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Essentials of Operational Risk Management (Power Point Presentation)

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Overview of Presentation

- Introduction
- Some Examples of Legal Risks
- Bill C-45 – Recent Amendments to the *Criminal Code* of Canada
- Human Rights in the Workplace
- Religious Accommodation in the Workplace
- Use of Facilities
- General Recommendations to Address Operational Risk Management

For more details see Checklist entitled “Essentials of Operational Risk Management” at www.charitylaw.ca

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A. Introduction

- Churches and charities (“charities”) operate in an increasingly litigious and regulated environment
- Supreme Court of Canada has ruled that there are no special exemptions available to charities for liability – charities are held accountable in the same manner and to the same extent as for-profit organizations are
- Given these legal realities, there is an ever increasing need for charities to take steps to implement necessary procedures and mechanisms to deal with the legal risks they face

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B. Some Examples of Legal Risks

1. Vicarious Liability

Sexual Abuse

- There have been a number of recent cases addressing abuse situations within the charity’s context that have identified vicarious liability for sexual abuse as a key risk faced by charities where children are involved
- Charities should remember that for vicarious liability to be imposed, a court does not need to make a finding of actual improper conduct by the charity—liability is imposed on the theory that the charity may properly be held responsible where the risks are inherent in the enterprise of the charity and those risks materialize and cause harm, provided that a finding of liability is both fair and useful

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- In order to make a finding of vicarious liability, two things must be shown
 - That there is a meaningful connection between the tortious conduct of an employee and the charity’s enterprise— to answer this, a court must determine whether it was a foreseeable risk
 - That a court must find that the enterprise and the employment created or materially enhanced the risk of harm

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What Can Charities Do?

- Carry out a thorough legal risk management audit of all situations where representatives of the charity are put in positions of authority over children
- Ensure that a sexual abuse policy is implemented and acted upon
- Obtain insurance where available, especially Directors and Officers Liability Insurance
- Provide a copy of the sexual abuse policy to the insurer of the charity

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- Implement open door policies
- Use the buddy technique—two adults present at all times when with children
- No private counselling or meetings with children
- Conduct criminal record checks for all persons who will be working with children as part of their duties for the charity
- Update criminal record checks regularly
- Obtain references and check up on them

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- Keep records of all investigations, including criminal record checks
- Implement surveillance systems where appropriate
- If operating a school, or day-care or other program involving children limit access to the children by requiring that all visitors sign in and out of the facility
- Limit third party use of all of the charity's facilities

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- Immediately act upon any complaints to and against the charity and perform thorough and well documented investigations
- Comply with reporting requirements contained in any applicable Child and Family Services legislation

Insurance Issues

- The following issues need to be addressed in determining if there is insurance coverage available to a charity when a claim of sexual abuse is initiated against it:
 - Is there an insurance policy available?

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- How is the action or allegation of sexual abuse pled? Does it include separate and independent claims in negligence, breach of fiduciary duty, assault?
- Have the insurers been placed on notice in a timely manner?
- Have sufficient particulars been provided to the insurer to allow it to fully investigate the claim?
- Expect that plaintiff’s counsel will plead the following allegations against the charity in sexual abuse claims
 - Non-existent or inadequate screening and hiring policies

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- Non-existent or inadequate supervision procedures
- Lack of policies concerning sexual abuse/ related issues
- Failure to implement or act on policies
- Failure to investigate a complaint of suspicious conduct (properly or at all)
- 2. Vicarious Liability for Clergy Malpractice
 - There is now at least one reported case in Canada of a church being held vicariously liable for the “malpractice” or negligence of clergy
 - In *V.B. v. Cairns* (2003), 65 O.R.(3d)343 the judge rejected defence based on protection of freedom of religion

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- The challenge is trying to determine what part of advice might be negligent
 - It is easy to see that where clergy start giving financial advice or medical advice they might be negligent, but in applying religious texts and teachings it is more challenging
- What Can Churches Do?**
- Advise clergy to be very careful about the areas where they give advice—e.g. should clergy be giving sexual health advice? Financial advice? Psychological advice?
 - Ensure that your church has clearly established teachings, which are followed by clergy

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- Determine whether insurance will cover a loss—most professionals providing advice have special insurance
- With respect to insurance, it is important to ensure that activities are considered within the normal confines of what a church does and would therefore be covered by the insurance
- Have clergy keep records of the advice they give to congregants
- Counselling must be within the context of faith

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- Where counselling activities are provided in the church context determine whether the counselling is being done in the name of church and thereby exposing the church to risk
- If outside counsellors are being used then the church needs to appreciate risks, and try to limit them
- Ensure that outside counsellors have appropriate insurance with the church named as an insured party
- Make sure that outside counsellors are not carrying out counselling under the name of the charity, unless specifically authorized to do so

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- If outside counsellors are going to carry out counselling in the name of the church, ensure that the church
 - Has checked their credentials
 - Has ensured that they are appropriately licensed
 - Has performed criminal record checks
 - Has determined what areas they will counsel in and what methods they will be apply
 - Ensured that there is an appropriate contract in place which outlines the boundaries within which the counsellor can function and will provide rights of termination

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C. Bill C-45 - Recent Amendments to the *Criminal Code of Canada*

- Recent changes to the *Criminal Code of Canada* have brought dramatic changes to the concept of “criminal negligence” and who can be held responsible for workplace injuries
- Bill C-45 was introduced by the Federal Government in response to the Westray Mines Disaster

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- The purpose of Bill C-45 is to establish criminal liability for a wide range of organizations and individuals who fail to take reasonable and appropriate steps to reduce or eliminate work related accidents
- Bill C-45 requires that employer organizations take reasonable steps to ensure a safe work environment for their workers
- Criminal negligence occurs when an act or omission of an accused shows a wanton or reckless disregard for the safety of others whether or not the accused is under a duty to act

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- Courts will look to the following as factors of due diligence
 - Implementation of appropriate supervisory personnel who are trained and empowered to ensure safety
 - Implementation of worksite reviews to ensure safety
 - Implementation of policies and procedures to protect workers
 - Implementation of disciplinary guidelines
 - Implementation of appropriate internal corporate reporting and monitoring

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1. What Can Employers Do?

- Perform a legal risk audit to determine where situations arise where employees are being directed in tasks—e.g. are there maintenance personnel employed to perform building repairs and what are the risks faced by them
- Establish clear policies and procedures
- Ensure that everyone involved is aware of policies and procedures
- Enforce policies and procedures
- Appoint supervisors who have the power to discipline if necessary
- Establish and enforce discipline codes

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2. Website and Publications Audit

- Bill C-250 has introduced changes to the *Criminal Code* of Canada respecting “hate communications”
- Communications may also violate provincial and/or federal human rights legislation
- Other concerns in relation to website and publications include
 - Defamation
 - Breach of copyright
 - Plagiarism
 - Trademark infringement
 - Breach of privacy rights

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3. What Can Charities Do?

- Perform regular audits to determine
 - What is being published?
 - Who is publishing it?
 - What contracts are in place to deal with authors and intellectual property rights?
 - How current are the publications and what are done with out of date publications?
 - Has appropriate credit been given to authors, photographers and website designers?

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- Are there restrictions on links to your website?
- Are there restrictions on who can post materials on your website?
- What personal information is provided on your website and do you have authority to post such information?
- Does any of the information posted on the website violate criminal legislation, human rights legislation, constitute libel?

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- Appoint one person or a group of persons to control access to and posting on your website
- Create a policy respecting use of the website
- Create appropriate policies for your website, including rules regarding linking
- Create a discipline policy regarding abuse of website privileges

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D. Human Rights in the Workplace
Charities Are Subject to *Human Rights Legislation*

- *Human Rights Legislation* exists at both the Federal and Provincial level
- In Ontario the primary human rights protections are found in Part I of the Human Rights Code, R.S.O. 1990,c.H.19

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- In relation to employment s.5 of the *Human Rights Code* provides:

5(1) Every person has a right to equal treatment with respect to employment without discrimination because of race, ancestry, place of origin, colour, ethnic origin, citizenship, creed, sex, sexual orientation, age, record of offences, marital status, same-sex partnership status, family status or disability.

5(2) Every person who is an employee has a right to freedom from harassment in the workplace by the employer or agent of the employer or by another employee because of race, ancestry, place of origin, colour, ethnic origin, citizenship, creed, age, record of offences, marital status, same-sex partnership status, family status or disability.

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- Charities may wish to have individuals working for them who share common religious or cultural values, or who are members of an identifiable group, such as a particular racial group
- There is a limited right to discriminate provided to charities under s. 24(1) of the *Human Rights Code*, which provides in employment:

s.24(1) The right under section 5 to equal treatment, with respect to employment is not infringed where

(a) a religious, philanthropic, educational, fraternal or social institution or organization that is primarily engaged in serving the interests of persons identified by their race, ancestry, place of origin, colour, ethnic origin, creed, sex, age, marital status, same-sex partnership status or disability employs only, or gives preference in employment to, persons similarly identified if the qualification is a reasonable and *bona fide* qualification because of the nature of the employment

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- In order to fall under this exemption, the charity must be able to establish:
 - that the employment relates to providing services to persons of a similar race, etc,
 - or that the qualification which will give rise to the discrimination is a reasonable and *bona fide* qualification because of the nature of the employment itself

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1. Some Examples Where the Exemption Would Apply

- A particular religious denomination only hires priests ordained in their specific faith
- A racial or cultural society or group only hires employees of the same race or cultural background
- A non-governmental organization which is based in a specific religious faith or worldview only hires an executive director who shares that worldview
- A same-sex political advocacy group hires employees who are of that sexual orientation

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2. Some Examples Where It Would Not Likely Be *Bona Fide*

- A church attempts to ensure that the grounds maintenance employees or janitors share in the faith of the church
- A church only hires persons of the same faith to work in office administration (questionable)
- A non-governmental organization attempts to restrict employment to individuals of a particular faith where there is no faith base to the activities of the organization

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3. What Can Charities Do?

- Determine if there is even a need for a hiring preference—identify the particular characteristics of the employment which would require such a preference
- Establish written hiring policies which outline the needs of the charity and which give rise to the preference
- Establish human rights policies, including anti-discrimination policies, sexual harassment in the workplace policies, religious accommodation policies, etc.
- Post written policies and make employees and management aware of them

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E. Religious Accommodation in the Workplace

- As noted above, s.5(2) of the *Human Rights Code* prohibits discrimination in employment based on creed
- Religious needs of employees must be accommodated to the point of undue hardship
- In *Central Alberta Dairy Products v. Alberta* [1990] 2. S.C.R. 489 some examples of what constitutes undue hardship were
 - Financial costs
 - Disruption of a collective agreement

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- Problems of morale of other employees
- Size of charity's operation might affect undue hardship considerations
- Where safety is at issue both the magnitude of the risk and the identity of those who bear it are relevant considerations

Accommodation Might Require and Include

- Flexibility in allocating shifts to provide religious holidays
- Allowing people prayer times during the workday

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- Providing an area of the work environment for prayer
- Allowing employees to wear ceremonial religious costumes, headdress and artifacts

What Charities Can Do?

- Create a written religious accommodation policy which requires that employees ask for accommodation, and, upon request, provide evidence from a cleric or religious official that the requested accommodation is necessary
- Educate employees and staff regarding religious accommodation and tolerance
- Keep written records of all requests and steps taken to accommodate

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F. Use of Facilities

- For churches, allowing outside parties to use church facilities is often seen as a way to generate much needed financial resources, as well as a way to outreach to potential members
- Such usage poses a number of concerns
 - Significantly increased liability for injury to third parties
 - Insurance concerns regarding coverage and/or increased insurance premiums
 - Concerns over misuse and damage or destruction to charitable property

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- Use of property for purposes which may be considered morally inappropriate
- Concerns over social host liability, breach of *Criminal Code*

What Can Churches Do?

- Obtain a copy of all leases and license agreements and have the same reviewed
- Determine if all uses are covered by leases and/or license agreement, and when they are not, implement the same
- Determine whether parties using property have insurance, its coverage, extent of coverage, and who is an insured

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- Obtain limitations of liability, releases and indemnifications from parties using property
- Determine whether third party use is part of a joint venture with church, and if it is, determine extent of risk, how intellectual property is being used, and whether there is insurance coverage
- Determine how use by third parties affects insurance of church, and ensure that there is sufficient insurance
- Establish property use policies and leases and license agreements which are beneficial to the church and which require the user to comply with the requirements of the church with respect to how the property will be used

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G. General Recommendations to Address Operational Risk Management

- Empower individuals or committees to address operational risk management issues
- Ensure that the board of directors receives regular reports regarding risks
- Complete a thorough and honest audit or analysis of the various operational risks faced—e.g. if carrying out day care programmes, the organization should recognize the risks of abuse, abduction and breach of trust
- Implement policies, protocols and where the risk is too dangerous, cease the activity

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- Have insurance policies either put in place, or if already in place, reviewed to ensure that there is sufficient insurance and that it covers the risks
- Request regular updates from insurers respecting coverage, and confirmation from insurers that all risks covered if possible
- Carry out a review of all legal agreements entered into with third parties, including leases, licenses, joint venture agreements, and ensure that the risks inherent are identified, and allocated in the agreements—where possible, obtain waivers, limitations of liability, assumptions of risk, and indemnifications

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- Ensure that third parties that are contracted with have insurance in a sufficient amount and of a kind that will address the risks
- Educate staff and volunteers respecting risks and steps to avoid risks
- Implement discipline policies
- Investigate and keep meticulous records of occurrences
- Address occurrences through appropriate channels such as reporting sexual abuse of minors to the Children's Aid Society

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