
**CANADIAN COUNCIL OF CHRISTIAN CHARITIES (CCCC)
THE ANNUAL CHRISTIAN
LEADERSHIP/STEWARDSHIP CONFERENCE**

Mississauga – September 25, 2007

**Pro-Active Legal Audits: What They Are and
How to Benefit From One**

By Terrance S. Carter, B.A., LL.B., Trade-mark Agent

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OVERVIEW OF TOPICS

- What Is a Pro-active Legal Audit?
- What Are the Stages of a Pro-active Legal Audit?
- What Is the Scope of a Pro-active Legal Audit?
- Additional Resources Available

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A. WHAT IS A PRO-ACTIVE LEGAL AUDIT?

What Does a Pro-active Legal Audit Involve?

- “Being pro-active is always better than being reactive!”
- A pro-active legal audit is a lawyer-led review of a charity’s key documents and operations in order to ensure compliance with the law and help reduce the risk of liability for the charity and its directors and officers
- A pro-active legal audit is an essential process that assists the Board in fulfilling its fiduciary obligation to evaluate the charity’s compliance with its governance and operational documents, as well as the law in general

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- A pro-active legal audit also facilitates the development of policies and procedures that will assist the charity in managing risks effectively in the future
- However, a pro-active legal audit cannot identify all compliance deficiencies, nor all legal risks that a charity may encounter
- A pro-active legal audit generally involves the lawyer reviewing the following:
 - Corporate documents, structure and compliance (i.e. letters patent and by-laws)

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- Inventory of property (i.e. land and buildings, leases and intellectual property)
- Fundraising and financial matters (i.e. fundraising documentation, financial statements and investment policies)
- Charitable issues (i.e. maintaining charitable status, Canada Revenue Agency (“CRA”) and *Income Tax Act* (“ITA”) compliance requirements)
- Operational and risk management issues (i.e. due diligence policies, risk management procedures and insurance)

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What Are the Reasons for a Pro-active Legal Audit?

- Charities, as well as not-for-profits collectively make up an essential part of Canadian society and its economy
- Charities and not-for-profits constitute the “Third Sector” of the economic engine of Canada
- Charities are facing fundamental changes and challenges in delivering their services to the public, in part because of a more litigious society

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- In facing these challenges charities must now become familiar with a vast array of legal requirements in numerous areas of law
- In order for charities to avoid exposure to legal liability, it is essential that they exercise due diligence in ensuring that they are in compliance with the legal obligations that are imposed upon them
- Why do charities often experience difficulties in complying with legal requirements?
 - Complicated corporate and charitable requirements at both the federal and provincial level

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- Increasingly complicated tax issues
- Expanding fundraising requirements
- Due diligence needed in the management of gifts and charitable receipting
- Inherent risks in operations, such as sexual abuse of children
- Determining appropriate investment policies involving charitable funds
- Incomplete corporate records
- Interrelationships between multiple corporate structures
- Privacy issues involving donors, employees and volunteers
- Compliance requirements under anti-terrorism legislation
- Frequently inadequate contractual documents

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- Possible consequences from legal non-compliance and deficiencies in organizational structure and operations:
 - Revocation of charitable status
 - Undertaking *ultra vires* activities
 - Allegations of breach of trust
 - Inquiries by the public under the *Charities Accounting Act* (Ontario)
 - Legal actions by donors and/or the Public Guardian and Trustee (Ontario) (“PGT”)
 - Court supervised audit of accounts
 - Confusion in corporate operations
 - Loss of corporate status

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What Are the Benefits of Conducting a Pro-active Legal Audit?

- **It allows the charity to identify areas of potential concern and possible legal risk ahead of time, thereby reducing the chance of legal actions**
- **It identifies mandatory compliance matters, as well as recommended best practice standards**
- **It assists the charity in prioritizing legal issues to be addressed by the charity, as well as setting out realistic time lines for the work to be done**

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- **It is an educational process that explains to the charity the nature of the legal work that is required in order to address issues of concern**
- **It assists the charity by explaining the documents and practices of the charity that need to be amended in order to reflect changes in the law**
- **It demonstrates due diligence by the charity's board and senior management and thereby reduces their exposure to liability**

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- **The lawyer conducting the pro-active legal audit will provide the following benefits to the charity:**
 - **Explain the process of the legal audit to the charity**
 - **Warn the charity of applicable risks and the consequences of intended courses of action**
 - **Advise the charity if there are better alternatives available to its current practices and procedures in order to minimize those risks**
 - **Produce a written report of the audit, which will be an essential historical reference document for future directors and future senior management**

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B. WHAT ARE THE STAGES OF A PRO-ACTIVE LEGAL AUDIT?

Preliminary Matters

- **Selecting the lawyer**
 - Experience in conducting a legal audit?
 - Breadth of knowledge in order to identify legal issues?
 - Ability to follow through and remedy deficiencies identified?
- **Retaining the lawyer**
 - What is the scope of the legal audit?
 - Is the audit to be completed in stages?
 - Are there specific exclusions to the audit?

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- Will the audit be done by one lawyer or several lawyers with experience in different areas of the law?
- If possible, limit the number of contact persons from the charity dealing with the lawyer
- **Equipping the lawyer by providing the following:**
 - An overview history of the charity and its relationship to other organizations
 - A full description of all programs and activities, together with full details on staff and volunteer requirements
 - Corporate records, i.e. letters patent supplementary letters patent, bylaws, minute books and various registers

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- Extra-provincial and fundraising registrations
- Business name registrations
- Trade-marks, official marks, copyrights and domain names
- Deeds, leases and mortgages
- Details of investments, as well as investment management agreements
- Fundraising documentation, such as a gift acceptance policy, fundraising brochures, sample charitable receipts
- Financial statements for the last three years, along with audit reports and management letters, if applicable
- T3010's (annual returns) for the last three years, and disbursement quota work sheets

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- Operational policies
- Risk management documentation
- Employee and volunteer documentation
- Significant agreements that the charity is a party to, i.e. funding agreements, trademark or copyright licenses, agency and/or contracts for service agreements, and bilateral and multilateral international agreements
- Copies of all insurance policies and reports from the insurance broker
- Details of current compliance with CRA requirements for a registered charity, such as disbursement quota, political activities, related business activities, etc.

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- Undertaking the Audit**
- The lawyer will generally need to undertake the following steps in conducting a pro-active legal audit
 - Review the documents provided by the charity
 - Conduct public record searches
 - Corporate profile and micro-fiche
 - Business name registration search
 - CRA online and private record search
 - Extra-provincial registration search
 - Trademark and domain name search
 - Review the charity's website

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- Interview senior management and/or board representatives as necessary and, where possible, arrange an onsite visit at the charity
 - The lawyer should provide a verbal interim update of the audit in order to discuss and clarify issues with the charity
- Reporting On the Audit**
- The written report may be in either a preliminary or final form
 - Preliminary form anticipates that further information and input from the charity may be forthcoming
 - The report needs to explain the relevant law to their charity in order for the charity to avoid problems in the future

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- The report needs to explain the consequences of identified deficiencies and the alternatives that are available
- The report should provide a prioritization of action items to be undertaken, and where possible, a time frame of when the action items should be completed
- The report should explain that the board of a charity has a fiduciary obligation to protect the charitable property and maintain the charitable status of the charity
- As such, the report should explain that the onus to respond to the report and take action as necessary lies with the board of the charity, not the lawyer

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- A draft of the report should be sent to the charity for review by its main contact person before the report is signed and issued for distribution
- The audit report must then be distributed to all board members and senior management
- However, because the report may contain commentary on areas where the charity and the board may be exposed to liability, it is essential that the report be kept strictly private and confidential and that it not be copied to anyone else without the consent of the board.
- Otherwise, the solicitor/client privilege for the report may be lost.

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- In the event that the report identifies significant areas of liability, then the report may need to recommend that board members and senior management obtain independent legal advice
- While there is no one format for an audit report, a pro-active legal report will generally include the following:
 - Scope and limitations of legal audit
 - Confidentiality
 - Executive Summary
 - Background facts
 - Substantive commentary on the issues
 - Prioritization and next steps forward

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Follow-up Matters

- Meeting with the board and senior management to discuss the results of the audit and be able to ask questions of the lawyer
- The board needs to agree upon a timetable to implement any corrective steps that need to be taken
- Need to distinguish between time sensitive matters involving deficiencies in basic compliance matters and matters that are of a less pressing nature concerning best practice recommendations
- The charity should consider forming a legal risk management committee to oversee the implementation of the recommendations

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- Depending upon the severity of any non-compliance issues identified, it may be advisable to proceed with a no-name disclosure
 - To the CRA for matters under the ITA to avoid either sanctions (i.e. penalties or suspensions) or even loss of charitable status in the event of a CRA audit
 - To the PGT in Ontario or Attorney General’s Office in other provinces for serious matters involving charitable property, such as unintended breach of trust involving restricted gifts, before a complaint is made

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- It is important that all future board members be given a copy of the legal audit as soon as they come on to the board. The same practice should also be undertaken where there are additions to senior management
- The greatest risk of doing a pro-active legal audit is that the audit results and recommendations will not be acted on. This is the responsibility of the board and senior management of the charity, not the lawyer
- Therefore, if the board is not prepared to implement recommendations that the legal audit may result in, then there is no point in doing a legal audit in the first place

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C. WHAT IS THE SCOPE OF A PRO-ACTIVE LEGAL AUDIT?

General Comments

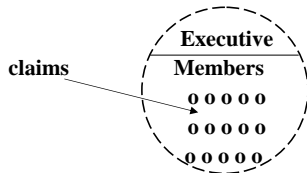
- The scope of a pro-active legal audit will vary from charity to charity depending upon the nature of the operations of a charity
- For a broad survey of the types of topics that can be included in a pro-active legal audit, reference can be made to “Legal Risk Management Checklist for Charities” available at <http://www.carters.ca/pub/checklist/charity.pdf>
- What follows is a brief sampling of some, but not all, of the issues and questions that will generally be covered in a pro-active legal risk management audit

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Organizational and Structural Issues

1. The Need to Identify and Compare the Different Types of Legal Forms for a Charity

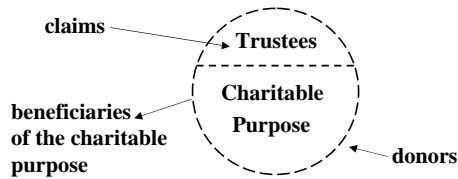
- Unincorporated associations
 - Not a legal entity
 - Generally used for starting up a charity in its early stages
 - Flow through liability to members



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• **Trusts**

- A trust is a relationship between trustees and beneficiaries involving the separation of legal and beneficial ownership of property
- Available for charitable organizations, public foundations and private foundations
- Trustees are exposed to liability



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- **Not-for-Profit Corporations**
 - Non profit purpose but not charitable
 - Members are not exposed to liability

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- **Charitable Corporations**
 - Charitable purpose akin to a public trust
 - Members are not exposed to liability

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2. Organizational and Legal Documentation

- **Review of key documents for an unincorporated association**
 - Are the objects clearly stated in the constitution and are they not-for-profit in nature or are they charitable in nature?
 - Do constitutional documents correctly reflect how the charity is actually structured and operated?
 - Is a copy of the constitution filed with the appropriate government agencies, i.e. with the CRA and the PGT?

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- **Review of key documents for an incorporated charity**
 - **Review of letters patent**
 - **Is the name in the letters patent the correct name of the charity and is it consistent with the objects?**
 - **Are its objects exclusively charitable in nature?**
 - **Are the activities of the charity authorized by its corporate objects?**
 - **Does the dissolution clause provide for distribution to other charities?**

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- **Review of supplementary letters patent (SLP)**
 - **Have all SLPs been identified?**
 - **Has there been a change of corporate name?**
 - **Has there been a change of corporate objects?**
- **Letters patent of amalgamation:**
 - **Are the objects the same or similar?**
 - **What are the terms of the amalgamation agreement?**
- **Does the organization have historical records of all the by-laws of the charity?**

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- **Need to review the current corporate by-law for basic terms, such as**
 - **Do provisions conflict with letters patent concerning objects or dissolution?**
 - **Do the provisions reflect the actual organization and operational structure of the charity?**
 - **Does the by-law reflect recent changes to applicable corporate legislation?**
 - **Is there an adequate indemnification provision for the directors?**
 - **Are the by-law amendment procedures consistent with corporate legislation?**

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- Was the initial corporate organization of the corporation properly done?
- Was there a documented transfer of assets and liabilities on incorporation?
- Are the records of board decisions and/or membership meetings complete?
- Is there adequate board and/or members' authorization for indebtedness, if applicable?
- Have corporate records been properly maintained, such as consent to be directors and applications for membership?
- Where are the corporate records kept?

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- Have necessary corporate filings and registrations been kept up to date?
 - Ontario Corporations
 - Initial Notice and Notice of Change - Form 1
 - *Business Name Act* (Ontario) registrations
 - Mandatory reporting to Public Guardian and Trustee for charitable organizations
 - Federal Corporations
 - Annual Summary (Form 3) - Canada

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- Extra-Provincial Initial Notice (Form 2) - Ontario
- *Business Name Act* (Ontario) registrations
- Mandatory reporting to Public Guardian and Trustee for charitable organizations
- Does the organization operate and/or fundraise in any other provinces? If so, there may need to be registration as extra-provincial corporations in other provinces, together with business name registrations
- Has there been a loss of corporate status for failure to maintain government filings?
- Is the organization aware of the importance of proper use of corporate name and operating names?

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3. Utilizing Multiple Corporations

- **Should the organization consider using multiple corporations for its high risk activities in order to reduce liability exposure and protect assets?**
- **Different types of multiple charitable corporations that can be implemented**
 - **Parallel operating organizations**
 - **Parallel charitable foundations**
 - **Umbrella organizations**
- **Has appropriate consideration been given to balancing control of multiple corporations with issues involving the possibility of cross over liability?**

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- **Has appropriate consideration be given to implementing effective control through contracts and/or licensing agreements as an alternative to overt corporate control?**

4. National/International Relationships

- **Multi-tiered provincial or national charities**
 - **Single corporate structure provides ease of administration, but results in greater risk of liability exposure for total assets of single corporate entity**
 - **Multiple corporate structure reduces risk of liability, but top-tier corporations may still be exposed to liability where too much control is imposed or employer/employee relationship exists**

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- **The reverse is also a risk: top-tier corporations can lose control over subsidiaries without proper corporate control in place and/or appropriate agreements**
- **Are relationships with national organizations and/or subsidiary chapters adequately documented to protect the rights of both parties?**
- **Are relationships between national and international structures adequately documented with specific reference to controlling trademarks in Canada?**
- **Is there need for an international umbrella organization?**

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- Has the ownership of trade-marks and/or copyrights been determined and protected in Canada?
- Have trade-marks and copyrights been adequately licensed?

Board Governance and Liability Issues

1. Board Management Issues

- Is the charity able to identify who is in charge of the organization?
 - i.e. Where does the de facto control of the charity lie? Is it with a board, a committee or executive staff?
 - Is board authority recognized by the membership?

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- Are there clearly defined lines of authority between the board and the executive staff?
- Does the board meet on a regular basis and do directors regularly attend?
- Has the board delegated too much responsibility to executive staff by restricting itself to policy development only without a careful and ongoing monitoring and review of policy implementation?
- Has an audit committee been established by the board to review financial statements and the auditors' report?
- Has the board established a comprehensive due diligence review process by establishing and utilizing a legal risk management checklist?

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- Has a risk management committee of the board been established?
- Is there adequate communication of board responsibilities to existing and new board members?
 - Need to create a board binder of all the organization's documents and inventory of assets, as well as an explanation of the general operations of the organization and the board of directors' legal duties and liabilities
 - Need to provide regular updates on changes in the law to board members

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2. Reducing Board Liability

- **Do any directors of a charity receive direct or indirect remuneration?**
- **If so, in Ontario, all board members maybe jointly and severly liable for such remuneration paid to a director**
- **Has the organization adequately indemnified its directors and officers and, for a charitable organization, has the indemnification been done in accordance with the *Charities Accounting Act* (Ontario)?**
- **Has the board of a charity authorized the organization to acquire directors' and officers' liability insurance in accordance with the *Charities Accounting Act* (Ontario)?**

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- **Should the charity consider reducing the size of the board to limit the number of people who are exposed to liability as directors?**
- **Is the charity effectively making use of committees as an alternative to a large board of directors?**
- **Should the charity consider implementing an advisory board to complement the board of directors without a corresponding exposure to liability?**

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Property Issues

1. Real Property Issues

- **Deeded land**
 - **Has an environmental assessment been conducted to determine the extent of liability exposure for the charity for future acquisitions as well as existing property?**
 - **If the charity has fuel oil tanks, either above or below ground, has there been compliance with new mandatory fuel oil tank regulations (Ontario)?**
 - **Are there trust provisions in old title documents that may impact real property held by a charitable organization that should be varied by a court?**

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- Has the charity addressed and rectified encroachments with neighbouring lands?
- Are municipal zoning and legal non-conforming uses being complied with?
- Could a charity be forced to sell surplus land or risk vesting of land in the Public Guardian and Trustee after three years under *Charities Accounting Act* (Ontario)?
- Has the charity reviewed its municipal property tax assessment to determine both classification and valuation and, if so, has there been a request for reconsideration or appeal of assessment?

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- **Leased Land**
 - Need to avoid personal guarantees on lease document, as much as possible
 - Avoid clauses requiring restoration of leased premises at the end of the lease
 - Ensure access to adequate parking
 - Need to limit the extent of tenant expenses under a net lease arrangement
 - Ensure the right to sub-let and assign the lease, with a release, if possible
 - Need to address issues of environmental liability for both the landlord and the tenant

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- Need to carefully monitor the date by which an option to renew the lease needs to be exercised
- The amount of rent on renewal should be made subject to arbitration
- Try to obtain a covenant from the landlord to prohibit offensive uses of adjoining leased premises
- Does the lease need to be registered on title?
- Try to obtain a right of first refusal to lease adjoining leased premises

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2. Intellectual Property Issues

- Intellectual property is an essential asset of a charity and consists of both trade-marks and copyrights
- Trade-marks need to be identified, licensed and enforced
- Trade-marks can be lost if they are not properly protected
- A charity needs to be pro-active in protecting its trade-marks or risk losing its trade-mark rights by default
- Registration of a corporate name or business name does not by itself give trade-mark protection

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- Trade-mark rights exist at common law but those rights are limited and should be protected by trade-mark registrations under the *Trademarks Act*
- There is enhanced trade-mark protection available for those charities that qualify as public authorities under the *Trade-marks Act* for official marks
- Separate trade-mark registrations must be done in each country in which the charity is operating
- It is essential that a trade-mark be properly marked with either a TM for an unregistered trade-mark or a ® for a registered trade-mark

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- It is essential to properly use and license trademarks, otherwise the trade-mark can be lost
- An infringement of a trade-mark by others, even if done unintentionally, must be immediately challenged
- The board members and executive staff of a charity need to be informed of the importance of trade-mark rights
- The charity should develop a portfolio management approach to identifying, registering, using and protecting trade-marks, both in Canada and in other jurisdictions as applicable

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- In addition to obtaining a trade-mark registration, a charity should secure multiple domain names as soon as possible using its trade-mark as part of the domain name
- Should the copyright material of the charity be registered, assigned or licensed?
- Has the designer of the charity’s website assigned the copyright for the website design?
- Who owns the copyright for publications of the charity and is it properly identified with a notice of copyright protection, i.e. ©?

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Fundraising and Financial Issues

1. General Fundraising Issues

- Are fundraising and/or administrative costs kept within the 80/20 disbursement quota?
- Has provincial fundraising legislation, where applicable, been complied with?
- Have fundraising programmes been reviewed by legal counsel?
- Are donors’ rights to require accountability respected, particularly rights under the *Charities Accounting Act* (Ontario)?
- Does the charity have a privacy policy in place in order to protect donors’ rights?
- Are sponsorship arrangements properly documented?

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- Is the charity complying with applicable provincial statutory provisions pertaining to fundraising?
 - *Charitable Fund-Raising Act* (Alberta)
 - *Charitable Fund-raising Businesses Act* (Saskatchewan)
 - *Charities Endorsement Act* (Manitoba)
 - *Charities Act* (Prince Edward Island)
 - *Charities Accounting Act* (Ontario)
 - *Charitable Gifts Act* (Ontario)
 - *Religious Organizations’ Lands Act* (Ontario)
 - *Income Tax Act* (Canada)

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2. Donor Restricted Trust Fund Issues

- Are there donor restricted trust funds being held by the charitable organization?
 - Building funds
 - Endowment funds
 - Special project funds
 - Ten year gifts
- Are restricted funds used only in accordance with applicable restrictions?

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- Are restricted funds being used in whole or in part for general operational purposes or are they being borrowed against? In either event there would be breach of trust.
- Are restricted funds segregated from operating funds?
- If not, is there compliance under the *Charities Accounting Act* (Ontario) to co-mingle restricted funds for investment purposes?
- Is the board of the charity aware of the consequences of breach of trust for failing to comply with restricted funds?

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3. Investment Issues

- What investment powers apply to investment of surplus funds of the charity?
 - Investment power may be found in the letters patent or supplementary letter patent
 - Investment power may be found in incorporating legislation
 - Investment power may be found in the *Trustee Act* (Ontario) or other provincial *Trustee Acts*, as applicable

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- Does the charity need and/or have an investment policy?
 - Documenting compliance with prudent investor rule
 - Establishing and documenting requirements for delegation of investment decision making
 - Proper management of endowed funds
- Are charitable funds being used to fund separate business operations of the charity?
- Is there violation of the *Charitable Gifts Act* (Ontario) by a charity owning more than 10% of a business as an investment?

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- Charitable Status**
- 1. Maintaining Charitable Registration**
- Is the legal name of the charity and/or its operating name consistent with the records of CRA?
 - Does CRA have the current head office address of the charity?
 - Has the charity obtained Quebec charitable status for fundraising in Quebec?
 - Does the charity submit its annual charity information return (form T3010) on a timely basis?
 - Is the charity and its directors aware of the recent key amendment to the *Income Tax Act* in May 2005 concerning the disbursement quota as outlined below?

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- The 4.5% disbursement quota is reduced to 3.5%
- The 3.5% disbursement quota is extended to charitable organizations
- Inter-charity transfers to charitable organizations are now subject to the 80% disbursement quota
- The 80% disbursement quota can be delayed through utilizing “enduring property” including ten year gifts
- Inter-charity transfers have become more complicated

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- Is the charity and its directors aware of the new penalties and sanctions that are part of the May 2005 amendments to the *Income Tax Act*?
- Is the charity and its directors aware of the key amendments proposed to the *Income Tax Act* from December 2002 to November 2006 dealing with split receipting and anti-tax shelter provisions outlined below?
 - New split receipting rules will apply, which will permit the donor to receive some consideration when making a gift
 - New broader definition of “advantage” may reduce the amount of a charitable receipt
 - New broader definition of a charitable organization and a public foundation will apply

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- Complicated new rules to curtail tax shelter schemes may result in reduction of charitable receipts for gifts in kind
- Charities will need to make reasonable inquiries of donors for all gifts, whether gifts in kind or cash
- New expanded basis for revocation of a charity will apply
- Different proposed changes have different effective dates, some are retroactive
- Is the charity aware of the new rules that apply to Private Foundations that were proposed in the March 2007 Budget?
 - New definition involving direct or indirect control

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- New excess business holding rules for shares held by a private foundation in both public and private corporations
- Is the charity involved in political activities and, if so, are they operating within limits permitted by CRA?
- Is the charity involved in business activities and, if so, are they operating within the related business guidelines permitted by CRA?
- Are agency, joint venture relationships or contractual transfer arrangements with non-qualified donees properly documented?
- Does the board of directors review the annual return (T3010A) for the charity before it is filed each year?
- Has the CRA been advised of and approved a change of objects or even a change of activities?

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2. Anti-Terrorism and Money Laundering

- Does the charity carry on operations that may require it to be in compliance with anti-terrorism/money laundering legislation?
 - International operations
 - Domestic operations
- Has the charity undertaken appropriate due diligence procedures in complying with anti-terrorism/money laundering legislation?
 - Development of an anti-terrorism/money laundering policy statement

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- Development of resource materials on anti-terrorism/money laundering legislation
- Requiring disclosure statements for board members and staff
- Evaluating all charity programs for compliance
- Requiring disclosure statements from affiliated organizations, third party agents and/or partners and conducting appropriate inquiries
- Determining when to make inquiries of donors
- Conducting due diligence internet searches on directors, officers and agents

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- Are directors aware of risks associated with failing to comply with anti-terrorism/money laundering legislation?
 - Loss of charitable status
 - Personal liability in civil law
 - Possible criminal law sanction
- For more details, see www.antiterrorismlaw.ca

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Operational and Risk Management Issues

1. Operational Policies

- Has the charity developed and implemented operational policies concerning:
 - Child protection
 - Sexual harassment
 - Bullying
 - Volunteer recruitment
 - Safety in the workplace
 - Protocol for foreign volunteer projects
 - Privacy
 - Does the charity revise and update these policies on a regular basis?

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2. Employment and Volunteer Issues

- Has the charity developed appropriate policies and practices for hiring, disciplining and terminating employees and volunteers?
- Does the charity have a policy in place concerning accommodation for employees who are members of a disadvantaged group identified in the *Human Rights Code* (Ontario)?
- Does the charity have a policy concerning sexual harassment?
- Is there a need to develop and adopt statements and/or manuals for employees as well as volunteers in relation to conduct and performance structure?

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- Do employees and volunteers who deal with children need to be screened and supervised in accordance with an appropriate sexual abuse policy statement?
- Is the charity aware of and addressing ownership issues regarding intellectual property created by the employees and volunteers?
- Is the 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 prerequisites?
- Is the charity and the board exposed to criminal liability under the *Criminal Code* i.e. Bill C-45 (Westray Mines)?

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3. Third Party Use of Facilities

- Has the charity been made aware of potential liability exposure in permitting third parties to use its property?
- Has the charity developed and implemented a third party facility use agreement with appropriate releases and indemnification?
- Does the charity require evidence of liability insurance from third party users of its facilities?
- Has the 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 users of these properties?
 - Charitable property requires fair market value for rent charged to non-charities
 - Properties held by not-for-profit organizations have more flexibility in the amount of rent that it can charge
- Does the charity have the corporate authority to allow third party use of its property?
- Does the third party use constitute an unrelated business under the *Income Tax Act*?
- For religious charities involved with same-sex issues, has consideration been given to compliance with recent amendments under the *Human Rights Code*? See www.churchlaw.ca

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4. Insurance Considerations

- Has the charity maintained a historical record of its insurance coverage in the event of a future claim?
- Does the charity know whether it has occurrence-based or claims-made insurance coverage for sexual abuse?
- Has the charity provided full written disclosure on a regular basis of all risks to its insurer to avoid denial of coverage?
- Does the charity require regular reports from its insurance broker on existing coverage, exclusions from coverage and recommendations to enhance coverage?

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- Is there a regular review of the adequacy and extent of general liability coverage and property insurance?
- Is there a regular review of directors' and officers' liability coverage?
- Does there need to be special insurance endorsements to extend insurance coverage in "out of the ordinary" situations, e.g. activities of volunteers and agents in foreign countries or multi-media coverage?

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- D. ADDITIONAL RESOURCES AVAILABLE**
- **Note:** For more details generally see articles and newsletters at www.charitylaw.ca
 - **Note:** Several articles that deal specifically with issues that were addressed today include, but are not limited, to the following:
 - "Legal Risk Management Checklist for Charities" <http://www.carters.ca/pub/checklst/charity.pdf>
 - "The Legal Duties of Directors of Charities and Not-for-Profits" <http://www.carters.ca/pub/article/charity/setof3/A-duties.pdf>
 - "Due Diligence in Avoiding Risks for Directors of Charities and Not-for-Profits" available at the following internet address: <http://www.carters.ca/pub/article/charity/setof3/C-diligence.pdf>

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- "Looking a Gift Horse in the Mouth: Legal Liabilities in Fundraising" available at the following internet address: <http://www.carters.ca/pub/article/charity/2004/tsc0416.pdf>
- "Donor-Restricted Charitable Gifts: A Practical Overview Revisited II" available at the following internet address: <http://www.carters.ca/news/2003/Philanth/vol18no1.pdf>
<http://www.carters.ca/news/2003/Philanth/vol18no2.pdf>
- "Essentials of Operational Risk Management" available at the following internet address: <http://www.carters.ca/pub/checklst/opriskman.pdf>
- "New Anti-Terrorist Financing Law has Direct Impact for Charities" <http://www.carters.ca/pub/alert/ATCLA/ATCLA12.pdf>

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