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## LEGAL CHECK-UP: TOP 10 TIPS FOR EFFECTIVE LEGAL RISK MANAGEMENT OF CHARITIES & NFPs

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<p><b>Legal Check-Up: Top 10 Tips for Effective Legal Risk Management of Charities &amp; NFPs</b></p> <p><b>By Terrance S. Carter, B.A., LL.B., TEP, Trade-mark Agent</b> tcarter@carters.ca 1-877-942-0001</p> <p>© 2017 Carters Professional Corporation</p>	
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## OVERVIEW OF THE TOP TEN TIPS FOR EFFECTIVE LEGAL RISK MANAGEMENT

- 1 Get to Know Your Organizational 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

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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 Surplus Funds

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## RESOURCE MATERIALS

- See Charity & NFP Law Bulletin No. 398 “*Charity and NFP Legal Check-Up: 10 Tips for Effective Legal Risk Management*” by Terrance Carter and Jacqueline Demczur dated February 23, 2017  
<http://www.carters.ca/pub/bulletin/charity/2017/chylb398.pdf>
- See Legal Risk Management Checklists
  - For Ontario-Based Charities  
<http://www.carters.ca/pub/checklst/CRMchklstNov16.pdf>
  - For Ontario-Based Not-For-Profits  
<http://www.carters.ca/pub/checklst/NFPchklstNov16.pdf>

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## WHY SHOULD YOU CARE ABOUT LEGAL RISK MANAGEMENT?

- Charities and Not-for-Profits (NFPs) are facing increasing challenges in delivering their services to members and the public
- This is in part because of a more litigious society and a more complicated regulatory environment
- In facing these challenges, charities and NFPs need to be familiar with an increasing array of legal requirements
- In order for charities and NFPs to comply with and avoid exposure to legal liability, it is important that they undertake regular legal check-ups



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- The key to compliance with legal requirements is to implement effective due diligence
- Due diligence in addressing risk management issues requires the charity or NFP to ask the following questions:
  - What is the legal status of the charity or NFP?
  - What are the applicable legal requirements that it must comply with?
  - How can those legal requirements be most effectively complied with?



- 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 charities and NFPs may want to address in conducting a “Legal Check-up” to implement effective legal risk management



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

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



- Identify key organizational documents when the charity or NFP 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 names, trade-marks, domain names
  - Intellectual property 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 charity or NFP
  - Are the objects clearly stated in the constitution and are they exclusively charitable in nature in the case of a charity?
  - Has there been a “mission drift” from the original purposes?
  - Do constitutional documents correctly reflect how the charity or NFP 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”) if a charity?



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

- 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 charity or NFP?
  - 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?



## TOP TIP #2: KNOW WHO IS IN CHARGE

- Who is in charge of running the charity or NFP?
  - Where does the *de facto* control of the charity or NFP actually lie?
  - Is it with the board, a committee or senior management ?
  - 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?
  - Is authority of the board recognized by the membership?

- 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 or NFP 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 governance, e.g. conflict of interest, confidentiality, succession planning, recruitment, and orientation?



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### **TOP TIP #3: MONITOR THIRD PARTY USE OF PROPERTY**

- Is the charity or NFP aware of potential liability exposure from permitting third parties use of their property?
- Has the charity or NFP developed and implemented a facility use policy and license agreement with appropriate releases of the charity and indemnification provisions?
- Does the charity or NFP require evidence of adequate liability insurance from third party users of its facilities?
- Has the charity or NFP 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 if not an investment?
- For charities and NFPs that have lifestyle requirements, has consideration been given to compliance with the *Human Rights Code* (Ontario) and applicable exemptions?



## **TOP TIP #4: CHECK INSURANCE AND RISK TRANSFER DOCUMENTATION**

- Has the charity or NFP maintained a historical record of its insurance coverage in the event of a claim?
- Has the charity or NFP provided full written disclosure of all risks to its insurer to avoid denial of coverage?
- Does the charity or NFP 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?



- 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?
- Is there a child protection policy, and if so has it been reviewed by the insurer as well as legal counsel?
- Has the charity or NFP considered developing and implementing liability shield documentation as may be appropriate, such as informed consents, disclaimers, releases, waivers and indemnities by program participants?

## TOP TIP #5: WATCH OUT FOR WASTING ASSETS

- Intellectual property is an essential asset of a charity or NFP 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 and copyrights can be lost if they are not properly protected and can therefore become wasting assets



- The charity or NFP 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 charity or NFP, 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 charity or NFP as the employer, but best to confirm in writing
  - Has the website designer assigned the copyright in the website design to the charity or NFP?
  - Have independent contractors or volunteers also assigned their copyright as may be necessary?



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

- Under the *Personal Information Protection and Electronic Documents Act* (“PIPEDA”) (where provincial privacy legislation does not apply), 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”
- Charities and NFPs 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 or NFP have a privacy policy in place to protect members, donors, employees and volunteers?

- Canada’s Anti-Spam Legislation (“CASL”) came into force on July 1, 2014, impacting how charities and NFPs communicate with donors, volunteers, members and the public
- CASL prohibits the sending of commercial electronic messages (“CEM”) 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

## **TOP TIP #7: MONITOR EMPLOYEE AND VOLUNTEER LIABILITY RISKS**

- Has the charity or NFP developed appropriate policies and practices for hiring, disciplining and terminating employees and volunteers, including employment and volunteer agreements?
- Does the charity or NFP 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 or NFP have a policy concerning workplace violence and harassment in accordance with the *Ontario Occupational Health and Safety Act*?
- Does the charity or NFP 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*?

- Are employees and volunteers who deal with children screened and supervised in accordance with an appropriate sexual abuse policy statement?
- Is the charity or NFP 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 charity or NFP and its board exposed to potential criminal liability under section 217.1 of the *Criminal Code* (Westray 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)

## TOP TIP #8: BE PREPARED FOR A CRA AUDIT

- Does the NFP meet the test to be a non-profit organization under par.149 (1)(l) of the *Income Tax Act* in relation to both income generation and reserves?
- 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?



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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 restrictions when engaging in political activities and does it comply with the 10% of resources limit?



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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 charity or NFP 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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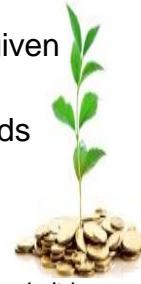
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## TOP TIP #9: ENSURE COMPLIANCE WITH DONOR RESTRICTIONS

- Are there donor restricted funds being held by the 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 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 SURPLUS FUNDS

- What are the investment powers that apply to investment of surplus funds of the charity or NFP?
  - 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 if applicable
  - By default, investment power will be found in the *Trustee Act*



- Does the charity need and/or have an investment policy?
  - Documenting compliance with prudent investor rule under the *Trustee Act* for charities will help to provide protection from liability for directors
  - Establishing requirements for delegation of investment decision making, particularly for a charitable organization because of requirements under the *Trustee Act*
- 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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