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# THE OTTAWA REGION CHARITY & NOT-FOR-PROFIT LAW SEMINAR

Ottawa – February 12, 2015

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## Volunteer Agreements: Managing Volunteer Relations and Reducing Risk Plus Employment Law Update

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By Barry W. Kwasniewski, B.B.A., LL.B.

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**Volunteer Agreements: Managing Volunteer  
Relations and Reducing Risk  
Plus Employment Law Update**

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**OVERVIEW**

- WHO IS A VOLUNTEER?
- VOLUNTEER LIABILITY
- RISK MANAGEMENT AND VOLUNTEERS
- DEVELOPING AND USING A VOLUNTEER AGREEMENT
- EMPLOYMENT LAW UPDATE
- CONCLUSIONS



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**A. WHO IS A VOLUNTEER?**

- A person who gives his services without any express or implied promise of remuneration” (Black’s Law Dictionary)
- “A person who freely offers to take part in an enterprise or undertake a task” (Oxford Dictionary)
- “First the activity should not be undertaken...for financial reward. Second, the activity should be undertaken voluntarily. And third, the activity should be of benefit to someone other than the volunteer him or herself, or to society at large” (United Nations)



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### 1. What are Volunteers at Law?

- Volunteers are generally agents, in that they have been authorized to act on behalf of the organization in some capacity
  - A principal is responsible for an agent's actions conducted within the scope of the agent's duties
- Volunteers are not employees, because they do not receive or expect to receive compensation
- Volunteers are not interns, i.e. individuals who are being trained for employment
  - Employers must pay interns at least minimum wage, unless they are students working under an approved secondary school, college, or university program or when all 6 ESA exceptions are met



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## B. VOLUNTEER LIABILITY

### 1. No Special Treatment for Charities and NPOs

- In *Bazley v Curry*, the SCC dismissed the idea that charities and NPOs should be exempt from vicarious liability because they provide needed services
- SCC also dismissed the idea that charities and NPOs are less able to supervise volunteers and, therefore, should not be held vicariously liable for their actions
  - Charities and NPOs have the same duty to screen and supervise volunteers as do commercial enterprises



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### 2. The Nature of Liability Involving Volunteers

- Organizations can be liable for harm caused either to or by a volunteer
  - If a volunteer causes injury to another volunteer, an employee, or a client in the course of his/her duties vicarious liability will result
  - For example, a claim could be made against an organization on the basis that the volunteer at fault should have been screened out initially
- Organizations are expected to reasonably foresee and address the risks associated with using volunteers



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- An organization can be liable for a volunteer's actions and its directors and officers could be liable on a personal basis for failing to properly supervise the volunteer
- Liability risk must be properly managed with the oversight of the Board of Directors
- In addition to monetary loss, organizations could face loss of reputation, loss of funding sources, and deterioration in the volunteer or client base
- Organizations can also be liable for injuries suffered by their volunteers



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**Consider these examples**



- The risk of a volunteer causing injury to an elderly resident of a retirement home
- The risk of an injury occurring during a fundraising sports event, either to a volunteer or a participant
- The risk of a volunteer being fatally injured during a field trip sponsored by a charity
- Question: How to manage the risks but also carry out your mission and purposes?
- Need to consider principles of risk management

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**C. RISK MANAGEMENT AND VOLUNTEERS**

**1. Risk Management Approach**

- Boards of organizations which use volunteers are expected to take reasonable steps to protect their volunteers from foreseeable harm
- As a Board, you should be thinking in terms of what your volunteers do, how they do it, what personal risks they may face in carrying out their services, and what may be done to eliminate or reduce that risk



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Analyze the situation and ask what can go wrong and what harm could result?

Identify measures to reduce the risk of such harm

Mitigate its impacts and pay/transfer for any resulting damage or losses

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- Examples of risk reduction
  - Deciding whether to continue activities that may be too dangerous
  - Properly screening volunteers
  - Requiring a standard reference check and/or criminal record check for each volunteer applicant where appropriate
  - Appropriately training all volunteers, particularly those in leadership roles
  - Developing and implementing internal policies (i.e. for child protection and sexual abuse)
  - Developing clear role descriptions reflective in a volunteer agreement

Risk 

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## 2. Insurance Considerations

### a) General insurance issues

- It is essential to know the type of insurance an organization has and whether it covers risks associated with volunteers, For Example:
  - Risks caused to clients and third parties by volunteers, including quasi-professional liability, like counselling, as well as sexual, psychological, physical abuse, or physical injury
  - Risk caused to the volunteer by clients and third parties including psychological, or physical abuse, as well as health and safety risks



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- Organizations need to consider the type of insurance that can cover the risks associated with the type of work it undertakes
- Organizations also need to understand the limitations of the coverage provided
- Once organizations have done this background work, they need to communicate to their volunteers what type of insurance the organization has, how this insurance protects the volunteers, and what protection is not available to the volunteer



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**b) Need to know the limitations/exclusions of insurance**

- Watch out for exclusions
- Don't buy an insurance policy if it excludes important coverage in relation to organization's activities
  - i.e. counseling services, sports and recreational activities, activities outside of Canada (territorial limits)
- Coverage for "Good Samaritan" claims (known as "Incidental Malpractice" coverage)



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**D. DEVELOPING & USING A VOLUNTEER AGREEMENT**

**1. What is a Volunteer Agreement?**

- A consensual agreement that sets out the nature of the volunteer relationship, and articulates the respective roles and responsibilities of each party
- A volunteer agreement addresses risk issues by
  - Clearly describing a volunteer's status, roles and duties
  - Requiring volunteers to agree to policies and procedures, release liability, and waive claims
  - Referring to the organization's insurance coverage and to what extent the volunteer is covered



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## 2. Benefits of a Volunteer Agreement

- Educates the volunteer about the organization
- Makes the volunteer aware of organizational decision-making and governance, including by-laws & policies
- Clarifies communication between volunteers, members, donors, employees and the board
- Defines the organization's values and goals
- Sets out required standards of conduct and any limitations on volunteer activities
- Shows credibility to the public, members & donors
- Addresses issues such as confidentiality, conflict resolution, dismissal, expenses, insurance and liability
- Limits the organization's liability exposure
- Can help to diffuse conflicts with volunteers



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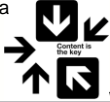
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## 3. Content of a Volunteer Agreement

### a) Provisions that generally apply to most volunteer agreements

- The terms of becoming a volunteer and with who
- The duties to be undertaken by the volunteer
- A description of any limits on the volunteer's authority and ability to do certain jobs
- A summary of the training and supervision available
- A description of the lines of authority
- Social media provisions, i.e. not speaking on behalf of the organization on social media



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- A clear statement that there is no compensation or other financial benefits associated with the position
- A clear statement that the volunteer is not an intern, i.e. not a person in training for employment
- A requirement that volunteers abide by the organization's rules of conduct, policies, regulations, and, where applicable, a volunteer code of conduct
- Copyright assignments and waiver of moral rights
- Description of how the relationship can be terminated
- Confidentiality requirements
- Conflict of interest protocol
- Consents by parents and/or guardians for children under age 18



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- An explanation that there is no coverage under the Ontario *Workplace Safety and Insurance Act, 1997*, except for members of volunteer fire or ambulance brigades and auxiliary members of a police force
- A media release granting the organization interest in all recordings and images taken of the volunteer
- An explanation of risks that are insured and those that are not
- A release of liability and waiver of claim
- A medical authorization and release



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**b) Provisions that may apply to higher risk volunteer situations**

- Disclosure and assumption of risks, e.g.
  - Travel and foreign country risks
  - Government of Canada travel warnings
  - Health risks, such as contagious diseases
  - Limitations of health care in foreign centres
  - Threat of terrorism and kidnapping
  - Lack of insurance coverage
- Criminal record checks if working with vulnerable persons (minors, disabled people, or the elderly)
- Waivers of claims



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- Medical information for foreign countries volunteer will be working, i.e. vaccinations required prior to departure
- Management should consider a "risk management checklist" for foreign volunteer trips
- Checklist identifies risk management issues and who in organization is responsible for implementing measures, prior during and after trip



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#### 4. How to Use a Volunteer Agreement

- Deciding whether a volunteer agreement is necessary for a particular volunteer position is part of the risk assessment process
- It is more important for volunteers involved in positions with greater risk, i.e. those working with vulnerable clients, to sign a volunteer agreement
- There is no "one size fits all" approach to developing a volunteer agreement
- Organizations must customize their own volunteer agreements to fit the situation



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#### E. EMPLOYMENT LAW UPDATE

##### 1. Occupational Health and Safety Awareness and Training, Ontario Regulation 297/13

- As of July 1, 2014, health and safety awareness training is required for all workers and supervisors in workplaces covered under the Ontario *Occupational Health and Safety Act* ("OHSA")
- Training for workers must include information on
  - The duties of workers, employers, and supervisors under the OHSA
  - The roles of health and safety representatives and health and safety committees under the OHSA
  - The roles of the Ministry of Labour and the Workplace Safety and Insurance Board
  - Workplace hazards
  - Occupational illness



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- Training for supervisors must also include how to recognize, assess, and control workplace hazards and how to evaluate those controls
- Training for supervisors must occur within one week of starting work as a supervisor
- The Ontario Ministry of Labour has training products available on its website (<http://www.labour.gov.on.ca/english/hs/tools/index.php>)
- If employers choose to use their own training resources, they must ensure that the resources cover the topics set out in the Regulation
- Employers must retain records of the completed training that can be requested by the Ministry of Labour



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**2. Ontario Employment Standards Act, 2000 ("ESA") Leaves of Absence**

- As of October 29, 2014, the ESA includes three new job-protected leaves of absence
  - Family caregiver leave
  - Critically ill child care leave
  - Crime-related death and child disappearance leave
- These new job-protected leaves are in addition to the existing seven job-protected leaves under the ESA
- Ontario employers should consider how these new leaves are reflected in the workplace policies, handbooks, and employment contracts



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**3. Ontario, Stronger Workplaces for a Stronger Economy Act, 2014**

- Received Royal Assent on November 20, 2014
- Amends five different labour and employment related statutes in Ontario
- As of October 1, 2015, the minimum wage will be tied to the Consumer Price Index
- Broadens the definition of "worker" under the OHSA to include unpaid co-op students, interns, and, potentially, volunteers
- These amendments will come into force at various times, ranging from immediately to up to two years
- NPOs and charities should take steps now to address the effect of these changes by revising their employment policies and contracts as applicable

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**4. Ontario Human Rights Commission ("OHRC") New Policies and Guidelines**

- In 2014, the OHRC released new or updated policies on preventing discrimination because of or based on
  - Pregnancy and breastfeeding (October 2014)
  - Mental health disabilities and addictions (June 2014)
  - Gender identity and gender expression (April 2014)
- The Ontario *Human Rights Code* (the "Code") authorizes the OHRC to prepare, approve and publish human rights policies, to set standards in how to interpret the Code
  - The Human Rights Tribunal must consider such policies if a party requests so
- On November 25, 2014, the OHRC also issued statement on how to prevent and deal with sexual harassment in the workplace

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**F. CONCLUSIONS**

- Working with volunteers can raise liability concerns
- Charities and NPOs are vicariously liable for harm caused to or by a volunteer within their scope of authority
- Risk management is a proactive process to reduce and transfer organizational risks
- Volunteer agreements are an important part of a successful risk management system
- These agreements, when combined with risk reduction steps, insurance, and internal policies, can lessen the risks associated with working with volunteers
- For more information see article on Volunteer Agreements Managing Relations and Reducing Risks <http://www.carters.ca/pub/bulletin/charity/2014/chylb351.pdf>

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