ESSENTIALS OF OPERATIONAL RISK MANAGEMENT

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A. INTRODUCTION

- Churches and charities ("charities") operate in an increasingly litigious and regulated environment.
- Supreme Court of Canada has ruled that there are no special exemption available to charities for liability – Charities are held accountable in the same manner and to the same extent that for-profit organizations are.
- Charities can no longer ignore the potential for liability—the exposure to liability goes further than simply the loss of charitable assets, and can include increased personal exposure for directors, officers, members and even volunteers.
- Given these legal realities, there is an ever increasing need for charities to take all appropriate steps to implement necessary procedures and mechanisms to deal with the legal risks they face.

B. SOME EXAMPLES OF LEGAL RISKS

1. Vicarious Liability:

   a) Sexual Abuse:

   - There have been a number of recent cases addressing abuse situations within the charities context that have identified vicarious liability for sexual abuse as a key risk faced by charities where children are involved.
   - Failure to address the risk of sexual abuse can lead to liability exposure for charities and their directors, as well as unwelcome media attention with negative effects apparent in donations and declining adherence levels.

- Charities face the potential for vicarious liability for the conduct of their employees and volunteers.
- There is little chance that the charities themselves will be responsible for the inappropriate conduct, and as such, the charities would bear no direct liability. However, vicarious liability is a real risk.
- Vicarious liability has been addressed by the Supreme Court of Canada in a number of recent cases involving the abuse of children in church settings:

Bazley v. Curry [1999] 2 S.C.R. 534 para. 37;
Jacodi v. Griffiths [1999] 2 S.C.R. 570;
John Doe v. Bennett [2004] S.C.J. No. 17.

- It should be remembered that for vicarious liability to be imposed, a court does not need to make a finding of actual improper conduct by the charity. Liability is imposed on the theory that the charity may properly be held responsible where the risks are inherent in the enterprise of the charity and those risks materialize and cause harm, provided that liability is both fair and useful:

> "Underlying the cases holding employers vicariously liable for the unauthorized acts of employees is the idea that employers may justly be held liable where the act falls within the ambit of risk that the employer's enterprise creates or exacerbates. Similarly, the policy purposes underlying the imposition of vicarious liability on employers are served only where the wrong is so connected with the employment that it can be said that the employer has introduced the risk of the wrong (and is thereby fairly and usefully charged with its management and minimization). The question in each case is whether there is a connection or nexus between the employment enterprise and that wrong that justifies imposition of vicarious liability on the employer for the wrong, in terms of fair allocation of the consequences of the risk and/or deterrence." *Bazley v. Curry* [1999] 2 S.C.R. 534 para. 37

- *Bazley v. Curry* also answered the question of whether charities should be entitled to an exclusion of liability for vicarious liability:

> "I can see no basis for carving out an exception from the common law of vicarious liability for a particular class of defendants, non-profit organizations." *Bazley supra* at para. 56

- Overall, in order to make a finding of vicarious liability, two things must be shown:
  i) That there is a meaningful connection between the tortious conduct of an employee and the charity's enterprise—to answer this, a court must determine whether it was a foreseeable risk; and
  ii) That a court must find that the enterprise and the employment created or materially enhanced the risk of harm.

b) What Can Charities Do?

- Carry out a thorough legal risk management audit of all situations where representatives of the charity are put in positions of authority over children;
- Ensure that a sexual abuse policy is implemented and acted upon;
- Obtain insurance where available, especially Directors and Officers Liability Insurance;
- Provide a copy of the sexual abuse policy to the insurer for the charity;
- Implement open door policies;
- Use the buddy technique—two adults present at all times when with children;
- No private counselling or meeting with children;
- Carry out criminal record checks for all persons who will be working with children in carrying out their duties for the charity;
- Update criminal record checks regularly;
- Obtain references and check up on them;
- Keep records of all investigations, including criminal record checks;
- Implement surveillance systems where appropriate;
- If operating a school, or day-care or other program involving children limit access to the children by requiring that all visitors sign in and out of the facility;
- Limit third party use of all of the charity's facilities
- Immediately act upon any complaints to and against the charity and perform thorough and well documented investigations;
- Comply with reporting requirements contained in any applicable Child and Family Services legislation.

c) Insurance Issues:

- The following issues need to be addressed in determining if there is insurance coverage available to a charity when a claim of sexual abuse is initiated against it:

  i) Is there an insurance policy available?
  ii) How is the action or allegation of sexual abuse pled by the victim against the charity? Does it include separate and independent claims in negligence, breach of fiduciary duty, assault?
  iii) Have the insurers been placed on notice in a timely manner?
  iv) Have sufficient particulars been provided to the insurer to allow it to fully investigate the claim?

- Expect that plaintiff's counsel will plead the following allegations against the charity in sexual abuse claims:

  i) Non-existent or inadequate screening and hiring policies;
  ii) Non-existent or inadequate supervision procedures;
  iii) Lack of sexual abuse and related polices;
  iv) Failure to implement or act on polices;
  v) Failure to investigate a complaint of suspicious conduct (properly or at all).

2. Vicarious Liability for Clergy Malpractice:

- There is now at least one reported case in Canada of a church being held vicariously liable for the "malpractice" or negligence of clergy

See *V.B. v. Cairns*, (2003), 65 O.R. (3d) 343

> *"There is obviously a close and direct relationship between a member of the clergy and a parishioner who goes to him for advice. In that situation the clergyman would know that the person seeking his advice would be directly affected by the advice he provides. In providing that advice, he would clearly have his parishioner in his contemplation as a person who would be affected by the advice he gives. Counselling a providing advice to parishioners is part of the normal duties of a member of the clergy. Further clergymen are typically regarded by members of their congregation as having a special status or position of authority. The relationship is one of trust. The parishioner would, to the knowledge of the clergyman, by likely to rely on him. It would reasonable for the parishioner to expect that the clergy member would exercise a reasonable degree of care in dispensing advice….Given the direct relationship, it is easily foreseeable that harm may befall the parishioner if the member of the clergy is negligent in dealing with the matter before him…"*
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> *V.B. v. Cairn, supra* at para. 156

- In *V.B. v. Cairns, supra* the judge rejected a defence based on protection of freedom of religion:

> *"…protection of religious freedom does not mandate the denial of any cause of action in negligence against a church or member of the clergy. Principles of religious freedom may be taken into account in determining, on a case by case basis, what standard of care should be imposed, or whether any remedy is available. However, religious beliefs should not be an absolute defence to conduct that is harmful to others." V.B. v. Cairns, supra* at para. 152

- As a result of this decision, the courts have introduced the possibility that clergy can be held liable for their negligent advice and have confirmed that the relationship between clergy and parishioner is fiduciary in nature.
- The challenge is trying to determine what part of that advice might be negligent.
- It is easy to see that where a cleric starts giving financial advice or medical advice he or she might be negligent, but in applying religious texts and teachings it is more challenging.

a) What Can Churches Do:

- Advise clergy to be very careful regarding the areas that they give advice in—e.g. should clergy be giving sexual health advice? Financial advice? Psychological advice?
- Ensure that your church has clearly established teachings, which are followed by clergy;
- Determine whether insurance will cover a loss—most professionals providing advice have special insurance;
- With respect to insurance, it is important to ensure that activities are considered within the normal confines of what a church does and would therefore be covered by the insurance;
- Have clergy keep records of the advice they give to congregants;
- Counselling must be within the context of faith;
- Where counselling activities are provided in the church context determine whether the counselling is being done in the name of church and thereby exposing the church to risk;
- If outside counsellors are being used then the church needs to appreciate risks, and try to limit them;
- Ensure that outside counsellors have appropriate insurance with the church named as an insured party;
- Make sure that outside counsellors are not carrying out counselling under the name of the charity, unless specifically authorized to do so;
- If outside counsellors are going to carry out counselling in the name of the church, ensure that the church:
  - i) has checked their credentials;
  - ii) has ensured that they are appropriately licensed;
  - iii) has performed criminal record checks;
  - iv) has determined what areas they will counsel in and what methods will be applied;
  - v) ensured that there is an appropriate contract in place which will outline the boundaries within which the counsellor can function and will provide rights of termination.

C. BILL C-45 – RECENT AMENDMENTS TO THE *CRIMINAL CODE* OF CANADA

- Recent changes to the *Criminal Code* of Canada have brought dramatic changes to the concept of "criminal negligence" and who can be held responsible for workplace injuries.
- All organizations including charities are potentially liable.
- Bill C-45 was introduced by the Federal Government in response to the Westray Mines Disaster.
- The purpose of Bill C-45 is to establish criminal liability for a wide range or organizations and individuals who fail to take reasonable and appropriate steps to reduce or eliminate work related accidents.

- Bill C-45 specifically deals with the criminal liability of organizations.
- Specific legal duties have been established which requires that those in charge and responsible for directing the work of others take reasonable steps to prevent bodily harm arising from such work.
- Bill C-45 requires that employer organizations take reasonable steps to ensure a safe work environment for their workers.
- Criminal negligence occurs when an act or omission of an accused shows a wanton or reckless disregard for the safety of others whether or not the accused is under a duty to act.
- With Bill C-45 there may be a due diligence defence available although each situation will be reviewed on its own merits.
- Courts will look to the following as factors of due diligence:
    - i) implementation of appropriate supervisory personnel who are trained and empowered to ensure safety;
    - ii) implementation of reviews of the worksite to ensure safety;
    - iii) implementation of policies and procedures to protect workers;
    - iv) implementation of disciplinary guidelines;
    - v) implementation of appropriate internal corporate reporting and monitoring.

1. <u>What Can Employers Do?</u>

- Perform a legal risk audit to determine where situations arise with employees being directed in tasks—e.g. are there maintenance personnel employed to perform building repairs and what are the risks faced by them;
- Establish clear policies and procedures;
- Ensure that everyone involved is aware of policies and procedures;
- Enforce policies and procedures;
- Appoint supervisors who have the power to discipline if necessary;
- Establish and enforce discipline codes;

2. <u>Website and Publications Audit</u>

- Bill C-250 has introduced changes to the *Criminal Code* of Canada respecting "hate communications".
- s. 318 and s.319 of the *Criminal Code* of Canada have introduced amendments to include "sexual orientation" as an identifiable group capable of being subjected to hate communications.
- Communications which address issues of sexual orientation and biblical interpretation and application may now constitute violations of the *Criminal Code* of Canada.

- Communications may also violate provincial and/or federal human rights legislation.
- Other concerns in relation to website and publications include:
  - i) Libel;
  - ii) Breach of Copyright;
  - iii) Plagiarism;
  - iv) Breach of trademark;
  - v) Breach of privacy rights;

3. What Can Charities Do?

- Perform regular audits to determine:
  - i) What is being published?
  - ii) Who is publishing it?
  - iii) What contracts are in place to deal with authors and intellectual property rights?
  - iv) How current are the publications and what are done with out of date publications?
  - v) Has appropriate credit been given to authors, photographers and website designers?
  - vi) Are there restrictions on links to your website?
  - vii) Are there restrictions on who can post materials on your website?
  - viii) What personal information is provided on your website and do you have authority to post such information?
  - ix) Does any of the information posted on the website violate criminal legislation, human rights legislation, constitute libel?
- Appoint one person or a group of persons to control access to and posting on your website;
- Create a policy respecting use of the website;
- Create appropriate policies for your website, including rules regarding linking;
- Create a discipline policy regarding abuse of website privileges.

D. HUMAN RIGHTS IN THE WORKPLACE

1. Charities are Subject to Human Rights Legislation

- Human rights legislation exists at both the federal and provincial level.
- Activities over the internet are governed by the federal human rights legislation.
- Generally the provincial human rights regime in place in the province or provinces in which a charity carries out its activities will govern the conduct of the charity.

- In Ontario the primary human rights protections are found in Part 1 of the *Human Rights Code*, R.S.O. 1990, c.H.19.
- In relation to employment s.5 of the *Human Rights Code* provides:

> 5(1) Every person has a right to equal treatment with respect to employment without discrimination because of race, ancestry, place of origin, colour, ethnic origin, citizenship, creed, sex, sexual orientation, age, record of offences, marital status, same-sex partnership status, family status o rdisability.
>
> 5(2) Every person who is an employee has a right to freedom from harassment in the workplace by the employer or agent of the employer or by another employee because of race, ancestry, place of origin, colour, ethnic origin, citizenship, creed, age, record of offences, marital status, same-sex partnership status, family status ordisability.

- Charities may wish to have individuals working for them who share common religious or cultural values, or who are members of an identifiable group, such as a particular racial group
- There is a limited right to discriminate provided to charities under s. 24(1) of the *Human Rights Code*, which provides in employment:

> s.24(1) The right under section 5 to equal treatment, with respect to employment is not infringed where:
>
> (a) a religious, philanthropic, educational, fraternal or social institution or organization that is primarily engaged in serving the interests of persons identified by their race, ancestry, place of origin, colour, ethnic origin, creed, sex, age, marital status, same-sex partnership status or disability employs only, or gives preference in employment to, persons similarly identified if the qualification is a reasonable and bona fide qualification because of the nature of the employment.

- In order to fall under this exemption, the charity must be able to establish:

  i) that the employment relates to providing services to persons of a similar race, etc.;

  ii) or that the qualification which will give rise to the discrimination is a reasonable and *bona fide* qualification because of the nature of the employment itself.

a) Some Examples Where the Exemption Would Apply:

- A particular religious denomination only hires priests ordained in their specific faith;
- A racial or cultural society or group only hires employees of the same race or cultural background;
- A non-governmental organization which is based in a specific religious faith or worldview only hires an executive director who shares that worldview;
- A same-sex political advocacy group hires employees who are of that sexual orientation

b) Some Examples Where it Would Not Likely be *Bona Fide*:

- A church attempts to ensure that the grounds maintenance employees or janitors share in the faith of the church;
- A church only hires persons of the same faith to work in office administration (questionable);
- A non-governmental organization attempts to restrict employment to individuals of a particular faith where there is no faith base to the activities of the organization.

c) What Can Charities Do?

- Determine if there is even a need for a hiring preference--identify the particular characteristics of the employment which would require such a preference;
- Establish written hiring policies which outline the needs of the charities and which give rise to the preference;
- Establish human rights policies, including anti-discrimination policies, sexual harassment in the workplace policies, religious accommodation policies, etc.;
- Post written policies and make employees and management aware of them.

E. RELIGIOUS ACCOMMODATION IN THE WORKPLACE:

- As noted above, s 5(2) of the *Human Rights Code* prohibits discrimination in employment based on creed.
- Religious needs of employees must be accommodated to the point of undue hardship.
- In *Central Alberta Dairy Products v. Alberta*, [1990] 2. S.C.R. 489 some examples of what constitutes undue hardship were:
  - i) Financial costs;
  - ii) Disruption of a collective agreement;
  - iii) Problems of morale of other employees;
  - iv) Size of charity's operation might affect undue hardship considerations;
  - v) Where safety is at issue both the magnitude of the risk and the identity of those who bear it are relevant considerations.
- In *Richmond v. Canada (Attorney General)*, [1997] 2 F.C. 946 (leave to appeal to the Supreme Court of Canada dismissed) the court held that:

> "Under the doctrine of reasonable accommodation and undue hardship, an employer must demonstrate that real efforts have been made, short of "undue hardship", so as to eliminate adverse effect discrimination suffered by its employees." (at para. 1 of summary on QL)

1. Accommodation Might Require and Include:

- Flexibility in allocating shifts to provide religious holidays;
- Allowing people prayer times during the workday;
- Providing an area of the work environment for prayer;
- Allowing employees to wear ceremonial religious costumes, headdress and artifacts.

a) What Can Charities Do?

- Create a written religious accommodation policy which requires that employees ask for accommodation, and, if requested, provide evidence from a cleric or religious official that the requested accommodation is necessary;
- Educate employees and staff regarding religious accommodation and tolerance;
- Keep written records of all requests and steps taken to accommodate.

F. USE OF FACILITIES

- For churches, allowing outside parties to use church facilities is often seen as a way to generate much needed financial resources, as well as a way to outreach to potential members.
- Such usage poses a number of concerns:
  - i) Significantly increased liability for injury to third parties;
  - ii) Insurance concerns regarding coverage and/or increased insurance premiums;
  - iii) Concerns over misuse and damage or destruction to charitable property;
  - iv) Use of property for purposes which may be considered morally inappropriate;
  - v) Concerns over social host liability, breach of *Criminal Code*.

a) What Can Churches Do?

- Obtain a copy of all leases and license agreements and have the same reviewed;
- Determine if all uses are covered by leases and/or license agreement, and where they are not, implement the same;
- Determine whether parties using property have insurance, its coverage, extent of coverage, and who is an insured;
- Obtain limitations of liability, releases and indemnifications from parties using property;
- Determine whether third party use is part of a joint venture with church, and if it is, determine extent of risk, how intellectual property is being used, and whether there is insurance coverage;

- Determine how use by third parties affects insurance of church, and ensure that there is sufficient insurance;
- Establish property use policies and leases and license agreements which are beneficial to the church and which require the user to comply with the requirements of the church with respect to how the property will be used.

G. GENERAL RECOMMENDATIONS TO ADDRESS OPERATIONAL RISK MANAGEMENT

- Empower individuals or committees to address operational risk management issues;
- Ensure that the board of directors receives regular reports regarding risks;
- Complete a thorough and honest audit or analysis of the various operational risks faced—eg. if carrying out daycare issues, the organization should recognize the risks of abuse, abduction and breach of trust;
- Implement policies, protocols and where the risk is too dangerous, cease the activity;
- Have insurance policies either put in place, or if already in place, reviewed to ensure that there is sufficient insurance and that it covers the risks;
- Request regular updates from insurers respecting coverage, and confirmation from insurers that all risks covered if possible;
- Carry out a review of all legal agreements entered into with third parties, including leases, licenses, joint venture agreements, and ensure that the risks inherent are identified, and allocated in the agreements—where possible, obtain waivers, limitations of liability, assumptions of risk, and indemnifications;
- Ensure that third parties that are contracted with have insurance in a sufficient amount and of a kind that will address the risks;
- Educate staff and volunteers respecting risks and steps to avoid risks;
- Implement discipline policies;
- Investigate and keep meticulous records of occurrences;
- Address occurrences through appropriate channels such as reporting sexual abuse of minors to the Children's Aid Society.

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