
**CANADIAN SOCIETY OF ASSOCIATION EXECUTIVES
SOCIÉTÉ CANADIENNE DES DIRECTEURS
D'ASSOCIATIONS
LEGAL ISSUES FOR ASSOCIATIONS CONFERENCE**

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**Identification and Management of Key Legal
Compliance Issues for Associations**

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OVERVIEW

- Different Types of Associations
- Different Legal Forms of Associations
- Organization and Legal Documentation
- Utilizing Multiple Corporations
- Board Management Issues
- Reducing Board Liability
- Insurance Considerations
- Third Party Use of Association 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 Funds
- Maintaining Charitable Registration
- National/International Relationships
- Anti-Terrorism Legislation
- Bill C21 (*Canada Not-for-Profit Corporations Act*)

Note: For more details see attached checklists, articles and newsletters at www.charitylaw.ca and www.antiterrorism.ca

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DIFFERENT TYPES OF ASSOCIATIONS

Charitable Associations

- What is a charity?
 - At common-law a charity includes
 - Relief of poverty
 - Advancement of education
 - Advancement of religion
 - Other purposes beneficial to the community recognized by the courts

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- Under the *Charities Accounting Act* – “charitable purpose” is defined
 - Codifies the common law definition of what is a charity
 - Definition does not extend to broader definition under the *Income Tax Act*
- Under the *Income Tax Act* – “qualified donees” concept was introduced
 - Includes a “registered charity”
 - Defined as “charitable organization”, “public foundation” and “private foundation”

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- No definition of a “charity” but reflects the common law
- Includes extended statutory list of “qualified donees”
 - Registered Canadian amateur athletics associations
 - Low-cost housing co-operatives for the aged
 - Municipalities
 - United Nations
 - Prescribed universities
 - Her Majesty in right of Canada or a province

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- What are the tax advantages of being a charity?
 - A charity does not pay tax on income or capital gains
 - A charity can issue charitable receipts to donors as tax credits for income tax purposes
 - A gift for income tax purposes can now include consideration back to donor
- What are the legal forms available for a charity?
 - Charitable trusts
 - Unincorporated associations
 - Non-share capital corporations

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Not-for-profit Associations

- **What is a not-for-profit organization under the *Income Tax Act*?**
 - Club, society or association
 - Must not be a charity
 - Organized and operated exclusively for social welfare, civic improvement, pleasure or recreation, or any other purpose, except profit
 - No part of the income can be payable or available to any proprietor, member or shareholder

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- **What are the tax advantages of being a not-for-profit organization?**
 - A not-for-profit organization does not pay tax on income or capital gains except income from property of an organization whose main purpose is to provide dining, recreation or sporting facilities
 - A not-for-profit organization cannot issue charitable receipts for income tax purposes

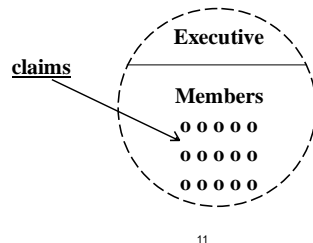
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- **What are the legal forms available for not-for-profit organizations?**
 - Unincorporated associations
 - Non-share capital corporations
- **Examples would include**
 - Recreational clubs
 - Service clubs
 - Trade associations
 - Professional associations

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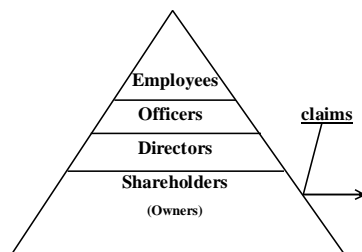
DIFFERENT LEGAL FORMS OF ASSOCIATIONS

- Unincorporated associations
(Not-for-profit but not a legal entity)



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- Share capital corporate associations
(can be either for profit or not-for-profit)

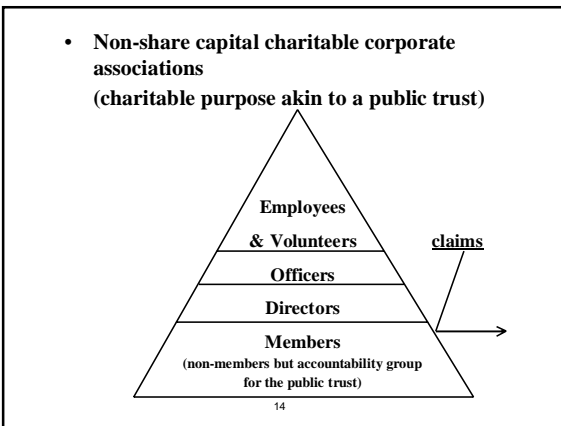


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- Non-share capital corporate associations
(not-for-profit purpose but not charitable)



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ORGANIZATION AND LEGAL DOCUMENTATION

- **General overview of organizational & legal documentation**
 - **Identify existence and location of key organizational documents**
 - **Develop an inventory of key documents**
 - **Maintain central location for key documents**

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- **Identify key organizational documents for an unincorporated association**
 - **Constitution and amendments , if applicable**
 - **Policy statements, if applicable**
- **Key organizational documents for an incorporated association**
 - **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, Section 9 official mark registrations and domain names
- Charitable registration number
- Policy statements, i.e. sexual abuse and volunteer policy statements
- Insurance policies
- Privacy policy
- Investment policy
- Review of key documents for an unincorporated association
 - Are the objects clearly stated in the constitution and are they not-for-profit?

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- Do constitutional documents correctly reflect how the organization is actually structured and operated?
- For charitable associations, 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 key documents for an incorporated association
 - Review of letters patent
 - Is the name in the letters patent the correct name of the association consistent with the objects?

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- Are its objects appropriate for a not-for-profit organization, i.e. are they not charitable?
- Are the activities of the association authorized by its corporate objects?
- Is the dissolution clause complementary to the objects or does it provide for distribution to its members?
- Review of supplementary letters patent
 - Has there been a change of corporate name?
 - Has there been a change of corporate objects?

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- Letters patent of amalgamation (only for Ontario corporations):
 - Are the objects the same or similar?
 - What are the terms of the amalgamation agreement?
- 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 association 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 for charitable associations
- 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 for charitable associations

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- Does the association operate and/or fundraise in any other provinces? If so, there may need to be registration as extra-provincial corporation in other provinces, together with business name registrations
- Does the association need to continue itself under the proposed new *Canada Not-for-Profit Corporations Act*?
- Has there been loss of corporate status for failure to maintain government filings?
- Is the association aware of the importance of proper use of corporate name and operating names?

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- Has the association developed and implemented risk management policy statements on:
 - child abuse
 - sexual abuse
 - sexual harassment
 - bullying
 - volunteer conduct
 - safety in the workplace
- Has the association conducted an inventory of its assets?

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BILL C-21 (CANADA NOT-FOR-PROFIT CORPORATIONS ACT)

Bill C-21: An act respecting not-for-profit corporations and other corporations without share capital

- First reading: November 15, 2004
- Will replace *Canada Corporations Act* (CCA)
- Modelled on the *Canada Business Corporations Act*
- All existing CCA corporations will be required to continue under the new act within 3 years of it coming into force

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Highlights of Bill C-21

- Streamlined incorporation “as of right” – incorporation will be granted upon filing required forms and payment
- Incorporation will take a matter of hours instead of weeks
- No filing of by-laws
- More corporate fundamental changes possible amalgamation and continuance

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- **Efficient process for special act corporations to be continued under new act**
- **Rights of members better enhanced and protected**
- **An objective standard of care and a due diligence defence for directors and clarifies directors and officer duties**
- **Graduated levels of financial review required depending on a corporation's category and gross annual revenue**
- **Requirement to provide financial statements to members, directors and officers as well as to the Director under the act**

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Timing

- **Depends on when receives royal assent**
- **Could be as early as March 2006**
- **File those annual summaries: Industry Canada is dissolving all federal corporations who are not in good standing in meeting their filing requirements before new act is in force**

Standard of Care for Directors:

- **Brought in line with business corporation statutes across the country**

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- **Every director and officer of a corporation in exercising their powers and discharging their duties shall**
 - **Act honestly and in good faith with a view to the best interests of the corporation**
 - **Exercise the care, diligence and skill that a reasonably prudent person would exercise in comparable circumstances**
- **The Bill provides increased protection but more accountability as it provides more instances of director obligations and enhancement of member right**

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Protection from Liability for Directors

- Provided that directors meet the standard of care, they will be protected from liability
- Directors and officers are provided a due diligence defence that can be relied on if they are named in an action
- Directors will satisfy the due diligence defence requirement if they “exercise the care, diligence and skill that a reasonably prudent person would have exercised in comparable circumstances” including good faith reliance on financial statements of the corporation or a report of a professional person (accountant or lawyer)

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Indemnification

- Bill C-21 allows a corporation to indemnify a present or former director or officer or another individual who acted at the corporation’s request and a corporation may advance money to any such person in respect of the costs of a proceeding against them provided that the individual acted honestly and in good faith and with a view to the best interest of the corporation
- The Bill also broadens and provides considerable detail regarding the scope of situations in which a director or officer would be indemnified for costs and awards arising out of legal actions

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Insurance

- Corporations are specifically authorized to purchase insurance to protect directors and officers from liability

Right of Dissent

- Statutory right to dissent allows a director to avoid responsibility for actions or resolutions taken during a board meeting by having his or her dissent recorded
- Similar protection extended even where not present at board meeting (as long as dissent registered within a prescribed time)

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Directors not Trustees

- The Bill clarifies that a corporation owns any property of any kind that is transferred to it and does not hold its property in trust unless the property was expressly transferred in trust for a specific purpose
- It also clarifies that directors are not trustees for any property held in trust by the corporation

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UTILIZING MULTIPLE CORPORATIONS

- Should the association consider using multiple corporations for its high risk activities in order to reduce liability exposure and protect assets?
- Should the association consider establishing a separate foundation to fund exclusively charitable objects that are complementary to the not-for-profit organization?

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

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BOARD MANAGEMENT ISSUES

- Is the association able to identify who is in charge of the association?
 - Where does the de facto control of the association lie? Is it with a board, a committee or executive staff?
 - Is board authority recognized by the membership?
- Are there clearly defined lines of authority 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 any directors receive direct or indirect remuneration that has not been disclosed to the full board of directors?
- Has the association adequately indemnified its directors and officers?
- Has the board authorized the association to acquire directors' and officers' liability insurance?

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- Has the board delegated too much responsibility to executive staff by restricting itself to policy decisions only without careful and ongoing monitoring and review?
- Should the association consider reducing the size of the board to limit the number of people who are exposed to liability as directors?
- Is the association effectively making use of committees as an alternative to a large board of directors?
- Do the board members on occasion need to receive independent legal advice due to liability exposure?

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- Should the association consider implementing an advisory board to complement the board of directors without a corresponding exposure to liability?
- Has the association established a comprehensive due diligence review process by establishing and utilizing a legal risk management checklist?
- Has a risk management committee of the board been established?

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INSURANCE CONSIDERATIONS

- Has the association 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 association provided full written disclosure of all risks to its insurer to avoid denial of coverage?
- Does the association 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 ASSOCIATION PROPERTY

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

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REAL PROPERTY ISSUES

- Has an environmental assessment been conducted to determine the extent of liability exposure for associations?
- Are there trust provisions in old title documents that may impact real property held by a charitable association?
- Has the not-for-profit organization addressed and rectified encroachments with neighbouring lands?
- Are municipal zoning and legal non-conforming uses being complied with?

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- Could a charitable association be forced to sell surplus land or risk vesting in the Public Guardian and Trustee after three years under *Charities Accounting Act* (Ontario)?
- Has the not-for-profit reviewed its municipal property tax to determine both classification and valuation?

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INTELLECTUAL PROPERTY ISSUES

- Does the association need to register any of its key names and/or logos as trade-marks?
 - Identify trade-marks
 - Protect trade-marks by registration
 - Use trade-marks in conjunction with appropriate marks
 - Ensure that any third parties using trade-marks enter into a trade-mark licensing agreement
 - Has the association protected its trade-mark by securing multiple corresponding domain names?
- Who owns the copyright for publications of the association?
- Should copyright be registered, assigned or licensed?

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EMPLOYMENT AND VOLUNTEER MATTERS

- Has the association developed appropriate hiring policies and practices for its employees?
- Is there compliance with applicable human rights legislation?
- 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 association 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 association and the board exposed to criminal liability under the *Criminal Code* i.e. Bill C-45 (Westray Mines)?

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CHARITABLE AND FUNDRAISING ACTIVITIES

- Has the charitable association 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 charitable association 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 association?
- Is the association 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 charitable association?
- Is there violation of the *Charitable Gifts Act* (Ontario) by a charitable association owning more than 10% of a business?

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INVESTMENT ISSUES

- What investment powers apply to investment of surplus funds of the association?
 - Investment power may be found in the letters patent or supplementary letter patent
 - Investment power may be found in incorporation legislation
 - Investment power may be found in the *Trustee Act* (Ontario), particularly for a charitable association

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- Does the association need and/or have an investment policy?
 - Documenting compliance with prudent investor rule
 - Establishing requirements for delegation of investment decision making, particularly for a charitable association

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DONOR RESTRICTED TRUST FUNDS

- Are there donor restricted trust funds being held by the charitable association?
 - 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 charitable association 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?
- Can the association comply with the new disbursement quota rules of December 2004?
- Is the charity involved in political activities within CRA limits?

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- Is the charity involved in related business activities within CRA guidelines?
- Is the charity aware of the applicable rules on the issuance of charitable receipts and split receipting and anti-tax shelter provisions?
- 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

- Multi-tiered provincial or national charities
 - Single corporate structure provides ease of administration, but results in greater risk of liability exposure for total assets of single corporate entity
 - Multiple corporate structure reduces risk of liability, but top tier organization may still be exposed to liability where too much control is imposed or employer/employee relationship exists
 - The reverse is also a risk: top-tier corporations can lose control over subsidiaries without proper corporate control in place and appropriate agreements

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- Are relationships with national organizations and/or subsidiary chapters adequately documented?
- Are relationships between national and international structures adequately documented with specific reference to controlling trade-mark?
- 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 association 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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