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The 2016 Annual *Church & Charity Law*[™] Seminar


Mississauga – November 10, 2016

LEGAL CHECK-UP: TOP 10 TIPS TO EFFECTIVE LEGAL RISK MANAGEMENT

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**Legal Check-Up: Top 10 Tips
For Effective Legal Risk Management**

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OVERVIEW OF THE TOP TEN TIPS FOR EFFECTIVE LEGAL RISK MANAGEMENT

- 1 Get to Know Your Organizational and Legal Documentation
- 2 Know Who is in Charge?
- 3 Monitor Third Party Use of Property
- 4 Check Insurance and Risk Transfer Documentation
- 5 Watch Out for Wasting Assets (IP)

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- 6 Ensure compliance with Privacy and Anti-spam Law
- 7 Monitor Employee and Volunteer Liability Risks
- 8 Be Prepared for a CRA Audit
- 9 Ensure Compliance with Donor Restrictions
- 10 Know the Legal Basis for Investing Charitable Funds

Note: For more details see Legal Risk Management Checklist at <http://www.carters.ca/pub/checklist/CRMchklistNov16.pdf>


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WHY SHOULD YOU CARE ABOUT LEGAL RISK MANAGEMENT?

- Churches and charities are facing increasing challenges in delivering their services to the public
- This is in part because of a more litigious society and a more complicated regulatory environment
- In facing these challenges, churches and charities need to be familiar with an increasing array of legal requirements
- In order for churches and charities to comply and avoid exposure to legal liability, it is important that they undertake regular legal check-ups
- The key to compliance with legal requirements is to implement effective due diligence




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- Churches and charities often experience difficulties in complying with legal requirements because:
 - Failure to maintain corporate records
 - Inadequate governance policies
 - Increasingly complicated tax issues
 - Inadequate management of charitable receipting
 - Incomplete maintenance of books and records
 - Failure to comply with fundraising requirements
 - Increasing operational risks, such as physical, emotional, and sexual abuse involving children and vulnerable persons



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- Lack of direction or control over foreign activities
- Improper management of donor-restricted gifts
- Violation of privacy rights involving donors, employees and volunteers
- Failure to comply with anti-spam requirements
- Inadequate investment policies and procedures
- Possible consequences from legal non-compliance
 - Revocation or suspension of charitable status and/or penalties
 - Director liability for lack of corporate authority
 - Director liability for breach of trust of charitable funds




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- Possible court proceedings by donors and/or the Public Guardian and Trustee (Ontario) ("PGT")
- Court audit of accounts in detailed estate form
- Due diligence in addressing risk management issues requires the church or charity to ask the following questions:
 - What is the legal status of the church or charity?
 - What are the applicable legal requirements that it must comply with?
 - How can those legal requirements be most effectively complied with?



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- Due diligence needs to be undertaken in a purposeful way in order to manage risks and avoid legal liability before they occur
- A due diligence approach involves a change from passivity to pro-active legal risk management
- The "top ten tips" that follow identify key issues that churches and charities should address in order to implement effective legal risk management




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TOP TIP #1: GET TO KNOW YOUR ORGANIZATIONAL AND LEGAL DOCUMENTATION


- What are the applicable organizational and legal documentation of your church or charity?
 - Develop an inventory of key documents
 - Maintain central location for key documents
 - Identify key organizational documents when the church or charity is an unincorporated association
 - Constitution and any amendments
 - Policies and procedures, if applicable
 - Minutes of the board and membership meetings



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- Identify key organizational documents when the church or charity is a corporation
 - Letters patent/articles of continuance and supplementary letters patent/articles of amendment, if applicable
 - By-laws
 - Mission statement, if applicable
 - Membership covenant, if applicable
 - Minutes of board and membership meetings
 - Directors, members and officers registers
 - Copies of government filings



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- Identify other key legal documents
 - Leases, deeds and mortgages
 - Agency, partnership, association, contracts for service and joint venture agreements
 - Business name, trade-marks, domain names
 - Intellectual property (IP) license agreements
 - Charitable registration number, CRA registration letter, T3010s and correspondence from CRA
 - Operational risk management policies, e.g. sexual abuse and volunteer policy statements
 - Privacy policy
 - Investment policy



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- Questions to ask when reviewing key documents of an unincorporated association
 - Are the objects clearly stated in the constitution and are they exclusively charitable in nature?
 - Has there been a "mission drift" from the original charitable purposes?
 - Do constitutional documents correctly reflect how the church or charity is actually structured and operated?
 - Has a copy of the constitution been filed with Canada Revenue Agency ("CRA") and the Public Guardian and Trustee of Ontario ("PGT")?



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- Questions to ask when reviewing key documents of an incorporated church or charity
 - Questions concerning letters patent/articles of continuance
 - Is the name in the letters patent/articles of continuance the correct name of the church or charity and is the name consistent with the objects/purposes?
 - Are its objects/purposes exclusively charitable?
 - Has there been "mission drift" from the original charitable objects/purposes?
 - Are the current activities of the church or charity authorized by its corporate objects/purposes?
 - Have a copy of the letters patent/articles of continuance been filed with CRA and the PGT?



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- Questions concerning provisions of the general operating by-law:
 - Is there a conflict with letters patent/articles of incorporation concerning its objects/purposes or dissolution clause?
 - Does the by-law reflect the actual organizational and operational structure of the church or charity?
 - Does the by-law reflect changes to applicable corporate legislation?
 - Does the by-law include an adequate indemnification provision that has been authorized in accordance with the requirements under the *Charities Accounting Act*?
 - Are the bylaw amendment procedures consistent with corporate legislation?
- Was initial corporate organization of the corporation done correctly?

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TOP TIP #2: KNOW WHO IS IN CHARGE?

- Who is in charge of running the church or charity?
 - Where does the *de facto* control of the church or charity lie?
 - Is it with the board, a committee or senior management ?
 - Is authority of the board recognized by the membership?
 - Are there clearly defined lines of authority between the board and senior management?
 - Has the board delegated excessive responsibility to senior management by restricting the board to policy development only without ongoing monitoring and accountability over policy implementation?

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- Are there clearly stated qualification requirements in becoming a director?
 - Have the qualification requirements to be a director been met by each director?
 - Are there conflicting qualifications to be a director in the by-laws, articles of incorporation or board policies?
 - Has the register of directors been maintained and are changes in director information being sent to the relevant government authority?
- Does the board meet on a regular basis?
- Do all directors regularly attend board meetings?
- Has an audit committee been established to review financial statements and the auditors' report?

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- Is there adequate communication of board responsibilities for existing and new board members?
 - Is there a board binder of all organizational documents and inventory of assets, as well as an explanation of the general operations of the charity and the board of directors' legal duties and liabilities?
 - Are board members provided with regular updates on changes in the law?
- Are there effective policies in place to address board succession planning, recruitment, and orientation?




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TOP TIP #3: MONITOR THIRD PARTY USE OF PROPERTY


- Is the church or charity aware of potential liability exposure from permitting third parties use of property?
- Has the church or charity developed and implemented a facility use policy and license agreement with appropriate releases of the charity and indemnification provisions?
- Does the church or charity require evidence of adequate liability insurance from third party users of its facilities?
- Has the church or charity provided written notice to its insurer concerning the use of its property by third parties?



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- Does the charity charge appropriate fair market rental fees to non-charity users of its property?
 - Charitable property requires fair market value for rent charged to non-charities
 - Properties owned by non-charities have more flexibility in the amount of rent that can be charged
- Does the rental of property to third parties meet CRA's "related business" requirements?
- For churches that have lifestyle requirements, has consideration been given to compliance with the *Human Rights Code* (Ontario) and applicable exemptions?




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TOP TIP #4: CHECK INSURANCE AND RISK TRANSFER DOCUMENTATION

- Has the church or charity maintained a historical record of its insurance coverage in the event of a claim?
- Has the charity provided full written disclosure of all risks to its insurer to avoid denial of coverage?
- Does the charity request regular written reports from its insurance broker on existing coverage, exclusions from coverage and recommendations to enhance coverage?
- Is there a regular review of the adequacy and extent of general liability coverage and property insurance, as well as employment benefits and practices coverage?
- Is there directors' and officers' liability coverage in place and is it reviewed regularly to ensure its adequacy?



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- Is there need for special endorsements to extend insurance coverage to "out of the ordinary" activities?
- Is there coverage for sexual, physical, and emotional abuse and if so in what amount?
- Has the charity considered obtaining the services of an independent insurance consultant to conduct an assessment of insurance coverage?
- Has the church or charity considered developing and implementing liability shield documentation as may be appropriate, such as informed consents, disclaimers, releases, waivers and indemnities by program participants?

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TOP TIP #5: WATCH OUT FOR WASTING ASSETS (IP)


- Intellectual property is an essential asset of a charity and generally consists of both trade-marks (i.e. branding) and copyright
- Trade-mark rights exist at common law but those rights are limited and should be supplemented by trade-mark registration under the *Trade-marks Act*
- Corporate name or business name registration does not by itself give trade-mark protection
- CRA does not monitor for confusingly similar charity names
- Trade-marks can be lost if they are not properly protected and can therefore become wasting assets



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- The charity needs to develop a portfolio management approach for identifying, registering, using and enforcing trade-marks, both in Canada and in other countries as applicable
- Who owns the copyright in publications and website content of the church or charity, and is it properly identified with a notice of copyright protection, i.e. ©?
 - Unless there is an agreement to the contrary with an employee, copyright vests in the church or charity as the employer
 - Has the website designer assigned the copyright in the website design to the church or charity?
 - Have independent contractors also assigned their copyright as may be necessary?



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TOP TIP #6: ENSURE COMPLIANCE WITH PRIVACY AND ANTI-SPAM LAW

- Under the *Personal Information Protection and Electronic Documents Act* ("PIPEDA"), organizations must obtain "knowledge and consent of the individual [...] for the collection, use, or disclosure of personal information, except where appropriate"
- PIPEDA applies to commercial activities, including "the selling, bartering or leasing of donor, membership or other fundraising lists"
- Churches and charities that engage in limited commercial activities ancillary to their primary functions will be subject to PIPEDA, so it is best to assume that PIPEDA applies
- Does the charity have a privacy policy in place to protect members, donors, employees and volunteers?

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- Canada's Anti-Spam Legislation ("CASL") came into force on July 1, 2014, impacting how churches and charities communicate with donors, volunteers and members
- CASL prohibits the sending of commercial electronic messages unless the sender has express or implied consent and the message contains prescribed information
- Regulations include a specific exemption for select messages sent by or on behalf of registered charities primarily for fundraising purposes
 - This does not provide a full exemption from all commercial electronic messages from charities
 - This exemption only applies to registered charities, meaning that non-profit organizations are not exempt

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TOP TIP #7: MONITOR EMPLOYEE AND VOLUNTEER LIABILITY RISKS

- Has the church or charity developed appropriate policies and practices for hiring, disciplining and terminating employees and volunteers, including employment and volunteer agreements?
- Does the church or charity have a policy in place concerning accommodation for employees who are members of a disadvantaged group identified in the *Ontario Human Rights Code*?
- Does the charity have a policy concerning workplace harassment in accordance with the *Ontario Occupational Health and Safety Act*?
- Does the church or charity have conduct requirements for employees and/or volunteers?
 - If it is mandatory, can it be enforced?
 - Does it comply with the *Ontario Human Rights Code*?

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- Are employees and volunteers who deal with children screened and supervised in accordance with an appropriate sexual abuse policy statement?
- Is the church or 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 legislation?
- Is the church or charity and its board exposed to potential criminal liability under section 217.1 of the *Criminal Code* (Westway Mine Disaster) by directing how another person performs a task but neglecting to take reasonable steps to prevent bodily harm to that person? (e.g. undertaking a building program in Haiti)

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TOP TIP #8: BE PREPARED FOR A CRA AUDIT


- Does the charity know what charitable objects of the charity are on file with the CRA?
- Has the charity ensured that its activities and programs are undertaken in accordance with its charitable objects?
- Is the legal name of the charity and/or its operating name consistent with the records of CRA?
- Has the charity filed all of its governance documents with CRA, including supplementary letters patent/articles of amendment and by-laws?
- Does CRA have the current head office address of the charity?
- Do all of the charity's receipts include the name and website address (www.cra-arc.gc.ca) of the CRA?



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- Does the charity submit its annual information return (Form T3010) within six months of the financial year end of a charity in order to avoid loss of charitable registration?
- Does the board of directors, the charity's accountant and legal counsel all review and approve the annual information return (Form T3010)?
- Does the charity comply with split receipting and anti-tax shelter provisions of the ITA?
- Is the charity aware of the CRA Guidance on Fundraising and the need to calculate and track its fundraising ratio each year?
- Does the charity follow the CRA's requirements for "related business"?
- Is the charity aware of the requirements to engage in political activities and does it comply with the 10% of resources restriction?



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- Are agency relationships, joint venture relationships, or contractual transfer arrangements with non-qualified donees, both inside and outside of Canada, documented and implemented with appropriate "direction and control"?
- Are the charity's books and records maintained in accordance with the requirements of the ITA?
- Does the church or charity screen its board of directors, trustees, officers or equivalent official, or any individual who otherwise controls or manages the operation of the charity to see if any are "ineligible individuals" under the ITA?




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TOP TIP #9: ENSURE COMPLIANCE WITH DONOR RESTRICTIONS


- Are there donor restricted funds being held by the church or charity?
 - Building funds
 - Scholarship funds
 - Endowment funds
 - Special project funds
 - Legacy “ten year gifts” that may have been given in the past under the ITA
- Is there a regular review of donor restricted funds to ensure compliance?



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- Are restricted funds used only in accordance with applicable restrictions and not borrowed against?
- Is the board of the charity aware of the consequences of breach of trust for failing to comply with restricted funds?
- Are restricted funds kept segregated from the general funds of the church or charity?
- Are restricted funds pooled for investment purposes?
- If yes, has there been compliance under the *Charities Accounting Act* to co-mingle restricted funds for investment purposes?




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TOP TIP #10: KNOW THE LEGAL BASIS FOR INVESTING CHARITABLE FUNDS


- What are the investment powers that apply to investment of surplus funds of the charity?
 - Investment power may be found in the letters patent/articles of incorporation or supplementary letter patent/articles of amendment
 - Investment power may be found in incorporating legislation
 - By default, investment power will be found in the *Trustee Act*



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- Does the charity need and/or have an investment policy?
 - Documenting compliance with prudent investor rule under the *Trustee Act* will help to provide protection from liability for directors
 - Establishing requirements for delegation of investment decision making, particularly for a charitable organization
- Best not to simply rely upon documentation from an investment manager, as such documents may not reflect the legal requirements for investing charitable funds under the *Trustee Act*



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