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**VOLUNTEER LAWYERS AND THE LAW SOCIETY  
OF UPPER CANADA  
CHARITABLE AND NONPROFIT PRIMER CLE**

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**LAWYERS' DUE DILIGENCE**  
*(Legal Risk Management Checklist)*

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**OVERVIEW**

- **Identification and Management of Legal Risks**
- **Utilizing Multiple Charitable Corporations**
- **Board Management Issues**
- **Reducing Board Liability**
- **Insurance Considerations**
- **Third Party Use of Charitable Property**
- **Real Property Issues**
- **Intellectual Property Issues**

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- **Employment And Volunteer Matters**
- **Charitable And Fundraising Activities**
- **Fiscal Management Issues**
- **Investment Issues**
- **Donor Restricted Trust Fund**
- **Maintaining Charitable Registration**
- **National/International Relationships**
- **Anti-Terrorism Legislation**

**Note: For more details see articles and newsletters at [www.charitylaw.ca](http://www.charitylaw.ca) and [www.antiterrorism.ca](http://www.antiterrorism.ca)**

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**IDENTIFICATION AND MANAGEMENT OF LEGAL RISKS**

- **Is charitable status needed?**
  - **Do charitable receipts need to be issued?**
  - **Can the organization work under the auspices of an existing charity?**
  - **Business donors may not require charitable receipts**
- **General overview of organizational & legal documentation**
  - **Identify existence and location of key organizational documents**

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- **Develop an inventory of key documents**
- **Maintain central location for key documents**
- **Identify key organizational documents for an unincorporated charity**
  - **Constitution and amendments , if applicable**
  - **Policy statements, if applicable**
- **Key organizational documents for a corporate charity**
  - **Letters patent and supplementary letters patent, if applicable**

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- **Membership covenant and mission statement, if applicable**
- **By-laws and resolutions**
- **Directors, members and debt registers**
- **Copies of government filings**
- **Determining other key legal documents**
  - **Leases, deeds and mortgages**
  - **Agency, association and joint venture agreements**
  - **License agreements**

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- **Business name, trade-marks and Section 9 official mark registrations**
- **Charitable registration number**
- **Policy statements, i.e. sexual abuse and volunteer policy statements**
- **Insurance policies**
- **Review of documents for unincorporated charity**
  - **Are there objects stated in the constitution and are they exclusively charitable?**

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- **Do constitutional documents correctly reflect how the organization is actually structured and operated?**
- **Is a copy of the constitution filed with the appropriate government agencies, i.e. with Canada Revenue Agency (“CRA”) and the Public Guardian and Trustee (“PGT”)?**
- **Review of corporate structure**
  - **Review of letters patent**
    - **Is the name in the letters patent the correct name of the charity consistent with the charitable objects of the charity?**

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- **Are its objects exclusively charitable?**
- **Are the activities carried out by the charity authorized by its charitable objects?**
- **Is the dissolution clause complementary to the charitable objects?**
- **Review of supplementary letters patent**
  - **Has there been a change of corporate name and/or objects?**
  - **What is the effect of change of objects upon existing charitable property?**

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- **Letters patent of amalgamation (only for Ontario corporations):**
  - **Requires the same or similar charitable objects**
  - **Existing charitable property must be held in trust for the charitable objects of the previous charitable corporations**
- **Need to review corporate by-law for basic terms, such as**
  - **Do provisions conflict with letters patent?**

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- **Do provisions reflect changes to corporate legislation?**
- **Is there an adequate indemnification provision?**
- **Are the by-law amendment procedures consistent with corporate legislation?**
- **Was initial corporate organization of the charity properly done?**
- **Was there a documented transfer of assets and liabilities on incorporation?**
- **Are the records of board decisions and/or membership meetings complete?**

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- **Was there adequate board and/or members’ authorization for indebtedness?**
- **Have corporate records been properly maintained?**
- **Have necessary corporate filings and registrations been kept up to date?**
  - **Ontario Corporations**
    - **Initial Notice and Notice of Change - Form 1**
    - ***Business Name Act* (Ontario) registrations**

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- **Mandatory reporting to Public Guardian and Trustee**
- **Canada Corporations**
  - **Annual Summary (Form 3) - Canada**
  - **Extra-Provincial Initial Notice (Form 2) - Ontario**
  - ***Business Name Act* (Ontario) registrations**
  - **Mandatory reporting to Public Guardian and Trustee**

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- **Does the charity operate and/or fundraise in any other provinces? If so, there may need to be registration as extra-provincial corporation and/or fundraiser in other provinces**
- **Has there been loss of corporate status for failure to maintain government filings?**
- **Is the charity aware of the importance of proper use of corporate name and operating names?**

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- **Has the charity developed and implemented a policy statement on:**
  - **child abuse**
  - **sexual abuse**
  - **sexual harassment**
  - **bullying**
  - **volunteer conduct**
  - **safety in the workplace**

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**UTILIZING MULTIPLE CHARITABLE CORPORATIONS**

- **Should the charity consider using multiple charitable corporations for its high risk activities in order to reduce liability exposure?**
- **Should the charity consider establishing and utilizing a parallel foundation for either fundraising or protection of charitable assets?**

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- **Has consideration been given to balancing control of multiple corporations with issues involving cross over liability?**
- **Has consideration be given to implementing control through contracts and/or licensing agreements as an alternative to corporate control?**

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**BOARD MANAGEMENT ISSUES**

- **Is the charity able to identify which group is in charge?**
  - **Where does the de facto control of the charity lie? Is it with a board, a committee or executive staff?**
  - **Is board authority recognized by the membership?**
- **Are there clearly defined lines of control between the board and the executive staff?**
- **Does the board meet on a regular basis and do directors regularly attend?**

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- **Has an audit committee been established to review financial statements and the auditors' report?**
- **Is there adequate communication of board responsibilities to existing and future board members?**
  - **Need to create a board binder of all corporate documents, as well as an explanation of the general operations of the corporation as a charity and the board of directors' legal duties and liabilities**
  - **Need to provide regular updates on changes in the law to board members**

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**REDUCING BOARD LIABILITY**

- **Do directors receive direct or indirect remuneration or other financial benefit from the charity in contravention of their fiduciary duties?**
- **Has the charity indemnified its directors and officers in accordance with the *Charities Accounting Act* (Ontario)?**
- **Is there corporate authority to acquire directors and officers liability insurance in accordance with the requirements of the *Charities Accounting Act* (Ontario)?**

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- **Has the board delegated too much responsibility to executive staff by restricting itself to policy decisions only?**
- **Should the charity consider reducing the size of the board?**
- **Is the charity effectively making use of committees as an alternative to a large board of directors?**
- **Do the board members need to receive independent legal advice?**

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- **Should the charity consider implementing an advisory board to complement the board of directors?**
- **Has the charity established a comprehensive due diligence procedure by utilizing a legal risk management checklist?**
- **Has a legal risk management committee of the board been established**

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### **INSURANCE CONSIDERATIONS**

- **Has the charity maintained a historical record of its insurance coverage in the event of a future claim?**
- **Is there occurrence-based or claims-made insurance coverage for sexual abuse?**
- **Has the charity provided full disclosure of all risks to its insurer to avoid denial of coverage?**
- **Does the charity require regular reports from its insurance broker on existing coverage, exclusions from coverage and recommendations to enhance coverage?**

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- **Is there a regular review of the adequacy and extent of general liability coverage and property insurance?**
- **Is there a regular review of directors' and officers' liability coverage?**
- **Does there need to be special insurance endorsements to extend insurance coverage, e.g. activities of agents in foreign countries?**

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### **THIRD PARTY USE OF CHARITABLE PROPERTY**

- **Is the charity aware of potential liability exposure in permitting third parties to use its property?**
- **Has the charity developed and implemented a third party property use agreement with appropriate indemnification?**
- **Does the charity require evidence of liability insurance from third party users of its facilities?**
- **Does the charity charge appropriate fair market rental fees for non-charities?**

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**REAL PROPERTY ISSUES**

- **Are there trust provisions in old title documents that may impact real property?**
- **Has the charity addressed encroachments with neighbouring lands?**
- **Are there charitable trust restrictions in old trust deeds on title and, if so, are they being complied with?**
- **Are municipal zoning and legal non-conforming uses being complied with?**

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- **Could the charity be forced to sell surplus land under *Charities Accounting Act* (Ontario)?**
- **Has the charity identified and evaluated the extent of liability exposure for toxic property?**
- **Is the charity entitled to exemptions or rebates from municipal taxation?**

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### **INTELLECTUAL PROPERTY ISSUES**

- **Does the charity need to register any of its key names and/or logos as trade-marks?**
  - **Identify trade-marks.**
  - **Protect trade-marks.**
  - **License trade-marks.**
- **Who owns the copyright for publications of the charity?**
- **Should copyright be registered, assigned or licensed?**

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### **EMPLOYMENT AND VOLUNTEER MATTERS**

- **Has the charity developed appropriate hiring policies and practices for its employees?**
- **Is there need for an employment contract with key employees?**
- **Is there a need to develop and adopt statements and/or manuals for employees as well as volunteers?**
- **Do employees and volunteers who deal with children need to be screened and supervised in accordance with an appropriate sexual abuse policy statement?**

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- **Is there need for a discipline procedure for employees and/or volunteer members?**
- **Is the charity aware of and complying with applicable statutory requirements, such as pay equity, employment standards, human rights legislation, privacy legislation and occupational health and safety prerequisites?**
- **Is the charity and the board exposed to criminal liability under the *Criminal Code* i.e. Bill C-45 (Westbury Mines)?**

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### **CHARITABLE AND FUNDRAISING ACTIVITIES**

- **Has the charity ensured that charitable activities are done in accordance with its charitable objects?**
- **Are fundraising and/or administrative costs kept within the 80/20 disbursement quota?**
- **Has fundraising legislation, where applicable, been complied with?**
- **Have fundraising programmes been reviewed by legal counsel?**

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- **Are donors' rights to require accountability respected, particularly rights under the *Charities Accounting Act* (Ontario)?**
- **Does the charity have a privacy policy in place in order to protect donor's rights?**
- **Are sponsorship arrangements properly documented?**

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### **FISCAL MANAGEMENT ISSUES**

- **Are all salaries and benefits being paid by the charity?**
- **Is the charity operating with a deficit and, if so, for how long?**
- **How is the deficit being funded?**
- **Has a sinking fund been established to retire debt?**
- **Are investments being offered to the public without full disclosure to potential investors?**

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- **Is there an audit committee in place?**
- **Are charitable funds being used to fund separate business operations of the charity?**
- **Is there violation of the *Charitable Gifts Act* (Ontario) by the charity owning more than 10% of a business?**

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## **INVESTMENT ISSUES**

- **What investment powers apply to surplus funds of the charity?**
  - **Prudent investor rule under the *Trustee Act* (Ontario) will generally apply**
  - **However, specific investment powers may sometimes apply as contained in**
    - **Letters patent and supplementary letters patent**
    - **Endowment and gift agreements**
    - **Testamentary gifts**

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- **Does the charity need and/or have an investment policy?**
  - **Documenting compliance with prudent investor rule**
  - **Establishing requirements for delegation of investment decision making**
  - **Prohibition on sub-delegation**

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### **DONOR RESTRICTED TRUST FUNDS**

- **Are there donor restricted trust funds being held by the charity?**
  - **Building funds**
  - **Endowment funds**
  - **Special project funds**
  - **Ten year gifts**
- **Are restricted funds used only in accordance with applicable restrictions?**

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- **Are restricted funds being used in whole or in part for general operational purposes or are they being borrowed against?**
  - **Are restricted funds segregated from operating funds?**
  - **Is there compliance under the *Charities Accounting Act* (Ontario) to co-mingle restricted funds for investment purposes?**
  - **Is the board of the charity aware of the consequences of breach of trust for failing to comply with restricted funds?**
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- MAINTAINING CHARITABLE REGISTRATION**
- **Is the legal name of the charity and/or its operating name consistent with the records of CRA?**
  - **Does CRA have the current head office address of the charity?**
  - **Has the charity obtained Quebec charitable status for fundraising in Quebec?**
  - **Does the charity submit its annual charity information return (form T3010) on a timely basis?**
  - **Has the charity complied with its disbursement quota?**
  - **Is the charity involved in political activities?**
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- **Is the charity involved in related business activities?**
- **Is the charity aware of the applicable rules on the issuance of charitable receipts and split receipting?**
- **Are agency and/or joint venture relationships with non-qualified donees properly documented?**
- **Is the charity involved in fundraising through tax shelters?**
- **Does the board of directors review the annual return (T3010A) for the charity before it is filed each year?**
- **Is the charity prepared for a spot audit by CRA?**

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- NATIONAL/INTERNATIONAL RELATIONSHIPS**
- **Are relationships with national organizations and/or subsidiary chapters adequately documented?**
  - **Are relationships between national and international structures adequately documented?**
  - **Has the ownership of trade-marks and/or copyrights been determined?**
  - **Have trade-marks and copyrights been adequately protected and licensed?**

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**ANTI-TERRORISM LEGISLATION**

- **Does charity carry on operations that may require it to be in compliance with anti-terrorism legislation?**
  - **International operations**
  - **Domestic operations**
- **Has the charity undertaken appropriate due diligence procedures in complying with anti-terrorism legislation?**
  - **Development of an anti-terrorism policy statement.**

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- **Development of resource materials on anti-terrorism legislation**
- **Requiring disclosure statements for board members and staff**
- **Evaluating all charitable programs for compliance**
- **Requiring disclosure statements from affiliated charities, third party agents and/or partners and conducting appropriate inquiries**
- **Determining when to make inquiries of donors**
- **Conducting due diligence internet searches on directors, officers and agents**

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- **Are directors aware of risks associated with failing to comply with anti-terrorism legislation?**
  - **Loss of charitable status**
  - **Personal liability in civil law**
  - **Possible criminal law sanction**

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