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

Ottawa – February 2, 2012

**Staying Out of the Headlines:
Child Protection Policies Revisited**

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A. INTRODUCTION

- The objective of this presentation is to provide a brief overview of the legal obligations as set out in the legislation and the common law with respect to child protection
- Additionally, general guidelines and principles that charities and not-for-profit organizations should consider in establishing internal policies and procedures to protect children from potential abuse will be discussed as well as ways for organizations to limit their liability
- The purpose is to be proactive in order to stay out of the headlines

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B. OVERVIEW OF APPLICABLE LEGISLATION

- Each province has a statute that establishes a provincial regime to assist children who are vulnerable to abuse
- In Ontario, the governing statute is the *Child and Family Services Act* ("CFSA")
- The *Criminal Code* (Canada) outlines numerous offences relating to child abuse, sexual exploitation of a child, etc. including offences committed extraterritorially
- There are new Bills currently before Parliament which, if passed, provide greater protection for children against sexual abuse and exploitation

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- United Nations documents on Child Protection and other local laws applicable to the international jurisdiction that the charity or NFP might be operating in
- Rescuing Children from Sexual Exploitation Act, 2002
- Child Pornography Reporting Act, 2008

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C. CHILD AND FAMILY SERVICES ACT (CFSA)

- Under Part III of the CFSA in Ontario, a “child” is defined in s. 37(1) as a person who is actually or apparently under the age of 16 years, unless a person is subject to a protection order, then a child is defined as a person under the age of 18
- Section 2 contains an expansive description of what can constitute abuse of a child which can include physical or emotional abuse, neglect or failure to adequately care/provide/supervise/protect the child, and sexual molestation or sexual exploitation

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- Section 72 deals with the duty to report, including a person who performs professional or official duties with respect to children, to the applicable Children’s Aid Society where a child is in need of protection
- The above reporting duties are an on-going nature that may require further reports if a person has reasonable grounds to suspect further abuse
- In addition, any such reports must be made directly to the CAS and the person should not rely on another to make the report on his/her behalf

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D. CRIMINAL CODE (CANADA)

- A number of amendments to the *Criminal Code* were assented to on February 20, 2008
- Of particular importance are the following:
 - The age of consent required for sexual activities with an adult was raised from 14 to 16 years of age
 - The Code provided for inclusion of a new criminal offence involving “sexual exploitation” of a child

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- S. 153 (sexual exploitation) states that no one in a position of trust or authority over a 16 or 17 year old (for example, a teacher, religious leader, babysitter, or doctor) or upon whom the young person is dependent, can touch any part of the body of the young person for a sexual purpose or invite that young person to touch himself/herself or them for a sexual purpose
- S. 150.1 (consent) – it is not a defence to a sexual offence that the complainant consented to the activity, in respect of a complainant under the age of 16
 - In other words, there can be no legal consent to sexual activity between the two

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- Other similar offences include:
 - Sexual interference (s. 151) – no one can touch any part of the body of a child under the age of 16 for a sexual purpose
 - Invitation to sexual touching (s. 152) – no one can invite a child under the age of 16 to touch himself/herself or them for a sexual purpose
 - Exposure (ss. 173(2)) – no one may expose their genital organs for a sexual purpose to a young person under the age of 16
 - Child pornography (s. 163.1) – no one may make, distribute, transmit, make available, access, sell, advertise, export/import or possess child pornography

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- There is a defence to child pornography in s. 163.1(6) which states that no one shall be convicted if the act that is alleged to constitute the offence has a legitimate purpose related to the administration of justice or to science, medicine, education or art
 - What constitutes “administration of justice” is unclear as only science, medicine, education, and art have been argued before the courts
 - The 2011 Supreme Court of Canada case of *R v. Katigbak* outlines a test for how to interpret “legitimate purpose” involving a high threshold of both subjective and objective analysis

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- The Code also covers extraterritorial offences in relation to sexual offences against children
- Ss. 7(4.1) states that where a Canadian (citizen or permanent resident) commits a specified sexual offence involving children outside of Canada, that offence is deemed to have been committed within Canada
- Additionally, s. 481.2 states that for offences having extraterritorial application which were committed outside of Canada, proceedings in respect of the offence may be held within Canada in the same manner as if the offence had been committed within Canada

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E. NEW BILLS BEFORE PARLIAMENT

1. Bill C-271 *An Act to Prevent the Use of the Internet to Distribute Pornographic Material Involving Children*
 - Provides for the licensing of Internet service providers
 - Requires service providers to co-operate in minimizing the use of the Internet for the publication or proliferation of child pornography or the facilitation of a sex offence involving a child
 - Internet service providers may be required to block access to identified portions of the Internet that carry child pornography
 - Special powers under search warrants may be prescribed by the Minister to facilitate electronic searches

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2. Bill C-213 *An Act to Amend the Criminal Code (means of communication for child luring)*
 - Amends the Criminal Code to expand the offence of luring a child to include all means of communication
3. Bill C-212 *An Act to Amend the Criminal Code (luring a child outside Canada)*
 - Amends the Criminal Code to add the offence of luring a child to the offences for which Canadian citizens or permanent residents may be prosecuted in Canada even if committed outside Canada

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F. UN DOCUMENTS AND LOCAL LAWS

- UN sources are generally not legally binding under Canadian law
- Where definitions and key terms are defined in policies, they should be consistent with Canadian (and provincial) legal requirements and not UN documents
- For organizations operating outside of Canada, legal counsel in that operating area should be consulted to ensure compliance with local laws as they may vary from Canadian laws

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G. RESCUING CHILDREN FROM SEXUAL EXPLOITATION ACT, 2002

- Not yet proclaimed in force, last amended in 2007
- The purposes of the Act are to protect children from, or at risk of, sexual exploitation for commercial purposes and to assist children in leaving situations in which they are sexually exploited for commercial purposes
- A child is defined as an individual who is under the age of 18

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H. CHILD PORNOGRAPHY REPORTING ACT, 2008

- Amends the reporting requirements under the CFSA by indicating that sexual exploitation of a child, including by child pornography, must be reported
- Received Royal Assent on December 10, 2008, however the amendments will not come into force until the Act is proclaimed
- Section 72(1.1) of the amendments also require reporting where any person reasonably believes that a representation or material is, or might, be child pornography
 - Also provides protections to persons who make a report under section 72(1.1) in good faith, including protection of the identity of the informant from the alleged perpetrator and protection from dismissal, suspension or other forms of retaliation

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I. CHILD PROTECTION POLICIES

- It is important that organizations implement child protection procedures for a number of reasons:
 - For the protection of children and youth
 - To protect volunteers and employees of an organization
 - To ensure compliance with legal reporting requirements that apply
 - To protect the organization from potential legal liability arising from claims involving allegations of sexual abuse
 - Many insurance companies now require organizations have an abuse prevention plan as a prerequisite to providing relevant insurance coverage

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J. TYPES OF POLICIES

- Sexual abuse
- Sexual misconduct/harassment
- Discrimination
- Child abuse
- Child ministry
- Counseling
- Bullying

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K. BENEFITS OF POLICIES

- Due diligence
 - As a response to an allegation of negligence, can prove that showed due diligence
 - Also creates an environment of heightened awareness, which may in turn lead to quicker responses and deterrence of conduct
- Increased awareness/education
 - Leads to heightened awareness in the church or not-for-profit and the community
 - Serves to educate on problems and solutions
 - Promotes reporting and pro-active conduct

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- Structured procedure
 - Provides for a structured procedure to respond to complaints and ensure that appropriate measures are taken to reduce or eliminate risks
 - Ensures a more uniform response to complaints and allows for mechanisms to deal with the complaints, including the right to terminate employees
 - Can be used as a defence where an employee has been terminated
- General and specific deterrence
- Public confidence
 - Failure to create or enforce policies indicates that the organization is unprepared
- Defences to litigation

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L. CHILD PROTECTION POLICY: A PROACTIVE APPROACH

1. Structure and Content of Policy

- A written Child Protection Policy ("Policy") is one of the safeguards that can be implemented by charitable and non-profit organizations in order to protect children and vulnerable persons
- Such a Policy should underscore the dignity and worth of all children and vulnerable persons and clearly state that abuse will not be tolerated by the organization
- This statement can cross-reference back to the objects of the organization

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- The Policy should be made available to and thoroughly reviewed by all employees and volunteers who will have contact with children or vulnerable persons – have them sign an acknowledgment that they have read it and tie a breach of it to grounds for termination
- The Policy should be reviewed and updated periodically to ensure that procedures are updated and clarified from time to time, and the Policy maintains its relevance to applicable provincial child protection legislation – ensure that all employees and volunteers are provided with copies of updated policies and are required to sign acknowledgments
- Ensure that the Policy provides an appropriate reporting regime with individuals named to take reports and act upon them

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2. Hiring and Screening Procedures

- Organizations should rigorously pre-screen all potential employees and volunteers who will have direct contact with children or vulnerable persons
- Pre-screening should include, but not be limited to, requiring a written application, reference checks, an in-person interview, as well as criminal reference checks from all prospective employees and volunteers
- Regular re-application should be required, or at least regular criminal record checks
- Employees and volunteers should be required to immediately self-report allegations or charges/convictions of abuse, etc. made against them

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- Employers should not be afraid to terminate employment if abuse is suspected and should not employ where there are reports of abuse in the past
- No exceptions should be made for any employee or volunteer regardless of their position, or length of tenure with the organization
- Making exemptions would detract from effectiveness of the Policy

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3. Supervising Procedures

- Once selected and approved for working with children or vulnerable persons, employees and volunteers should be trained, monitored and supervised
- At the outset, employees and volunteers should be apprised of the specific roles they are expected to play, what constitutes appropriate disciplining of and rapport with children or vulnerable persons and the importance of adhering to the organization's code of conduct, policies and guidelines

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- In 2005, the Supreme Court of Canada made a decision in *Blackwater v. Plint* holding a church and the government vicariously liable for the conduct of a dormitory supervisor who sexually abused children entrusted to the church's care
- In doing so, the SCC clarified when and how vicarious (no-fault) liability will be imposed and apportioned upon non-profit organizations
- This case confirms that vicarious liability may be imposed where there is sufficient nexus between the conduct authorized by the employer and the wrong committed by the employee or agent

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- Moreover, vicarious liability can be imposed even though the wrongful act may be contrary to the desires and policies of the non-profit organization
- Given *Blackwater*, pre-screening, training, and supervision of employees and volunteers are imperative
- The court also rejected the existence of a doctrine of charitable immunity
- Non-profit status does not automatically exempt organizations from liability
- Charitable status will not exempt organizations from being held liable for the conduct of its employees

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4. Child Abuse Reporting

- In addition to pre-screening, monitoring and supervision of employees and volunteers, it is vital that a Policy include child abuse reporting requirements and procedures that were outlined above in the CFSA and other applicable legislation
- It is suggested that a Policy include:
 - Duty to Report
 - The CFSA expressly names teachers, early childhood educators, religious officials, service providers and employees of service providers, among other, as part of a group of professionals for which the reporting requirements may lead to special penalties

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- To Whom/What Agency Should the Report be Made
 - Many organizations err in this matter by implementing policies that state the incident must first be reported to senior management, before child protection authorities are alerted
 - Such an internal policy does not absolve the legal obligation to report suspected child abuse directly to the CAS for investigation
- Other Reporting Issues
 - As in the situation above, the duty to report cannot be delegated to senior management to report – it must be done directly by the person who has reasonable grounds to suspect that a child is or may be in need of protection

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- Internal Investigation Process and Sanctions
 - The Policy should indicate a clear internal procedure to be followed in investigating allegations of abuse, to be completed after the necessary reports have been made with CAS
 - Those who report suspected abuses should be assured of confidentiality
 - The Policy should identify remedies and sanctions that may be imposed on the accused prior to and following the internal and external investigations
 - Examples may include: suspension with/without pay, removal from the premises, access denied to the organization's premises

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M. INSURANCE

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- Insurance will provide the first line of defence in the event of a claim being made against the charity or not-for-profit organization and/or its directors and officers
- It is recommended that a detailed written summary of all of its programs be provided to the insurance broker, and request that the broker provide written comments describing the broker's recommendations on the quantum of insurance coverage that would be appropriate for the organization
- The broker should also review the current insurance coverage available and provide a written summary of the exclusions, together with recommendations on steps that the organization should take to better help insure its risk

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- The amount of insurance obtained to cover liability claims needs to be sufficient to cover all occurrences that may happen during the current policy year, regardless of when the claim may subsequently occur
- Since the Supreme Court of Canada has delayed the running of the limitation period for abuse matters, a claim arising out of sexual abuse and/or molestation may occur many years in the future
- Since a claim in future years will invariably reflect higher court awards than currently in effect, the insurance coverage should anticipate court awards that may be made many years in the future

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- Therefore, it is recommended that the organization obtain the greatest amount of liability insurance that is available and that can be afforded
- The appropriate quantum of coverage should be reviewed by the board each year in light of the activities carried out by the organization each year
- Typically, the general liability insurance policy provides only limited protection to directors and officers in relation to wrongful acts alleged against them
- Therefore, it is also recommended that directors' and officers' liability insurance be obtained to complement (or supplement) the general liability coverage

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N. RELATED WAYS THAT LIABILITY MAY BE LIMITED

- Obtain appropriate insurance
- Full screening of all persons interested in working with children
- No offer of employment or agreement to allow a person to work should occur if anything is discovered in the screening process
- Full documentation of all steps taken to ensure safety
- Education and training of what conduct is prohibited and how it will be dealt with
- Education of persons in power of their responsibilities and fiduciary obligations
- React immediately to complaints or suspicions in a compassionate and understanding manner
- Comply with reporting requirements and cooperate fully with authorities

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O. CONCLUSION

- It is important that a child protection policy must reflect adherence to applicable statutory definitions and legal reporting requirements
- An organization that carries out children's programs across Canada needs to keep in mind that each province has different reporting and compliance requirements
- Typically, a master policy document on behalf of the head office is prepared and then customized by local counsel in each province or country in which the organization operates in order to ensure compliance
- Child protection issues are an evolving area of law, as evidenced by the new Bills before Parliament
- As such, it is important to keep informed of changes to the laws and update policies accordingly

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