between the applicable lines and expenditures must be allocated consistently and on a reasonable basis
- Gave examples of expenses for charitable, management /administrative, fundraising, or political activity, but no explanation or principles

<http://www.cra-arc.gc.ca/E/pub/tg/t4033/>

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2. Guide T4063 how to complete T2050

- Uses the term “prorate”
- Only 2 examples given on page 15, no explanation on principles
- E.g., Salary prorated based on time spent - an employee who has two duties:
 - manages the charitable activities of an organization (charitable)
 - does bookkeeping and maintains records (administration)

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- E.g., Occupancy costs (including all expenses associated with maintaining the building, such as, rent, insurance, heat, and electricity) prorated based on amount of space used - building used partly for two purposes:
 - a drop-in program for people with disabilities (charitable)
 - offices for the bookkeeper and administrative director (administrative)
 - director of corporate fundraising (fundraising)

<http://www.cra-arc.gc.ca/E/pub/tg/t4063/README.html>

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3. Fundraising Guidance – Appendix B

- CRA explains how to allocate expenses associated with a fundraising activity
- Very detailed explanation on how to “prorate the allocation” of costs – Useful for this to be set out in a standalone guidance since this is not just applicable to fundraising activities
- Where fundraising activities include content that is not related to fundraising, some of these costs may be allocated to charitable activities, management or administrative activities, or political activities
- Needs reasonable and consistent approach to allocating and reporting expenditures
- Onus is on the charity to explain and justify the allocation

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a) 100% allocation to fundraising

- Where 90% or more of the activity was devoted to fundraising, a charity will have to allocate all of the costs to fundraising
- To determine if an activity is exclusively (or almost exclusively) undertaken to fundraise, separate the fundraising content from the other content and assess proportions, resources devoted to and prominence given to charitable, fundraising, management or administrative, and political content
- Certain activities are by default considered to be 100% fundraising expenditures

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b) No allocation to fundraising

- Where an activity would have been undertaken without the fundraising component, then 100% of the costs will be allocated to the applicable expenditure (e.g. charitable, administrative, or political activity)
- Must meet “substantially all” test
 - If substantially all (90% or more) of the activity advances an objective (or objectives) other than fundraising, then no need to allocate anything to fundraising
 - When completing this test, a charity must separate fundraising content from other content

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- c) Prorated allocation of costs
 - In some cases a charity may be able to prorate the allocation of costs of an activity between fundraising expenditures and charitable, management or administrative, and political activity expenditures
 - But must be able to establish that less than 90% of the total content of the activity advances fundraising
 - If more than 90%, then all expenditures must be allocated to fundraising
 - To determine if prorating is possible, must separate the fundraising content from other content
 - The onus is on the charity to produce the necessary accounting records to support the allocation

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- Guidance explains in considerable detail the characteristics associated with the different types of charitable, fundraising, management /administrative, or political content – more detailed than T4033 which only gave examples with no explanation
- Charitable content
 - Will directly further the charity's charitable purposes
 - Focuses primarily on beneficiaries or potential beneficiaries of the charity's programs, services, or facilities, not current or prospective donors
 - Is not, as a rule, prepared and/or delivered by individuals or organizations whose skills and usual responsibilities are to fundraise

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- Fundraising content
 - Implied or explicit requests for donations of cash or gifts in kind
 - Information about how to make a donation, including planned giving
 - The provision of goods and services that do not directly further the charity's charitable purpose
 - Activities, such as sports events, where participants are encouraged or expected to raise pledges
 - Advertising to promote events that involve fundraising
 - The management and administration of fundraising activities (e.g., planning and research for future fundraising)

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- Management and administrative content
 - Arranging, holding and reporting on board meetings
 - Bookkeeping, accounting, auditing, personnel, and other administrative services
 - Purchasing supplies and equipment and occupancy costs for administrative offices
 - Applying for grants or other types of government funding, and/or for gifts from other qualified donees
- Political content
 - An activity that directly or indirectly attempts to retain, change, or oppose a law in Canada or abroad, or sways public opinion on social issues
- Needs to maintain complete and detailed books and records – including records of research to determine appropriate costs

<http://www.cra-arc.gc.ca/chrts-gvng/chrts/plcy/cgd/ndrsng-eng.html>

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4. Political Activities Policy Statement

- Permitted political activities undertaken need to fall within expenditure limit (i.e., generally within the 10% resource limit)
- Where expenditures relate in part to political activities and in part to other activities, a reasonable allocation should be made and the methodology should be consistent from year to year
- If substantially all (90% or more) of an expense is for charitable activities, then the whole expense should be considered a charitable expense - if the expense relates substantially to a political activity, the whole expense should be counted as a political expense

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- Allocation of resources include financial, physical and human resources
- A charity needs to choose record-keeping methods suited to its operations provided that the method chosen is consistently applied, complies with the requirements of the *Income Tax Act*, and is sufficient to disclose its position

<http://www.cra-arc.gc.ca/chrts-gvng/chrts/plcy/cps/cps-022-eng.html>

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D. SUMMARY PRINCIPLES

- Onus on the charity to explain and justify the categorization and allocation is reasonable
- CRA requires “reasonable” allocation
 - Rationale of allocation clearly relates to the expense allocated and the activity allocated to, e.g.
 - Allocate salary based on time spent on duties
 - Allocate occupancy costs based on floor space used by each department, each function
 - Amount allocated is reasonable in relation to other costs and value of activities to the charity
- CRA requires “consistent” allocation
 - Similar expenses allocated in similar manner
 - Same allocation method consistently used and applied over time and across the board

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- Some principles from other tax cases (e.g. HST)
 - “Reasonable” means no specific formula must be used
 - As long as the allocation method used is a reasonable one, it does not need to be “more” reasonable than the one used by CRA or is the “best” method
 - Question is whether the (HST registrant’s) calculation is fair and reasonable, not that CRA has come up with a better calculation
 - Once the (HST registrant) has selected a method of calculation, the onus shifts to CRA to prove that the method in question is “not fair” or “not reasonable”
 - Method needs to be consistently used
 - If the method used was changed, there needs to be a basis why a change was made

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- If an activity is “substantially all” one type of activity, the entire expense would be allocated to that activity
- Allocation requires a clear understanding of what each type of activity means
- Keep it simple
- Keep detailed books and records to support the allocation
- Allocate up front – rather than at year end
- Need clear correlation between financial statements and T3010 allocation
- How best to allocate may differ depending on the circumstances, no one-size-fits-all methodology

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- Consider adopting policy on categorization and allocation
 - Helpful in complex situations
 - Ensures consistent implementation
 - Ensures correlation of reporting in books/records with T3010 reporting
 - Possible topics to include
 - Set out CRA’s requirements
 - Explain what each type of activity means (charitable, administration/management, etc.)
 - Principles used in allocating expenses
 - How each type of expense is allocated – allocation formula, factors, calculation, exceptions, etc.

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- Ensures the policy is in writing and implemented
- Periodic review of the policy and update as necessary
- Appoint a person or committee to review allocation issue

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FOOD FOR THOUGHT

- What are some basis to allocate staff salary?
 - Program staff
 - Admin staff
 - Fundraising staff
- How do you allocate occupancy costs for a wing of a building that is used for multiple purposes?
 - board meetings
 - program meetings
 - staff training
 - rented out on weekends

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- A charity publishes a booklet that is 30 pages long, 15 pages is an annual report with financials and 15 pages is on charitable programs of the charity. The charity spent 5 hrs on the annual report section but 50 hrs on the charitable section. How do you allocate the expenses used to publish the booklet?



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**The Ottawa Region 2017 *Charity
& Not-for-Profit Law Seminar***

Ottawa – February 16, 2017

**DUTY OF CARE INVOLVING
TRAVEL AND FOREIGN
ACTIVITIES**

By Kenneth Hall, B.A. (Hons), Insurance Broker

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Are you good to go?

DUTY OF CARE: TRAVEL AND FOREIGN ACTIVITIES

ROBERTSON HALL
INSURANCE

Presented By Kenneth A. Hall, B.A. (Hons)
Charity & Not-for-Profit Law Seminar
February 16, 2017 - Ottawa

Injury and Liability Risk

What is Legal "Duty of Care"?

Based on common law precedents and confirmed in Supreme Court of Canada decisions...employers and sponsoring organizations owe a duty of care to individuals carrying out their work, whether for-profit or not-for-profit, including while travelling and/or working abroad

Legal Liability is based on the following key questions...

Foreseeability i.e. To what degree could and should the risks associated with the work being done that caused injury, illness, or loss of property harm have been foreseen, reduced or eliminated by the organization as the employer or sponsoring organization?

Duty of Care i.e. What would a reasonable and prudent person or organization do, or not do, in order to prevent harm or loss of property, based on foreseeable risks?

"In tort law, a duty of care is a legal obligation imposed on individuals or organizations to adhere to a standard of reasonable care while performing any activities that could foreseeably harm others"

Injury and Liability Risk

What is Legal "Duty of Care"? continued

Civil courts and common law precedents have long held there is no difference between **Actual Knowledge** (facts or information you have at hand) and **Implied Knowledge** (facts or information you could easily obtain by making reasonable inquiries) when it comes to the negligence of an organization and its leaders for injuries or illness suffered as the result of sponsored operations and activities

There is no defense based on ignorance, or because your organization is doing good work, with respect to the safety and security of your staff, short-term mission participants or expatriate missionaries. From a legal standpoint, your organization is held to be the expert!

Directors, officers, ministry personnel and trip leaders all have a legal duty of care and responsibility for the health and safety of workers while abroad, just as with any other sponsored program or ministry here in Canada.

Foreign Activity Risk Foreseeability

Personal Harm

- Injury, Disability, Death
- Serious and Permanent Illness
- Mental Health Issues
- Kidnapping, Abduction
- Terrorism

Financial Harm

- Insured or Uninsured Lawsuits
- Directors' Personal Liabilities
- Joint and Several Liability for Partners
- Misuse of Donor Funds Overseas
- Funds Transfer Fraud/Cyber Crimes

Reputational Harm

- Loss of Good Will
- Reduced Donor Support
- Revocation of Charitable Status
- Civil Liability Awards
- Bill C-45 Convictions, Fines and Penalties

Legal Liability Risk for NGO's, Mission, Relief and Development Organizations (Claims Examples)


- ❖ Resident in children's orphanage in Africa operated by Canadian charity obtains landed immigrant status as an adult and sues organization and its director for alleged abuse
- ❖ Teenager from U.S. volunteering with Canadian church on mission team in Europe is injured as passenger in an automobile accident and sues church and board members
- ❖ Adult on mission trip building homes suffers heart attack, is airlifted to nearest country, incurs over \$200,000 of uninsured medical bills and sues sponsoring organization
- ❖ Over \$20,000 in donor funds to purchase equipment goes missing and is untraceable from international money wire transfers to partner organizations in the field
- ❖ Teenager on short-term mission trip falls from hotel balcony in the Dominican Republic resulting in quadriplegia and in a \$17,000,000 lawsuit against sponsoring organization and church leaders on the trip for inadequate supervision and unsafe conditions
- ❖ Kidnapping of a Christian aid worker in Sudan involved months of captivity before release. Resulted in a lawsuit for civil damages against the charity and directors based on alleged willfully ignoring the threat of abduction, putting the worker in a dangerous situation and causing mental anguish during and since her abduction.

NGO and Mission Worker Risk

Similarities to For-Profit Global Workers and Executives:

- Advancing the organization's objects and purposes
- Long term residency outside Canada, often with family
- Need for effective health care services and insurance protection
- Need for pro-active and emergency security and medical advice, support and consulting services (e.g. civil unrest, war, terrorism, natural disaster, kidnapping, cardiovascular events, malaria, etc.)

NGO and Mission Worker Risk




Differences with For-Profit Global Workers and Executives:

- Involved in not-for-profit or charitable work to advance the lives of others including an incredible variety of mission, relief and development around the world
- Lack of corporate financial resources, often raising their own donor support for expenses on the mission field
- Lack comprehensive medical insurance and health care support
- Lack pro-active and emergency security and medical advice, support and consulting services (e.g. civil unrest, war, terrorism, natural disaster, kidnapping, cardiovascular events, malaria, etc.)

These Differences create a potential "gap" in the ability to meet legal duty of care for NGO workers!


Legal Liability Risk for NGO, Mission, Relief and Development Organizations (Source of Claimants)



Highest to lowest risk for lawsuits:

1. SHORT TERM TRAVELLERS/MISSION PARTICIPANTS
2. STAFF MEMBERS OVERSEAS
3. EXPATRIATES/LONG-TERM MISSIONARIES
4. FOREIGN CITIZENS
 - a) Employees and Volunteers
 - b) Clients/Program Recipients
 - c) Other Third Parties


The Rise of Short-Term Missions, Volunteerism and Youth Travel



Did you know?

Between 1979 and 2006 the number of annual short-term mission trip participants in the U.S. and Canada increased from 24,200 to 1,760,000

Youth, student and educational travel now accounts for 20% of Canadian travellers abroad, including student and cultural exchange, international higher education, school trips, work abroad and organization volunteerism (e.g. Habitat for Humanity)

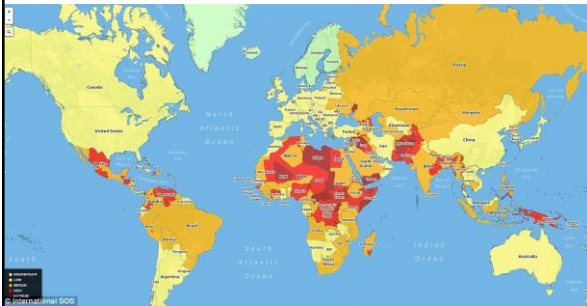



Overview of Foreign Activity Risks



- Security**
 - Violent Crimes
 - Kidnap & Ransom
 - War, Civil War & Insurrection
 - Terrorism
- Health & Medical**
 - Infectious Diseases (HIV/AIDS, Ebola, Hepatitis B)
 - Tropical Diseases (Malaria, Dengue Fever, Chagas)
 - Poisonous Bites and Stings
 - Cardiovascular Health (Heart Attacks, Strokes, etc.)
 - Mental Illness
- Injury & Liability**
 - Construction and Agricultural Injuries
 - Automobile Accidents
 - Other Transportation (e.g. Watercraft, Aircraft)
 - Abuse and Molestation

Security Risk Map



Terrorism, Political Violence, Kidnapping, Personal Crime

Source: International SOS/Control Risks, 2016

Security Risk

Duty of Care Resources

Check with Global Affairs Canada (GAC) www.travel.gc.ca/travelling/advisories

- ❖ Travel Reports and Warnings for current safety and security issues, local laws and customs, entry requirements, health and other important travel information **before** planning or leaving on a trip. The reports are extremely helpful for planning purposes. Countries subject to a Travel Warning may indicate a recommendation that Canadians avoid non-essential travel, or avoid all travel to that country, or to a specific region within that country. **Note:** Warnings are subject to change and should be checked right up to date of departure and during the term of expat residency.
- ❖ Registration of Canadians abroad in advance of your planned trip so that GAC can contact and assist your group in the event of an emergency in a foreign country, such as a national disaster, civil unrest or notification of a family emergency at home
- ❖ Customized Medical and Security Warnings and Alerts are available through reputable private assistance companies such as International SOS, but only if your organization has access through comprehensive membership

Security Risk

GAC Travel Reports and Warnings (09/26/16)

Important Note: Warnings can be both by county and by region within countries

Level One – Exercise Normal Degree of Caution (e.g. U.S.A., Australia, Singapore)
- Individuals or groups are approved to travel to these countries or regions

Level Two – Exercise High Degree of Caution (e.g. Mexico*, Philippines*, China, Ukraine*)
- Individuals or groups are only recommended to travel to these countries or regions under the supervision of experienced leaders with the support and resources of recognized NGO's and local trusted partners in the field

Level Three – Avoid Non-Essential Travel (e.g. Egypt, Mexico (US Border), Nigeria, Sudan)
- Individual or group travel to these regions should be limited to health care professionals or other essential workers who are under the supervision of experienced leaders with the support, security and resources of recognized NGO's and local trusted partners in the field

Level Four – Avoid All Travel (e.g. Afghanistan, Syria, Mali, Somalia, South Sudan)
- Individuals and groups should **not** be travelling to these countries or regions. Note: The only exception is as part of government-sponsored international relief initiatives with full security under the supervision of national or international police or peacekeeping forces.

* Indicates countries with heightened regional advisories

Security Risk

Duty of Care Resources

- ❖ Partner with international charities and agencies who already operate in the area you are working or travelling and/or utilize local trusted individuals, churches, missionaries and organizations who can provide you with invaluable local insight, guidance, security and protection
- ❖ Create a medical emergency response plan (MERP) in advance including key medical, transportation, security and consular contact information for trip leaders and expats
- ❖ Work with a recognized medical and security assistance provider who can provide valuable resources before and during your duration of travel including travel advisories, travel trackers, assistance apps and the capability to provide 24/7 advice, evacuation and access to international-grade medical clinics. There's a world of difference in an emergency between a 1-800 number on the back of a Travel Insurance card versus having a truly global assistance company on your side!

Security Risk

Kidnap, Ransom and Security

- ❖ Violence, abductions and other crimes suffered by Westerners for political, ideological, religious and monetary reasons has been on the rise in the past decade
- ❖ Kidnap and ransom has become epidemic in certain Latin American, Asian and African countries
- ❖ The target victims of kidnapers have expanded from politicians and business executives to any foreigners and is increasingly being perpetrated by gangs for strictly monetary reasons, including express kidnappings

Security Risk

Kidnap and Ransom Insurance

- ❖ Kidnap and Ransom (K&R) insurance protection is available only through a handful of specialty insurance companies and Lloyds of London underwriting syndicates
- ❖ Policy coverage scope includes kidnap, ransom, wrongful detention, extortion and expenses related to crisis response hostage negotiation and legal services
- ❖ Coverage options can include Political and Security Evacuation
- ❖ Premiums are dependant on areas of operation, number of persons insured, frequency of travel and amount of coverage
- ❖ Concerns about purchasing K&R insurance by charities for workers and volunteers:
 - Faith and ethical objections
 - Coverage makes workers more of a target
- ❖ Emphasis on confidentiality for organizations with K&R coverage

Security Risk

Important Caution About Terrorism and Liability Insurance

Recent proliferation of terrorism and terrorist groups, even in regions previously considered lower risk including Tunisia, Mali, Burkina Faso, Kenya, Nigeria, Egypt, Somalia, Turkey, Ukraine, The Philippines, Indonesia, etc., in the past year alone

Higher terrorism threat to aid and mission workers from charities and other NGO's in northern and sub-Saharan Africa, the Middle East and Southern Asia

In the aftermath of 9/11, virtually all liability insurance policies issued in the western world contain an absolute exclusion for terrorism, including potential negligence that an employer or sponsoring organization may have for a lack of care that results in injuries, fatalities, or third party property damage as the result of a terrorist act



Health and Medical Risk

Checklist for Foreign Travel:

Check with the Public Health Agency of Canada www.publichealth.gc.ca for information on Travel Health Notices, Clinics, Travel Booklet and recommended immunization for tropical and infectious diseases for yourself and your group, including the following:

Tropical Diseases

Malaria
Dengue fever
Yellow fever
Meningococcal
River Blindness
Cholera

Other Infectious Diseases

Influenza (general)
Avian Flu
AIDS/HIV
Hepatitis B
Polio
Ebola
Zika Virus



Health and Medical Risk

Checklist for Foreign Travel:

Carefully screen sponsored travellers, work teams and short-term mission volunteers for pre-existing medical conditions and any food or drug allergies, in order to avoid placing them in life-threatening situations and medical emergencies due to strenuous work projects, extreme weather conditions, high altitudes and only limited health care available

Have participants obtain permission from their doctor (especially travellers age 55 and older or with existing medical conditions) and ensure they take the appropriate vaccinations and medications as prescribed for infectious tropical diseases in advance of travel

- Examples:
- Antimalarial drugs
 - Twinrix (Hepatitis A and B)
 - Up-to-date Tetanus/Diphtheria vaccine
 - Typhoid vaccine

Visit an infectious diseases clinic for immunization 6 weeks in advance of travel for maximum vaccine efficacy



Health and Medical Risk

Checklist for Foreign Travel:

Emergency First Aid supplies should be carried with your worker appropriate to the regions and conditions in which you are operating

Examples:

- Epipens for use in case of severe and life-threatening anaphylactic to food, insects etc., in remote locations
- Antivenom supplies in either liquid form (must be refrigerated) or freeze-dried ampules for use in case of bites or stings by poisonous snakes, spiders, scorpions and frogs
- Sterile medical packs (e.g. disposable hypodermic needles) for use in remote locations in case of emergency medical treatment in local hospitals and medical clinics
- Or better yet contract with an international medical assistance company, who can provide proactive advice, an MERP, emergency evacuation and access to accredited regional medical facilities



Health and Medical Risk

Remember!

In developing countries, hospitals and clinics could be hours or days away and the healthcare and medical supplies provided may be inferior or non-sterile by Western standards. The incidence of HIV/AIDS in many southern African countries exceeds 25% of the general population, (including medical workers) making blood transfusions potentially unsafe.

Note: Recognized Medical and Security Assistance providers (e.g. International SOS) have a network of certified international-grade hospitals and clinics located around the globe including safe, reliable ground transportation and air medical and security evacuation.



Health and Medical Risk

Hospital's ER "scary" for Canadians travelling abroad

"It was a shock when I got there with what the hospital was like", John said. The ER is scary as hell! When you're on the island and the resorts are beautiful and what you see is all really nice, but you get into Santa Clara and it was a real shock."

"There was no running water, no antiseptic and no blankets. The hospital was open to the environment, the beds were stained and staff wore their street clothes in the intensive care unit."

"I don't think the doctors there realized that the flight crew (i.e. medical evacuation) had better equipment than they had at the hospital."

"There's a million Canadians down there that have no idea what's going to happen to them if they get sick. Be prepared when you go down there. Have an emergency plan and make sure you're aware of the dangers."

From one Canadian Family's experience as told in a Winnipeg Free Press article titled "Oak Lake Family Reeling from Cuba Tragedy" – January 9, 2016



Health and Medical Risk

Checklist for Foreign Travel:

A Note About Mental Health Awareness, Especially For Youth

- ❖ A recent study at the University of Michigan titled *Psychological Resilience in Students on Overseas Experiences* confirmed the significant incidence of mental health events triggered by the stresses associated with travelling and studying abroad
- ❖ The vast majority of mental illness episodes and events reported by non-governmental organizations relate to young people under the age of 25, according to Dr. Robert Quigley, Regional Medical Director for the Americas, International SOS.



Health and Medical Risk

Checklist for Foreign Travel:

Mandatory Travel Insurance for ALL participants and leaders, including:

- ❖ Emergency Out-of-Province Medical Insurance
- ❖ Excess Hospital and Medical Benefits
- ❖ Prescription Drug Reimbursement
- ❖ Accidental Dental Expense
- ❖ Medical Evacuation and Special Transportation
- ❖ Ground and Air Expense
- ❖ Repatriation Benefit
- ❖ Life Insurance
- ❖ Accidental Death and Injury Benefits
- ❖ Optional Trip Cancellation and Interruption

Important: Make sure all travellers provide physical proof of insurance or better yet arrange "group" coverage with a guaranteed level of protection!



Health and Medical Risk

Checklist for Foreign Travel

Strongly Recommended Additional Travel Protection

The following can make all the difference in an emergency for your travellers and expats, and can provide peace of mind for their family and love ones at home and also keep your leaders out of court...

- ❖ Medical and Security Communication and Travel Advisories from an Assistance Provider
- ❖ Travel Tracker to help locate travellers and activate emergency assistance
- ❖ Assistance Smartphone App for travellers and trip leaders for communication in real time
- ❖ Security Evacuation, Kidnap Consulting indemnity or full Kidnap Ransom coverage (depending on region of travel)
- ❖ Medical Emergency Response Plan (MERP) for all destinations/events



Injury and Liability Risk

The Insurance and Legal Landscape

- ❖ Many liability insurance policies issued by Canadian insurers contain exclusions or limitations for bodily injury or property damage that occur outside of Canada and the United States
- ❖ There are now legal precedents for individual or class action suits by foreign citizens against mission sponsoring organizations in North American civil courts
- ❖ Importance of ensuring that your organization's insurance program includes General Liability and Directors & Officers Liability coverage with a full "Worldwide" coverage territory for lawsuits brought against your organization in Canada or the United States



Injury and Liability Risk

Transportation

- ❖ Automobile accidents are the #1 cause of death and injury for travelers abroad, whether in vehicles owned, rented or borrowed by the individual, business or organization
- ❖ The reason for the higher frequency and severity of auto accidents in developing countries include:
 - Older, poorly-maintained vehicles
 - Lack of vehicle safety standards and equipment
 - Poorly maintained and signed road systems
 - Inferior driver qualification standards
 - Lack of insurance standards
- ❖ All transportation and drivers, whether in automobiles, taxis, aircraft or ferries should be carefully planned in advance as much as possible with reputable operators



Injury and Liability Risk

Abuse Claims

- ❖ Sexual and physical abuse is the biggest liability issue facing child and youth-serving charities in Canada
- ❖ It is also an issue for NGO's who sponsor relief, development and missions activities that include any of the following circumstances:
 - Participants on trips who are minors
 - Youth placed with host families
 - Travel to countries or cultures with higher incidence of reported, unreported and/or unprosecuted sexual assaults
 - Evangelistic, educational, health care or relief services provided by Canadian or foreign staff and volunteers who work with children, youth and vulnerable adults outside of Canada
 - Operation of schools, orphanages or residential care facilities outside Canada
- ❖ For the few insurers willing to provide abuse liability protection for Canadian charities operating abroad, an abuse prevention plan including formal policies, procedures and screening is a must, as with any program or ministry in Canada!



Injury and Liability Risk

Legal Risk Management

- ✓ Carefully screen travel candidates, work teams and short-term mission volunteers for pre-existing medical conditions and any food or drug allergies, in order to avoid placing them in life-threatening situations and medical emergencies due to:
 - Strenuous work projects (construction , agriculture, etc.)
 - Extreme weather conditions (heat, humidity)
 - High altitude acclimatization (especially over 5,000 ft. above sea level)
 - Limited emergency medical care (hours or days away)



Injury and Liability Risk

Legal Risk Management...continued

- All participants should complete and sign the following as part of their registration in advance of their trip or assignment.
- ✓ **Informed Consent** clearly advising them of the health, injury and security risks associated with foreign travel, the work and particular destination(s) of their assignment
 - e.g. "risk of death or injury from violence, civil unrest, abduction"
 - "risk of sickness or disease from influenza, malaria, cholera..."
 - "risk of death or injury related to unregulated construction sites and lack of safety standards and equipment usual to Canada"
 - ✓ **Waiver of Legal Liability** to protect the organization, its directors and officers for any bodily injury or damage suffered by the participant due to the inherent travel risks, work and destination conditions beyond the control of the sponsoring organization
 - ✓ **Parental Permission** for any minors participating on a trip. **However, remember waivers signed by or on behalf of minors are generally unenforceable!**

We generally recommend against sponsoring short-term travel by minors without fully understanding, addressing and meeting the high duty of care (Refer to Youth Short Term Missions Section in 5-Point Checklist)



Bill C-45 and Foreign Activities

Legal responsibility for the care of workers abroad has now become even more important because of Bill C-45, also known as the Workplace Health and Safety or "Westray" Bill

This law amended the Canadian Criminal Code by adding certain provisions, including the possibility of criminal liability against an employer organization and its directors in cases of gross negligence causing work-related illness, injuries or fatalities

Consider section 217.1 of the Criminal Code, which was added as a result of Bill C-45:

"Every one who undertakes, or has the authority, to direct how another person does work or performs a task is under a legal duty to take reasonable steps to prevent bodily harm to that person, or any other person, arising from that work or task."



Bill C-45 and Foreign Activities

...continued

Initially intended to discourage employers from placing employees in dangerous conditions in Canadian workplaces and job sites, the scope of the legislation as passed has been expanded in two important respects which have implications for Canadian NGO's engaged in foreign travel and activities:

- 1) Recent amendments to C-45 have extended the concept of the "workplace" to encompass areas beyond the four walls of the physical location of the employer. For example, a mining resources company operating with Canadian workers in a volatile, violent, or infectious disease-ridden region of Africa, Asia, or South America, without proper security, equipment, vaccinations, and medical support, can be subject to potential criminal prosecution.
- 2) Amendments to Bill C-45 also now define employer organizations more broadly to include "associations of persons," and "work" has been expanded to include "tasks," including those of volunteer nature being carried out across Canada and throughout the world, whether by a corporation, a non-profit, or a charity.



The Implications of Criminal Liability Under Bill C-45

Organizations can now be held criminally liable where a representative (i.e. director, officer, manager, supervisor) demonstrates a lack of care for the safety of others resulting in injury or harm.

Not only are fines and penalties under C-45 uninsurable, criminal culpability on the part of a corporate entity or unincorporated association also calls into question whether coverage for civil lawsuits resulting from such injuries or illness are even insurable under the organization's liability insurance policies, which contain standard exclusions for criminal acts of the policyholder organization and its directors

Therefore it is more important than ever for Canadian charities and not-for profits engaged in travel and foreign activities - whether large or small - to become "Bill C-45 compliant" by meeting or exceeding their legal Duty of Care



Thank You!

We hope this presentation helps provide your organization and directors with insight, practical tips and solutions in meeting your Duty of Care for travellers, expatriates and foreign activities.

By: Kenneth A. Hall

Disclaimer: The information contained in this seminar has been compiled by Robertson Hall Insurance Inc. to assist charitable organizations and their leaders in better understanding insurance and legal issues and to help in reducing or eliminating foreseeable and preventable risks associated with their ministries, programs, operations and events. However, your organization may have insurance requirements and risks that are unique to your premises or operations which are not addressed by this seminar and should be specifically reviewed with the appropriate qualified professional. This publication may not be reproduced in any way without the written consent of Robertson Hall Insurance Inc.

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The Ottawa Region 2017 *Charity & Not-for-Profit Law Seminar*

Ottawa – February 16, 2017

WHY DO DIRECTORS GET INTO TROUBLE? THE PERSPECTIVE FROM THE PGT



By Kenneth Goodman, B.A., LL.B.
The Public Guardian & Trustee of Ontario

 Ontario
 Ministry of the
Attorney General

**Office of the
Public Guardian and Trustee
Charitable Property Program**



**Why Do Director's Get Into
Trouble?**
 The Perspective of the
Public Guardian and Trustee
 Presented by Ken Goodman

1


**Mandate of the Public
Guardian and Trustee**


- Plays a role in helping to protect charitable assets in Ontario;
- Affords advice and assistance to the courts; and
- Can take steps to ensure that charitable property is used for the charitable purposes intended by the donor.



2


Fulfilling Mandate


PGT carries out its mandate by:

1. Reviewing Ontario applications for incorporation of charitable organizations and corporate- change documents;
2. Protecting charitable property in court proceedings; and
3. Acting on complaints regarding misapplication of charitable property or breach of fiduciary duties of directors or trustees.



3


Fulfilling Mandate


PGT jurisdiction includes:


- All of Ontario
- All charitable property, including funds held by non-charitable not-for-profits and for-profit organizations
- For instance, many service organizations hold charitable funds.

4



Charities


- Most charities are filled with good people striving to do good work;
- They work hard to relieve poverty, to educate others, to live out their religion, and to engage in many other activities beneficial to the community.

5


Charities

Unfortunately, even the best intentions
 don't shield
 charities
 from trouble



6

What Trouble Looks Like

- Breaches fall into three main categories:
 - internal governance;
 - use of charitable property;
 - conflict of interest.

7

Internal Governance

- Dissension within the Board
- Disenfranchised Membership
- Employee relationships



8

Charitable Purposes & Work

- Misapplication of Funds
- Miscommunication with Donors
- Fundraising Irregularities
- Failure to protect the charity's interests



9

Conflict of Interest

- Remuneration of Directors
- Personal Benefit to Directors



10

How to Avoid Trouble



"I'm the weird accident that only happens when someone's not paying attention. I'll just wait over here."

11

How to Avoid Trouble


1. KNOWLEDGE

- Know your fiduciary duties
 - All Directors have fiduciary duties; the extent of those duties depends on the type of organization
 - Not-for-profit non-charitable organizations such as Service Clubs and professional associations;
 - Not-for-profit charitable corporations.
 - The extent of your duties also depends on the property held: if you are responsible for charitable property, you have the fiduciary duties of a charitable director.
 - A list of Fiduciary Duties of Charities Directors is Appendix A to this PPT.

12

How to Avoid Trouble

1. KNOWLEDGE (con't)
 - Know the Law
 - Know the Charity's Purposes
 - Know the By-Laws or Constitution



13


Don't Forget:



14

How to Avoid Trouble


2. Process – how the Charity works
 - Communication
 - Know when to talk
 - Know when to listen
 - TRANSPARENCY
 - With Membership
 - With Board
 - Documentation
 - Decisions
 - Rationale



15

How to Avoid Trouble


3. Underlying Principles
 - Know Your Fiduciary Duties
 - Always Act in the Best Interest of the Charity
 - Don't confuse being Charitable and meeting your duties



16

How to Avoid Trouble

4. Warning Signs
 - Is one person running the show?
 - Are Board members being ignored or shut down?
 - Is the Board showing loyalty or preference to a person or idea rather than the Charity as a whole?
 - "How would I feel if this situation were shared on Facebook, trending on twitter, or in the newspaper?"
 - Has fundraising, or some other incidental, become the end rather than the means?
 - Does it sound too good to be true?




17

When Issues Aren't Resolved

Individuals and groups can take one or more steps if their concerns are not address:



- Complaints to the Board
- Complaints to the Members
- Complaints to the Media
- Complaints to the PGT, government, police
- Applications to Court



18


When Issues Aren't Resolved

- Cost Consequences
- Reputation
- Volunteers
- Donations

19

What the Court Has Said




I can think of no problem less suited for a courtroom and the adversary system than an internal disagreement amongst members of a religious denomination.

Palmer v. Marmon
1978 CarswellOnt 717, [1978] 2 A.C.W.S. 246, 32 O.R. (2d) 417

20

What the Court Has Said




The [Charity] is a place of compassion and tenderness, of community spirit, of dedication and charity. It is arguably the last place one would expect to find a derisive and costly power struggle for stewardship of a group of volunteers and charitable programs. Yet we are faced with exactly that: an epic struggle for control of the Board of Directors. This struggle has been very costly to the [Charity], It has been depressingly expensive financially and, perhaps more profoundly, has tarnished the reputation of the [Charity] in the community.

Alaimo v. Di Maio
2008 CarswellOnt 3729, [2008] O.J. No. 3570, 171 A.C.W.S. (3d) 784

21

What the Court Has Said




The vigour with which the litigation is being conducted has not been curbed by the fact that the objects and work of the corporate parties are religious in nature. There appear to be no significant doctrinal differences between the parties and, although the contest has many of the dominant characteristics of a turf war, the evidence leaves me in no doubt that personality clashes have exacerbated, if they have not created, the essential problem.

Asian Outreach Canada v. Hutchinson
1999 CarswellOnt 1794, [1999] O.J. No. 2060, 28 E.T.R. (2d) 275, 88 A.C.W.S. (3d) 1076

22

What the Court Has Said



It is not the policy of the *Corporations Act* that courts should baby-sit the affairs of such corporations; self-governance by the members is the operating norm. If members, such as those of the [Charity], are incapable of governing the corporation, they should take a hard look in their collective mirrors and do one of three things: (i) reform their ways, which the current members seem incapable of doing; (ii) step aside and let new members who are unencumbered with the baggage of past factionalism take over the running of the corporation; or, (iii) wind-up the corporation, with the different factions parting company and setting up their own temples.

There was no winner in this litigation. However, there was a loser – the Centre, because it's directors were not prepared to put the corporation's best interests before their own factional purposes.


Singh v. Sandhu
2013 ONSC 3230, 2013 CarswellOnt 7398, 16 B.L.R. (5th) 194, 229 A.C.W.S. (3d) 22

23

OPGT Areas of Investigation

The Public Guardian and Trustee can inquire into allegations that:

- charitable property is not being used for the purposes for which it is intended;
- those responsible for the administration of charitable property are in breach of their fiduciary duties;
- charitable property is being held in breach of legislation.



24

Steps of Investigation

- Request information from the charity.
- Review information received.
- Request clarification from the charity or require charity to take certain actions.
- If information not received or organization does not take required action. OPGT may require a Court Audit
- Court Audit – (Passing of Accounts). In a court audit, a charity is required to file its accounts in estate form with the court and the OPGT. The accounts are then reviewed to determine if funds have been misapplied. The OPGT can require a charity to pass its accounts under s. 3 of the Charities Accounting Act

25

Responding to the PGT

- It is important to keep the OPGT advised of the charity's actions. An extension of the time maybe granted for valid reasons.
- An organized, comprehensive response that provides context when needed, will help our office to better understand the charity's rationale.
- Silence, vague, defensive answers and inconsistent information will cause closer review and scrutiny.
- The philosophy of the OPGT in reviewing complaints about charitable organizations is to work with charities to correct errors and to avoid problems in the future.

26

Responding to the PGT

- Section 2 of the *Charities Accounting Act* requires the charity to provide requested information to the OPGT;
- Charities are entitled to obtain professional advice, such as from a lawyer or accountant, before forwarding the information;
- Even if while seeking the assistance of professionals, the charity should continue to gather all relevant information to avoid unnecessary delays in responding;

27

Contact Information

- Office of the Public Guardian and Trustee
Charitable Property Program
595 Bay Street, Suite 800
Toronto, ON M5G 2M6
Tel: (416) 326-1963 or in Ontario
toll free at 1-800-366-0335**
- Internet:**
 - English:** www.attorneygeneral.jus.gov.on.ca/english/family/pgt
 - French:** www.attorneygeneral.jus.gov.on.ca/french/family/pgt/

28

Appendix A Fiduciary Duties

- Duties on Appointment
 - Know the purpose of the charity
 - Review past administration to correct any problems
- Duty to be Reasonable, Prudent and Judicious
 - Handle property with skill, care and diligence of a prudent person

29

Fiduciary Duties

- Duty to Carry Out the Charitable Purpose
 - Property must be used for the charitable purposes and not for any other purpose, even if that purpose is charitable;
 - Charitable purposes (or objects) are found in the Letters Patent or Trust Document;
 - Restricted Purpose funds must be used for that purpose only.

30

Fiduciary Duties

- **Duty to Avoid Conflict-of-Interest Situations**
 - Occur when a director has a personal interest in the result of a decision made by the charity. The interests of the charity must be paramount;
 - Directors and trustees must avoid both an actual conflict and the appearance of conflict;
 - To avoid even an appearance of conflict, trustees and directors should not transact business or accept any personal benefit from the charity.

31

Fiduciary Duties

- **Duty to Act Gratuitously**
 - A director or trustee cannot be paid to act as a director or trustee;
 - Nor can they be paid for working in any other capacity for the charity without Court approval;
 - Reimbursement of reasonable expenses is acceptable.

32

Fiduciary Duties

- **Duty to Account**
 - Ensure that proper accounts are maintained and that supporting documentation is saved;
 - Accounting includes gross receipts from 3rd party fundraisers;
 - Ensure that the charity is compliant with financial reporting requirements of their legislation (Ontario Corporations Act or the Canada Not-for-Profit Act; and, when enacted, the Ontario Not-for-Profit Act)

33

Other Information

Brochures including this information and other charitable matters at the PGT's website:

- <http://www.attorneygeneral.jus.gov.on.ca/english/family/pgt/>
- <https://www.attorneygeneral.jus.gov.on.ca/french/family/pgt/>

34

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The Ottawa Region 2017 *Charity & Not-for-Profit Law Seminar*

Ottawa – February 16, 2017

WHAT'S NEW AT THE CHARITIES DIRECTORATE

By Tony Manconi, B.A.
Director General of the Charities Directorate
of Canada Revenue Agency



Charity and Not-for-Profit Law Seminar

February 16, 2017
Presented by Tony Manconi, B.A.

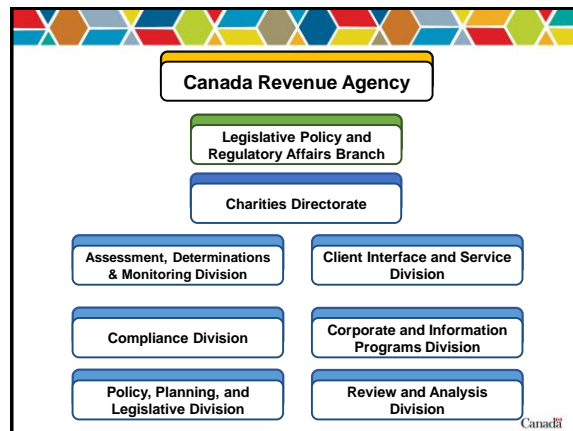
Canada Revenue Agency / Agence des Revenus du Canada

Presentation Outline

- ✿ Know the difference: Charity vs. Not-for-Profit
- ✿ Charities Directorate overview
- ✿ Update on recent education products
- ✿ *Credit Counselling Services of Atlantic Canada Inc. v Minister of National Revenue*
- ✿ Consultations on political activities
- ✿ Revenue generation activities
- ✿ Charities IT modernization
- ✿ Compliance activities
- ✿ Report on Charities Program
- ✿ Priorities of the Charities Directorate

Know the difference

Registered Charity	Not-for-Profit Organization
Must be established and operate exclusively for charitable purposes	Can operate for a variety of purposes except for profit
Must apply to the Charities Directorate and be approved for registration as a charity	Does not have to go through a registration process
Can issue official donation receipts for income tax purposes	Cannot issue official donation receipts for income tax purposes
Must file an annual information return (Form T3010)	May have to file a T2 return (if incorporated) or an information return (Form T1044) or both
Charities Directorate as primary contact for information and guidance. 1-800-267-2384	CRA Business Enquiries as primary contact for information and guidance. 1-800-959-5525



Update on education products

✿ Guidance on:

- ✿ Relieving conditions attributable to being aged
- ✿ Retention of envelopes
- ✿ Other qualified donees: Low-cost housing corporations for the aged, prescribed universities outside Canada, and foreign charities that have received a gift from Her Majesty in right of Canada

✿ Other:

- ✿ Videos on gifting and receipting
- ✿ Infographics, interactive quizzes, and banners
- ✿ Web pages to assist charities in the context of the Alberta wildfires and the Syria crisis

Credit Counselling Services of Atlantic Canada Inc. v MNR

- ✿ Under the relief of poverty, assistance provided must be to persons in poverty.
- ✿ Poverty is a relative term.
- ✿ Prevention of poverty is not a charitable purpose.



Political Activities Consultations


Online consultation Fall 2016. Asked for feedback on:

- ✿ Awareness of the rules and issues/challenges with those rules
- ✿ Usefulness of current policies and educational resources
- ✿ Suggestions for changes to be made to the rules

Received almost 20,000 e-mails (only 460 unique responses)



In person consultations December 2016

- ✿ Halifax, Montréal, Ottawa, Toronto, Winnipeg, Calgary, and Vancouver
- ✿ Moderated by an external facilitator
- ✿ 167 total attendees



Political Activities Consultations

- ✿ Consultation Panel members:
 - ✿ Marlene Deboisbriand (Chair of the Panel)
 - ✿ Peter Robinson
 - ✿ Kevin McCort
 - ✿ Susan Manwaring
 - ✿ Shari Austin
- ✿ The Panel will make recommendations to the Minister in Spring 2017, based on the in-person and online consultations feedback.



Revenue Generation

- ✿ Member of the Interdepartmental Social Finance Working Group led by ESDC
- ✿ Currently analyzing social finance/social enterprise/special innovation
- ✿ Currently considering changes to CG-014, *Community Economic Development Activities and Charitable Registration*, and CPS-019, *What is a related business?*


Charities IT Modernization “CHAMP”

- ✿ Reduce administrative burden
- ✿ Modernize business & meet sector needs
- ✿ Support Open Government (data)
- ✿ Improve compliance

Charities IT Modernization “CHAMP”

- ✿ Online filing features:
 - ✿ Built in validations to reduce adding errors and double reporting
 - ✿ Built in help text to explain complex terms
 - ✿ Prompts to ensure form is complete and that financial statements are included
- ✿ Online filing benefits:
 - ✿ Reduced costs
 - ✿ improved processing times
 - ✿ increased compliance




Compliance

Filing your annual return on time

- ✿ It is important to file your Registered Charity Information Return on time
- ✿ Your return is due within six months of your fiscal period end
- ✿ In the last two years, 1200 charities were revoked for failure to file their return



Consequences of revocation

- ✿ Cannot issue official donation receipts
- ✿ No longer qualify for exemption from income tax
- ✿ Must transfer all remaining assets to an eligible donee or pay the revocation tax
- ✿ Could impact GST/HST rebates
- ✿ Will need to go through the full registration process to re-register
- ✿ Liable to pay a late filing-penalty of \$500

Canada

Annual Report Charities Program

Information on:

- ✿ The mission, vision, structure, and roles of the Directorate
- ✿ The four categories of charity
- ✿ The charitable sector in Canada
- ✿ The Directorate's regulatory process, including applications for registration, audits, and recourse
- ✿ The Directorate's outreach and engagement activities, including guidance and consultations
- ✿ "What's Next" for the Directorate, including upcoming projects and activities

Canada

Priority Setting

- ✿ The Charities Directorate's priorities are being identified through:
- ✿ Ministerial mandate
 - ✿ Collaboration with other government departments
 - ✿ Consultations with the public
 - ✿ Sector feedback
 - ✿ Operational issues and challenges

Canada

Priorities for the Charities Directorate:

- ✿ Ministerial mandate commitments
- ✿ Program delivery
- ✿ Service
- ✿ Guidance

Canada

Thank You!

www.cra.gc.ca/charities

1-800-267-2384

Charities Directorate
Canada Revenue Agency
Ottawa ON K1A 0L5

Canada

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**The Ottawa Region 2017 *Charity
& Not-for-Profit Law Seminar***

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**LEGAL CHECK-UP:
10 TIPS TO EFFECTIVE LEGAL
RISK MANAGEMENT**

By Terrance S. Carter, B.A., LL.B., TEP, Trade-mark Agent

**tcarter@carters.ca
1-877-942-0001**

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**The Ottawa Region
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**Legal Check-Up:
10 Tips to Effective Legal Risk Management**

By Terrance S. Carter, B.A., LL.B., TEP, Trade-mark Agent
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2

**OVERVIEW OF THE TOP TEN TIPS FOR EFFECTIVE
LEGAL RISK MANAGEMENT**

- 1 Get to Know Your Organizational Documentation
- 2 Know Who is in Charge
- 3 Monitor Third Party Use of Property
- 4 Check Insurance and Risk Transfer Documentation
- 5 Watch Out for Wasting Assets

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- 6 Ensure compliance with Privacy and Anti-spam Law
- 7 Monitor Employee and Volunteer Liability Risks
- 8 Be Prepared for a CRA Audit
- 9 Ensure Compliance with Donor Restrictions
- 10 Know the Legal Basis for Investing Surplus Funds


Note: For more details see Legal Risk Management Checklists at <http://www.carters.ca/pub/checklist/CRMchklistNov16.pdf>

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4

**WHY SHOULD YOU CARE ABOUT LEGAL RISK
MANAGEMENT?**


- Charities and Not-for-Profits (NFPs) are facing increasing challenges in delivering their services to members and the public
- This is in part because of a more litigious society and a more complicated regulatory environment
- In facing these challenges, charities and NFPs need to be familiar with an increasing array of legal requirements
- In order for charities and NFPs to comply with and avoid exposure to legal liability, it is important that they undertake regular legal check-ups



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- The key to compliance with legal requirements is to implement effective due diligence
- Due diligence in addressing risk management issues requires the charity or NFP to ask the following questions:
 - What is the legal status of the charity or NFP?
 - What are the applicable legal requirements that it must comply with?
 - How can those legal requirements be most effectively complied with?



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- Due diligence needs to be undertaken in a purposeful way in order to manage risks and avoid legal liability before they occur
- A due diligence approach involves a change from passivity to pro-active legal risk management
- The “top ten tips” that follow identify key issues that charities and NFPs should address in conducting a “Legal Check-up” to implement effective legal risk management




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TOP TIP #1: GET TO KNOW YOUR ORGANIZATIONAL DOCUMENTATION


- What are the applicable organizational and legal documents of your charity or NFP?
 - Develop an inventory of key documents
 - Maintain a central location for key documents
 - Identify key organizational documents when the charity or NFP is an unincorporated association
 - Constitution and any amendments
 - Policies and procedures, if applicable
 - Minutes of the board and membership meetings



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- Identify key organizational documents when the charity or NFP is a corporation
 - Letters patent/articles of continuance and supplementary letters patent/articles of amendment, if applicable
 - By-laws
 - Mission statement, if applicable
 - Membership covenant, if applicable
 - Minutes of board and membership meetings
 - Directors, members and officers registers
 - Copies of government filings



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- Identify other key legal documents
 - Leases, deeds and mortgages
 - Agency, partnership, association, contracts for service and joint venture agreements
 - Business name, trade-marks, domain names
 - Intellectual property license agreements
 - Charitable registration number, CRA registration letter, T3010s and correspondence from CRA
 - Operational risk management policies, e.g. sexual abuse and volunteer policy statements
 - Privacy policy
 - Investment policy



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10


- Questions to ask when reviewing key documents of an unincorporated charity or NFP
 - Are the objects clearly stated in the constitution and are they exclusively charitable in nature in the case of a charity?
 - Has there been a "mission drift" from the original purposes?
 - Do constitutional documents correctly reflect how the charity or NFP is actually structured and operated?
 - Has a copy of the constitution been filed with Canada Revenue Agency ("CRA") and the Public Guardian and Trustee of Ontario ("PGT")?



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11

- Questions to ask when reviewing key documents of an incorporated charity or NFP
 - Questions concerning letters patent/articles of continuance
 - Is the name in the letters patent/articles of continuance the correct name of the charity or NFP and is the name consistent with the objects/purposes?
 - Are its objects/purposes exclusively charitable in the case of a charity?
 - Has there been "mission drift" from the original objects/purposes?
 - Are the current activities of the charity or NFP authorized by its corporate objects/purposes?
 - For a charity, have a copy of the letters patent/articles of continuance been filed with CRA and the PGT?



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- Questions concerning provisions of the general operating by-law:
 - Is there a conflict with letters patent/articles of incorporation concerning its objects/purposes or dissolution clause?
 - Does the by-law reflect the actual organizational and operational structure of the charity or NFP?
 - Does the by-law reflect changes to applicable corporate legislation?
 - Does the by-law include an adequate indemnification provision that has been authorized in accordance with the requirements under the *Charities Accounting Act*?
 - Are the bylaw amendment procedures consistent with corporate legislation?
- Was initial corporate organization of the corporation done correctly?

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13

TOP TIP #2: KNOW WHO IS IN CHARGE

- Who is in charge of running the charity or NFP?
 - Where does the *de facto* control of the charity or NFP actually lie?
 - Is it with the board, a committee or senior management ?
 - Are there clearly defined lines of authority between the board and senior management?
 - Has the board delegated excessive responsibility to senior management by restricting the board to policy development only without ongoing monitoring and accountability over policy implementation?
 - Is authority of the board recognized by the membership?

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14

- Are there clearly stated qualification requirements in becoming a director?
 - Have the qualification requirements to be a director been met by each director?
 - Are there conflicting qualifications to be a director in the by-laws, articles of incorporation or board policies?
 - Has the register of directors been maintained and are changes in director information being sent to the relevant government authority?
- Does the board meet on a regular basis?
- Do all directors regularly attend board meetings?
- Has an audit committee been established to review financial statements and the auditors' report?

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15

- Is there adequate communication of board responsibilities for existing and new board members?
 - Is there a board binder of all organizational documents and inventory of assets, as well as an explanation of the general operations of the charity or NFP and the board of directors' legal duties and liabilities?
 - Are board members provided with regular updates on changes in the law?
- Are there effective policies in place to address board succession planning, recruitment, and orientation?




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16

TOP TIP #3: MONITOR THIRD PARTY USE OF PROPERTY


- Is the charity or NFP aware of potential liability exposure from permitting third parties use of their property?
- Has the charity or NFP developed and implemented a facility use policy and license agreement with appropriate releases of the charity and indemnification provisions?
- Does the charity or NFP require evidence of adequate liability insurance from third party users of its facilities?
- Has the charity or NFP provided written notice to its insurer concerning the use of its property by third parties?



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- Does the charity charge appropriate fair market rental fees to non-charity users of its property?
 - Charitable property requires fair market value for rent charged to non-charities
 - Properties owned by non-charities have more flexibility in the amount of rent that can be charged
- Does the rental of property to third parties meet CRA's "related business" requirements?
- For charities and NFPs that have lifestyle requirements, has consideration been given to compliance with the *Human Rights Code* (Ontario) and applicable exemptions?




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18

TOP TIP #4: CHECK INSURANCE AND RISK TRANSFER DOCUMENTATION

- Has the charity or NFP maintained a historical record of its insurance coverage in the event of a claim?
- Has the charity or NFP provided full written disclosure of all risks to its insurer to avoid denial of coverage?
- Does the charity or NFP request regular written reports from its insurance broker on existing coverage, exclusions from coverage and recommendations to enhance coverage?
- Is there a regular review of the adequacy and extent of general liability coverage and property insurance, as well as employment benefits and practices coverage?
- Is there directors' and officers' liability coverage in place and is it reviewed regularly to ensure its adequacy?



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19


- Is there need for special endorsements to extend insurance coverage to “out of the ordinary” activities?
- Is there coverage for sexual, physical, and emotional abuse and if so in what amount?
- Has the charity considered obtaining the services of an independent insurance consultant to conduct an assessment of insurance coverage?
- Is there a child protection policy, and if so has it been reviewed by the insurer as well as legal counsel?
- Has the charity or NFP considered developing and implementing liability shield documentation as may be appropriate, such as informed consents, disclaimers, releases, waivers and indemnities by program participants?

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20

TOP TIP #5: WATCH OUT FOR WASTING ASSETS


- Intellectual property is an essential asset of a charity or NFP and generally consists of both trade-marks (i.e. branding) and copyright
- Trade-mark rights exist at common law but those rights are limited and should be supplemented by trade-mark registration under the *Trade-marks Act*
- Corporate name or business name registration does not by itself give trade-mark protection
- CRA does not monitor for confusingly similar charity names
- Trade-marks and copyrights can be lost if they are not properly protected and can therefore become wasting assets



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21

- The charity or NFP needs to develop a portfolio management approach for identifying, registering, using and enforcing trade-marks, both in Canada and in other countries as applicable
- Who owns the copyright in publications and website content of the charity or NFP, and is it properly identified with a notice of copyright protection, i.e. ©?
 - Unless there is an agreement to the contrary with an employee, copyright vests in the charity or NFP as the employer
 - Has the website designer assigned the copyright in the website design to the charity or NFP?
 - Have independent contractors also assigned their copyright as may be necessary?



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TOP TIP #6: ENSURE COMPLIANCE WITH PRIVACY AND ANTI-SPAM LAW

- Under the *Personal Information Protection and Electronic Documents Act* (“PIPEDA”), organizations must obtain “knowledge and consent of the individual [...] for the collection, use, or disclosure of personal information, except where appropriate”
- PIPEDA applies to commercial activities, including “the selling, bartering or leasing of donor, membership or other fundraising lists”
- Charities and NFPs that engage in limited commercial activities ancillary to their primary functions will be subject to PIPEDA, so it is best to assume that PIPEDA applies
- Does the charity or NFP have a privacy policy in place to protect members, donors, employees and volunteers?

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- Canada’s Anti-Spam Legislation (“CASL”) came into force on July 1, 2014, impacting how charities and NFPs communicate with donors, volunteers, members and the public
- CASL prohibits the sending of commercial electronic messages unless the sender has express or implied consent and the message contains prescribed information
- Regulations include a specific exemption for select messages sent by or on behalf of registered charities primarily for fundraising purposes
 - This does not provide a full exemption from all commercial electronic messages from charities
 - This exemption only applies to registered charities, meaning that non-profit organizations are not exempt

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24

TOP TIP #7: MONITOR EMPLOYEE AND VOLUNTEER LIABILITY RISKS

- Has the charity or NFP developed appropriate policies and practices for hiring, disciplining and terminating employees and volunteers, including employment and volunteer agreements?
- Does the charity or NFP have a policy in place concerning accommodation for employees who are members of a disadvantaged group identified in the *Ontario Human Rights Code*?
- Does the charity or NFP have a policy concerning workplace violence and harassment in accordance with the *Ontario Occupational Health and Safety Act*?
- Does the charity or NFP have conduct requirements for employees and/or volunteers?
 - If it is mandatory, can it be enforced?
 - Does it comply with the *Ontario Human Rights Code*?

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- Are employees and volunteers who deal with children screened and supervised in accordance with an appropriate sexual abuse policy statement?
- Is the charity or NFP aware of and complying with applicable statutory requirements, such as pay equity, employment standards, human rights legislation, privacy legislation and occupational health and safety legislation?
- Is the charity or NFP and its board exposed to potential criminal liability under section 217.1 of the *Criminal Code* (Westway Mine Disaster) by directing how another person performs a task but neglecting to take reasonable steps to prevent bodily harm to that person? (e.g. undertaking a building program in Haiti)

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TOP TIP #8: BE PREPARED FOR A CRA AUDIT


- Does the NFP meet the test to be a non-profit organization under par.149 (1)(l) of the *Income Tax Act* in relation to both income generation and reserves?
- Does the charity know what charitable objects of the charity are on file with the CRA?
- Has the charity ensured that its activities and programs are undertaken in accordance with its charitable objects?
- Is the legal name of the charity and/or its operating name consistent with the records of CRA?
- Has the charity filed all of its governance documents with CRA, including supplementary letters patent/articles of amendment and by-laws?
- Does CRA have the current head office address of the charity?



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27


- Does the charity submit its annual information return (Form T3010) within six months of the financial year end of a charity in order to avoid loss of charitable registration?
- Does the board of directors, the charity's accountant and legal counsel all review and approve the annual information return (Form T3010)?
- Does the charity comply with split receipting and anti-tax shelter provisions of the ITA?
- Is the charity aware of the CRA Guidance on Fundraising and the need to calculate and track its fundraising ratio each year?
- Does the charity follow the CRA's requirements for "related business"?
- Is the charity aware of the requirements to engage in political activities and does it comply with the 10% of resources restriction?



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- Are agency relationships, joint venture relationships, or contractual transfer arrangements with non-qualified donees, both inside and outside of Canada, documented and implemented with appropriate "direction and control"?
- Are the charity's books and records maintained in accordance with the requirements of the ITA?
- Does the charity or NFP screen its board of directors, trustees, officers or equivalent official, or any individual who otherwise controls or manages the operation of the charity to see if any are "ineligible individuals" under the ITA?




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TOP TIP #9: ENSURE COMPLIANCE WITH DONOR RESTRICTIONS


- Are there donor restricted funds being held by the charity?
 - Building funds
 - Scholarship funds
 - Endowment funds
 - Special project funds
 - Legacy "ten year gifts" that may have been given in the past under the ITA
- Is there a regular review of donor restricted funds to ensure compliance?



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- Are restricted funds used only in accordance with applicable restrictions and not borrowed against?
- Is the board of the charity aware of the consequences of breach of trust for failing to comply with restricted funds?
- Are restricted funds kept segregated from the general funds of the charity?
- Are restricted funds pooled for investment purposes?
- If yes, has there been compliance under the *Charities Accounting Act* to co-mingle restricted funds for investment purposes?




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31

TOP TIP #10: KNOW THE LEGAL BASIS FOR INVESTING SURPLUS FUNDS


- What are the investment powers that apply to investment of surplus funds of the charity or NFP?
 - Investment power may be found in the letters patent/articles of incorporation or supplementary letter patent/articles of amendment
 - Investment power may be found in incorporating legislation if applicable
 - By default, investment power will be found in the *Trustee Act*




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- Does the charity need and/or have an investment policy?
 - Documenting compliance with prudent investor rule under the *Trustee Act* for charities will help to provide protection from liability for directors
 - Establishing requirements for delegation of investment decision making, particularly for a charitable organization because of requirements under the *Trustee Act*
- Best not to simply rely upon documentation from an investment manager, as such documents may not reflect the legal requirements for investing charitable funds under the *Trustee Act*



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THE OTTAWA REGION
Charity & Not-for-Profit Law Seminar

Thursday, February 16th, 2017

FEEDBACK FORM

Thank you for participating in today's Seminar. Please help us plan the 2018 Ottawa Region *Charity & Not-for-Profit Law Seminar* by completing this Feedback Form.

1 = disagree 2 = neutral 3 = agree 4 = strongly agree

How Did You Hear About This Seminar?

- Mailing Email Advertising Word of Mouth E-Newsletter "Charity Law Update"

Presentations

	Disagree	Neutral	Agree	Strongly Agree
The presentations were relevant and informative.	1	2	3	4
The number of presentations was appropriate.	1	2	3	4
The speakers explained the legal issues in a manner that was understandable	1	2	3	4
The use of PowerPoint was helpful and instructive.	1	2	3	4
The question and answer periods were helpful and informative.	1	2	3	4

What topic would you like to see discussed next year?

Lunch & Coffee Breaks

	1	2	3	4
The lunch reflected good value	1	2	3	4
The time allotted for coffee break was adequate.	1	2	3	4
The time allotted for lunch break was adequate.	1	2	3	4

What is one way we could improve the lunch or coffee breaks?

General

	1	2	3	4
The facilities were comfortable.	1	2	3	4
The seminar location was convenient.	1	2	3	4
I will recommend this seminar to others.	1	2	3	4
I would like to attend next year.	1	2	3	4

Comments and Suggestions:

We appreciate any other comments or suggestions.

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THE OTTAWA REGION

Charity & Not-for-Profit Law Seminar

Thursday, February 16th, 2017

QUESTION SHEET

Please complete the question sheet, tear along the dotted lines and leave it at the front lectern in the auditorium any time before 2:30 p.m. Questions will be answered during two Question Periods at 12:20 p.m and 3:15 p.m.

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