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SPRING 2017 - CARTERS CHARITY & NFP WEBINAR SERIES

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YOUTH PROGRAMS: IDENTIFYING AND MANAGING THE RISK

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Sean Carter is a partner with Carters and the head of the litigation practice group at Carters. Sean has broad experience in civil litigation and joined Carters in 2012 after having articulated with and been an associate with Fasken Martineau DuMoulin LLP (Toronto office) for three years. Sean has published extensively, co-authoring several articles and papers on anti-terrorism law, including publications in *The International Journal of Not-for-Profit Law*, *The Lawyers Weekly*, *Charity & NFP Law Bulletin* and the *Anti-Terrorism and Charity Law Alert*, as well as presentations to the Law Society of Upper Canada and Ontario Bar Association CLE learning programs.

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Overview of Selected Topics

1. Types of Youth Programs
2. Types of Risks
3. Who Can Be Liable
4. Identifying and Managing the Risks

“The young are permanently in a state resembling intoxication.” – Aristotle

A. TYPES OF YOUTH PROGRAMS

1(a) Who are the “youth”?

- Generally, in Ontario, any program run by an organization where the participants have not yet reached the age of 18 is a program involving “minors”, “youth” or individuals not having attained the “age of majority”
- This varies by province in Canada, depending on the legislation and the provincial “age of majority” (generally 18 or 19 in most provinces) or “child” and therefore there is different provincial legislation re: child protection, consumption of alcohol and potentially soon to be legal intoxicants?

1(a) Who are the “youth”?

- For child protection purposes (*mandatory reporting*), in Ontario, any programs involving children under the age of 16 require heightened attention/training (*Child and Family Services Act “CFSA”*)
- Also, in Ontario, the enforceability of contracts entered into by youth under the age of 18 is highly restricted. Absent the contract specifically being about the “necessities of life” or that the contract solely “benefits” the youth, the court is likely to rule the contract is void. Otherwise, all other contracts are subject to the youth choosing to cancel it at anytime or upon turning 18.

1(a) Who are the “youth”?

- It could be a *long* time before you get notice of a problem involving youth. In Ontario, under the applicable limitation period legislation, mainly the *Limitations Act, 2002*, a youth has 18 plus 2 years to launch an action, and generally sexual assault has *no* hard-line limitation period

1(a) Who are the “youth”?

- Federally and internationally, “youth” or “minors” are generally defined as persons under the age of 18:
 - *Youth Criminal Justice Act, Citizenship Act, Canada Elections Act*
 - *U.N. Convention on the Rights of the Child*
 - de facto definition is under 18 (unless age of majority is differently defined nationally)



1(a) Who are the “youth”?

- Also, persons under the age of 18 may well constitute a “vulnerable person” (*Criminal Records Act*):
- *a person who, because of his or her age, a disability, or other circumstances, whether temporary or permanent:*
 - *a) is in a position of dependency on others; or*
 - *b) is otherwise at a greater risk than the general population of being harmed by a person in a position of trust or authority towards them.*



1(b) Types of typical youth programs

- Overnight trips - (youth festivals, inter-faith events, field trips)
 - *“it’s fun to be bad...”*
- Mission trips – (often out of country, youth engagement and building/infrastructure programs)
 - *“Jimmy hammered a nail through his foot... how do you say ‘hospital’ in Haitian Creole?”*
- Day trips – (youth concerts, festivals, volunteering in the community, field trips to historical/religious sites)
 - *“God gave rock and roll to everyone...”*



1(b) Types of typical youth programs

- Sports programs – (inter-organization field day or intermural sports programs put on by the Church/Temple/Mosque – floor hockey, dodgeball)
 - *“Because competitiveness and the energy of youth never ends up with someone crying”*
- Youth group meetings/social events – (Youth group meetings, fundraisers, socials)
- Religious or other types of instruction (from Sunday school to lessons at the Mosque or Temple)
 - *“Because there is always that one kid who wants to be the “funny” one”*

B. TYPES OF RISKS

- Sexual abuse – a new and expansive range of new criminal offences dealing with not only inappropriate physical contact with youth, but now even just communication (digital or otherwise). Several provisions are directed specifically at “a person in a position of trust or authority towards a young person”:
 - *Invitation to sexual touching (s. 152 of CC)*
 - *Sexual exploitation (s. 153 of CC)*
 - *Corrupting children (s. 172 of CC)*
 - *Making sexually explicit material available to a child (s. 171 of CC)*
 - *Luring a child (s. 172.1 of CC)*

Types of Risks

- Physical – assault and battery (both civil and criminal), amongst many others can arise. Remember that even when some action may not rise to level of a criminal offence, the evidence may support a civil claim (beyond a reasonable doubt vs. balance of probabilities)
 - *It's why O.J. is broke, but not in jail...*
- Emotional – most of these offenses are regulatory or civil rather than criminal but include “intentional infliction of emotional distress”, “uttering threats of bodily harm”, “harassment”.

Types of Risks

- In Ontario and dealing with children under 16? The *Child and Family Services Act* (“CFSA”) ensures individuals have a mandatory obligation to report to the Children’s Aid Society *if they have reasonable grounds to suspect* a child is in need of protection (which includes):
 - a guardian of a child has neglected to protect, supervise or care for that child
 - there is a risk the child will suffer emotional or physical harm because of the guardian’s neglect, etc.



Types of Risks – CFSA cont.

- The child has suffered emotional harm demonstrated by serious aggressive behaviour, anxiety or depression and there are reasonable grounds to believe that the emotional harm results from neglect of the guardian of the child
- The CFSA specifically contemplates those with a duty to report who received that information as a “youth or recreational worker”, “mediator” or “religious official”, et. al.
- The fine, is currently a maximum of \$1,000, but once the amendments are proclaimed in force, the maximum will be \$50,000 fine and up to two years in jail.

C. Who Could Be Liable (1) Adults

- Personal civil liability
 - Assault and battery
 - Intentional infliction of emotional distress
 - could face significant legal fees, damages awards (including aggravated and punitive)
- Criminal liability
 - Invitation to touching, sexual exploitation, etc. (as set out above), and the duty (of those who have the authority to dictate tasks/work) to take reasonable steps to ensure the persons performing the tasks do not suffer bodily harm (discussed below)
 - May result in fines, imprisonment, national sex offender registry

(1) Adults

- CFSA/ Regulatory
 - As a person in a position of trust, not only criminally, but via the CFSA, you have a specific duty to report if a child (under 16) is in need of protection. It is an ongoing and personal duty for the individual.



(2) Organizations

- Charities and not-for-profits are liable in the exact same way any for profit corporation
- Negligence - Organizations particularly could be held to be negligent if a duty of care is owed to the youth and there is a failure to take reasonable steps to provide that standard of care. Case law has confirmed that reasonable standard of care has changed overtime, and the 'bar' is simply much higher than it was even a few decades ago.



(2) Organizations

- Vicarious liability – organizations can be liable for the wrongful negligent or intentional tortious actions of their employees, volunteers and even agents, while they are acting in the course of their duties/responsibilities to the organization. This is where courts really look at the care in selecting, training and supervision of individuals, as the court has discretion in assigning liability in this instance
- Board Liability - In certain circumstances, the board of directors may be held personally liable if they have failed to manage or supervise the management of the corporation.

(2) Organizations

- **Criminal Liability** – With the advent of Bill C-45, the sections of the *Criminal Code* (s. 215 to s. 218) which address the few select situations where a positive duty in criminal law exists “towards the preservation of life” was amended to add the following:
 - 217.1 *Every one who undertakes, or has the authority, to direct how another person does work or performs a task is under a legal duty to take reasonable steps to prevent bodily harm to that person, or any other person, arising from that work or task.*

D. IDENTIFYING AND MANAGING THE RISKS

- 1) How to proactively prepare: Effective youth policies and procedures:
 - **Screening Policies: Employees, Volunteers, Agents**
 Demonstrating due diligence in selecting those who will have contact with youth, something that may be critical in a defence at a later date. There may be a need for a type of ‘risk matrix’ to help determine when more invasive and thorough background, reference and police checks are called for, and recognizing when they are not (e.g. overnight trip chaperone vs youth group assistant). Different types of police checks (vulnerable sector checks to normal CPIC) will be necessary depending on the position, and varying need for a renewal

Youth Policies and Procedures

Child Protection Policies

- Ensuring a comprehensive but understandable policy is put in place to help address child protection and risk management procedures within the organization. Ensure the policy not only addresses how to try and avoid situations (e.g. two adult rule) but also procedures that address what to do if something happens (and properly record it).
- Questions to be addressed include: should Children’s Aid be contacted, should legal advice be sought, what duties might the organization have to preserve evidence?



Youth Policies and Procedures

- Companion handbooks and ongoing training
 - Static policies that are not implemented or practical (e.g. simply stating grand principles) is not only wasteful, but exposes the organization and the board of directors to potential liability
 - Given the turn-over in staffing and volunteers, it is critical not only to retrain on a regular basis but also to have a policy regarding youth protection and risk management, but also practical “what if” publications (often a companion handbook to the policy), along with reporting forms, recommendations for handling incidents, and contact information for authorities

Youth Policies and Procedures

- Not only is retraining and refreshers important for employees and volunteers because of turn-over and the reality of the complex details that may be contained within the policies, the policies and procedures need to be reviewed with legal counsel for changes in legislation and case law
- Youth policies and procedures are very much a “growing tree”, evolving and expanding as necessary to meet new risks and jettison parts that are no longer necessary



(2) Insurance

- Insurance – for each type of activity (from mission trips to religious instruction), the question must be asked, among other things:
 - if existing insurance coverage is in place and does it cover the activity, is it sufficient and what are the limitations and requirements for coverage?
 - what additional insurance coverage might be necessary for the activity, considering again the limitations and requirements for a successful claim are fulfilled if required

(3) Indemnification

- Indemnification – most organizations will have in their by-laws a provision that the organization will indemnify and hold harmless directors/officers for claims made against them while in the course of their duties to the organization
- This is very much an avenue of last resort, not only because it is contingent on the assets of the organization, but director’s and officer’s insurance in addition to the general insurance provisions may well provide coverage to avoid the need to resort to the indemnification provision

(4) Employee Volunteer Contracts



Employee and Volunteer Contracts

- Employee and volunteer contracts are becoming more common (including volunteer) as it can address so many critical matters at the very beginning of the relationship to reduce risk:
 - the contract can have an acknowledgement of the employee/volunteer’s review of relevant youth policies
 - the contract can address the potential privacy concerns involved in screening (e.g. maintaining a record of the results of the police screening, references, etc.)

Employee and Volunteer Contracts

- It is important to include a statement in the contract that the information collected during the vetting process can be kept indefinitely at the discretion of the organization and that some information (results of reference interviews) will not be considered apart of the volunteer file for the purposes of disclosure requests.
- This means that the organization will not have to destroy the personal information when the employee/volunteer leaves and anything kept (e.g. private reference comments) could be kept from disclosure if requested.



(5) Youth Waivers

Youth Waivers, Permission Forms and/or Releases

- as discussed above, the bottom line is that particularly waivers or releases signed by a youth will most likely be unenforceable – **so why bother?**
For an organization, it's about what reasonable steps were taken in advance to avoid the tragedy or damage – so this is why these forms could be useful in a judge's decision
- Know your youth's vulnerabilities/special needs (e.g. allergies). It is proof that steps were taken in advance to identify vulnerabilities and (hopefully) steps were taken accordingly

Youth Waivers

- The waiver (which should include a reference to the risks) may exist at least as proof that the youth and their guardian purported to understand the risks and were as informed as possible. It helps support a positive and proactive narrative which can be essential to the success of the case.
- Jurisdiction/governing law clause in waiver – particularly for mission trips outside of Ontario, especially Canada. What law is applied and what jurisdiction the case is heard in can be definitive. A judge may decide that while the waiver of liability section isn't binding, he/she will uphold the jurisdiction and governing law provision.

Youth Waivers

**“Judges are like Almighty God,
completely unpredictable”**



Rumpole of the Bailey (by: John Mortimer)

- While the chances are slim to none that the entirety of the waiver/release will be upheld, there is no caselaw binding a judge from either finding some portions valid (e.g. jurisdiction). At the very least it may be evidence that the organization took its duties of care owed to the youth seriously, it attempted to educate the youth as to the risks, and it may demonstrate that steps were taken to protect the youth (particularly if vulnerable – e.g. allergies)

Conclusion

- The youth demographic are a cross-section of potentially the most in need and vulnerable, and yet one of the hardest groups to minister to given the state of the law
- As with most things in life, it is not about eliminating risk, its about managing and reducing it to an acceptable level for your organization
- Every organization needs to address this demographic (future donors, volunteers and employees) in its own way, but in knowing the risks and what you can do about it, you can more fully embrace the future lifeblood of your organization.

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