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**THE 2009 ANNUAL  
CHURCH & CHARITY LAW™ SEMINAR**

**Toronto – November 10, 2009**

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**Facility Use Policies: What to Consider to  
Protect Your Church or Charity**

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**By Esther S.J. Oh, B.A., LL.B.  
and Barry W. Kwasniewski, B.A., LL.B.**

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Barristers, Solicitors & Trade-mark Agents / Avocats et agents de marques de commerce

Ottawa (613) 235-4774  
Mississauga (905) 306-2791  
Orangeville (519) 942-0001

**Toll Free: 1-877-942-0001**

**www.charitylaw.ca™**

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Facility Use Policies: What to Consider  
to Protect your Church or Charity

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A. INTRODUCTION

- Churches and charities often receive requests to use their facilities from a wide variety of groups, including other charitable and non-profit organizations, businesses and individuals
  - Examples include sports clubs, self-help groups (substance abuse), day care centres, theatre groups, music schools, concert promoters, wedding parties, etc
  - This may often make a great deal of financial sense where the property is underutilized

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- Hosting events that will attract individuals to their premises may also help raise awareness of the church or charity's presence within the community
- However, permitting third parties to use the facilities of a church or charity may expose the organization to substantial risk of liability
- A facility use policy and agreement should be one component of a proactive risk management strategy for a church or charity

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**B. WHY SHOULD YOU BE CONCERNED ABOUT THIRD PARTY USAGE OF YOUR FACILITY?**

- **General increased risk of litigation**
  - **For example, a person slipping or falling while attending an event at your facility could result in liability exposure from bodily injuries**
  - **Incidents of sexual abuse where vulnerable persons are in the facility without adequate supervision could also lead to claims against facility owners**
  - **If alcohol is served at an event held at a facility resulting in serious injury, facility owners could be sued and found liable**

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- **Liability under the *Occupiers' Liability Act***
  - **s.1 of the Act defines “occupier” as,**
    - (a) **a person who is in physical possession of premises, or**
    - (b) **a person who has responsibility for and control over the condition of premises or the activities there carried on, or control over persons allowed to enter the premises, despite the fact that there is more than one occupier of the same premises; (“occupant”)**

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- **s. 3 of the Act defines the occupier’s duty as,**
  - **3.(1) An occupier of premises owes a duty to take such care as in all the circumstances of the case is reasonable to see that persons entering on the premises, and the property brought on the premises by those persons are reasonably safe while on the premises**
- **Note however that the standard of care is reasonableness, not perfection**

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- **Potential Liability under Human Rights Legislation where a claim may be filed against the church or charity with the Human Rights Tribunal of Ontario**

- See for example the British Columbia Human Rights Tribunal decision of *Smith and Chymyshyn v. Knights of Columbus and others*, 2005 BCHRT 544

- A same sex couple in B.C brought a human rights complaint against the Knights of Columbus, when they were denied use of the Knight’s facility for their same-sex wedding reception

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- Couple alleged that the Knights had discriminated against them on the basis of their sexual orientation
- The panel concluded that the Knights had not made sufficient effort to “search for a pragmatic and workable solution that minimizes the adverse effects on the rights of the complainants”
- The Knights were obligated to accommodate the complainants to the point of undue hardship, and should have considered alternatives

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- The Knights were ordered to pay \$1,444.59 to the complainants for expenses incurred by them and for injury to their dignity
- In the Ontario *Human Rights Code*, s. 18 enables religious and philanthropic organizations to restrict the use of their facilities to their membership
- The Knights of Columbus were unable to rely on the concordant exemption in B.C legislation because they rented their facility to individuals outside of their membership, i.e. to the general public

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- In Ontario, s. 18.1 provides a specific exemption for churches or religious groups opposed to same sex marriage
- However, the exemption is limited to “sacred places”
- Had there been a better screening and approval process in place, as well as a facility use policy that clearly stated that their facilities could only be used for purposes consistent with their beliefs and mission, the complaint and ensuing litigation may have been avoided altogether

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- Directors of registered charities and not-for-profits have a fiduciary duty to protect their charitable assets in the event of such claims
  - Recent case law has affirmed that charities and non-profits are not immune from liability solely because of their non-profit or charitable status: see Supreme Court of Canada decisions of *Bazley v. Currey* and *John Doe v. Bennett*

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- The Ontario Court of Appeal in the *Christian Brothers* decision held that all assets of a charity, whether beneficially owned or held as a special purpose charitable trust, are available to satisfy the claims of tort victims upon the winding-up of a charity
- Directors of a charity must therefore be proactive in identifying the risks in allowing third parties to rent and make use of their facilities and take appropriate steps to protect charitable property from those risks

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**C. WHAT IS A FACILITY USE POLICY?**

- **Problems for churches and charities can arise when deciding who to rent to and for what activities**
- **No policy can be a “one-size-fits-all” solution for churches or charities**
- **The facilities of a church or charity are there to help it achieve its charitable purposes**
- **These purposes can be included in a policy, to inform potential users about why the facilities exist**
  - **Facility use policy statements can be of assistance in articulating a practical manifestation of a church’s beliefs**

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- **Facility use policy statements must be prepared in a manner that is consistent with applicable human rights legislation**
- **The facility use policy should prohibit any activities that represent an unreasonable risk or harm**
- **For church organizations, a facility use policy may provide for the following:**
  - **Restricting use of church facilities to church programs and/or members and for purposes which are consistent with the Statement of Faith and constitution of the church**
  - **This will strengthen ability to refuse requests for undesirable uses of the property**

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- **Since a church can discriminate in terms of membership and services per s. 18 of the Ontario Human Rights Code, a church may restrict the use of facilities to only those holding membership status**
- **Churches and charities should ensure that their facility use policy is enforced in a consistent manner, otherwise the following may occur:**
  - **The organization may waive its ability to enforce**
  - **The organization may be vulnerable to allegations of discrimination for inconsistency in enforcement**

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**D. WHAT SHOULD GO INTO THE FACILITY USE POLICY?**

- A statement outlining the prioritization of uses of facilities
- The charity must consider its purposes, reputation and exposure to liability
- Any restrictions on activities need to be clearly stated in the policy
- The activities identified by the charity's board of directors as the organization's charitable activities should have priority over any rentals to third parties
- Church groups could prioritize facility use as follows: ministry related activities, followed by wedding receptions, with external use activities being last in priority, where applicable

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- Permitting use of facilities to external third party users i.e. outside of membership may expose the church or charity to allegations human rights complaints
- In renting their facilities, churches and charities need to decide if there are any activities they will not permit, subject to human rights considerations
- In renting to third party individuals outside of membership, the church or charity cannot distinguish on the basis of individual characteristics i.e. under the human rights legislation
  - i.e., race, religion, sex, sexual orientation, etc.

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- The policy may outline the refusal to rent facilities or cancellation of use based on a number of reasons, including:
  - Unsatisfactory prior use
  - Non-payment of fees
  - Proposed activity does not further charitable objects
  - Terms of facility use agreement not met or complied with

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- The policy could also outline the application process
  - Where the facility is being rented by a corporation, the policy should address who will be the authorized representative, and require evidence of the representative’s authority to act on behalf of the corporation
- A copy of the policy should be made available to those who wish to make use of the facilities

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**E. WHAT IS A FACILITY USE AGREEMENT?**

- A facility use agreement is a contract that can provide for legal liability and insurance for activities or events to third party individuals, organizations or businesses using a church or charity’s facilities
- The agreement can serve as evidence of due diligence by the board to fulfill their fiduciary duty to protect and ensure efficient usage of a church’s or charity’s property and resources

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- As a result of decisions by the Supreme Court of Canada, like *Dube v. Labar*, as well as the Ontario Superior Court, in *Gallant v. Fanshawe College*, doctrine of “voluntary assumption of risk” as a defence against negligence claims has been greatly eroded
- Best practice for organizations to effectively defend themselves against legal liability in future claims is through the contractual exclusion of negligence through measures such as a facility use agreement

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• While liability insurance is an integral part of a risk management strategy, churches and charities should not rely solely on insurance for the following reasons:

- Liability insurance is subject to financial limits, which, in cases of serious injury, may not be sufficient to protect the organization from liability to pay the excess over the limit
- Insurance claims will cause premiums to rise
- All liability insurance policies are subject to coverage exclusions
- Involvement in a lawsuit is a stressful and time consuming distraction for directors, staff and members of the organization

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**F. WHAT SHOULD GO INTO A FACILITY USE AGREEMENT?**

- Waiver of legal liability
  - A facility use agreement should require a waiver or release against your church or charity by the user for any legal liability arising out of personal injury caused by the users negligence
    - A copy of the agreement containing the waiver should be provided in advance so that there is no “last minute” pressure
    - Should be worded by a lawyer to address allegations of both negligence and breach of contract

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- Design, format and content of waiver should be in plain language
- The user should be clearly identified on the waiver
- The waivers should be at most two pages to avoid challenges of incomprehensibility
- The person signing the agreement must be competent under the law
- A completed agreement should be kept on file

- A Disclaimer
  - Different from a waiver in that a disclaimer is a unilateral declaration

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- A disclaimer is an express disavowal, repudiation or limitation by the party permitting use of the facility
- This is to serve as a warning of the risks associated with a particular event or type of activity
- For example, a disclaimer on posted signs or on a ticket stub that the charity is not responsible for any lost or stolen items in a cloak room, or that the charity does not endorse the activities of the rental group

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- An Indemnity Undertaking
  - An undertaking by the user of the facility to indemnify and save harmless the charity from any litigation expenses, legal fees and liability damage awards
  - Requires the user to reimburse the church or charity for any legal damages or defence costs arising out of the facility use, regardless of who is legally responsible for resulting injury or damage

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- A provision that the party renting the facility will provide to the owner a Certificate of Liability Insurance confirming that their event is covered and that the church or charity has been named on the policy as an additional insured
  - The charity should also provide written notice to their own insurer that its property is being used by a third party and what that activity will be

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- Charities should be familiar with the terminology of insurance policies to ensure that the coverage obtained by the third party is adequate
  - For example, while Commercial General Liability (CGL) Insurance will typically cover personal injury and property damage, such coverage does not generally cover liquor liability
  - Also, CGL usually excludes liability arising from sexual abuse, so need special endorsement for sexual abuse

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- In that regard, it is important to be aware of the distinction between occurrence based and claims based coverage in the event of an abuse claim
- If the claim was made prior to the policy, or if it occurs outside the policy period, there may not be coverage
- Ideally, a “full prior acts” policy should be obtained to cover claims arising from all prior acts, regardless of when they occurred

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- If the nature of the activity to be carried out in the facility may require coverage, as well coverage for the facility itself (the building and its contents), charities should be aware of the type of coverage the third parties insurance will cover
  - Actual Cash Value: poor coverage as it will only pay for the depreciated value of items lost
  - Replacement Cost: does not take depreciation into account
  - Guaranteed Replacement Cost: can replace facility even if it costs more than what it is insured for

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- If your staff or volunteers are going to be at the event, they should also be named on the insurance policy so that they are covered as well
  - For more information, see Imagine Canada’s Insurance and Liability Resource Center for Nonprofits at [www.nonprofitzzz.ca](http://www.nonprofitzzz.ca)
  - For Church and Charity specific insurance advice, resource materials at <http://www.carters.ca/pub/seminar/chrchl原因/2008/kah1106.pdf> or Robertson Hall Insurance at [www.robertsonhall.com](http://www.robertsonhall.com)

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- Other conditions a charity may consider addressing in the agreement could include:
  - Who is the official representative for rental purposes
  - Whether or not assistance with set-up is required
  - The maximum length of time in hours the facility can be rented
  - A preset time for when rentals end, i.e, 12 a.m. or 2 hours prior to church services

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- The maximum number of individuals permitted in the facilities
- Requirement to pay janitorial fees
- Requirements to pay and arrange musicians and sound technicians separately
- The fee structure, based on time, charity staff time required, amount of space rented
- Down payments/deposits
- The charity’s acceptance of the rental application

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**G. OTHER CONSIDERATIONS**

- Does the church or charity charge fair market rental fees to users of the facilities that are not charities?
  - The amount of rental fees, if any, on the basis of community outreach is at the discretion of the charity
  - Rental fees on the basis of revenue opportunities should be at fair market value
  - A church or charity must not charge different fees for member and non-members

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- If members or donors receive preferential treatment, the church or charity would be providing an advantage to its members in contravention of the *Income Tax Act*
  - Doing so would put the church or charity's charitable status at risk
  - In addition, the church or charity would have to determine the value of the advantage and report this information on the official donation receipt

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- Does the third party use constitute the carrying on of an "unrelated business" prohibited by the *Income Tax Act*?
  - Carrying on an unrelated business can result in loss of charitable registration
  - For details see CRA Policy on Related Business at <http://www.cra-arc.gc.ca/tx/ehrts/plcv/cps/cps-019-eng.html>
- Where children will be using the facility, a Child Protection Policy should also be considered

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