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Legal Risk Management for Sports Organizations in BC



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Please Note

- The contents of this presentation are provided as general information only and should not be relied on in place of legal advice.
- If you have a legal question or problem, you should seek specific advice from a lawyer.



Introduction

Objectives

- Identify and discuss the main sources of legal risk for non-profits
- Identify and briefly discuss some key risk mitigation measures
- Address specific questions you may have about legal risk in the context of your organization

We will not cover

- All sources of legal risk for non-profits
- Other types of risk (such as financial or reputational risk)
- Broad-based risk management strategies or frameworks

*“This report, by its very length, defends itself against the **risk** of being read.”*

- Winston Churchill



Agenda

- Discuss three general categories of legal risk:
 - Governance Risks
 - Operational Risks
 - Asset-Related Risks
- Exercise
- Discussion and Questions
- Concluding remarks



Key Sources of Legal Risk

Governance Risks

- Legal Structure
- Documents
- Tax Status
- Director Duties
- Member Relations

Operational Risks

- Tort Liability
- Human Resources
- Privacy

Asset-Related Risks

- Real Property
- Intellectual Property



Governance Risks **Legal Structure**

- Legal structure plays a role in determining the categories, levels and sources of risk a not-for-profit organization may face
 - the wrong structure could expose your organization to unnecessary risk
- Alternately, legal structure can be viewed as a tool for risk management as opposed to a source of risk
- Options:
 - Corporation without share capital
 - Unincorporated association
 - Trust



Governance Risks **Incorporation**

- Incorporation creates a separate legal person
 - corporation has all the rights and powers of a natural person
 - can sue and be sued
 - can own property
 - can contract
 - limited liability
 - members not personally responsible for debts and obligations of organization



Governance Risks **Incorporation**

- Business corporations created to run a business and generate profit
 - shareholders own shares, elect directors
- Non-share capital corporations created for purposes other than profit
 - Incorporated under *BC Society Act, Canada Corporations Act* or new *Canada Not-for-Profit Corporations Act*



Governance Risks

Non-share capital corporations

- Main differences with business corporation:
 - purpose other than profit
 - social, environmental, recreational, religious, artistic, patriotic, benevolent, charitable, etc.
 - members, not shareholders
 - no shares (non-share capital corporation)
 - not “owned” by shareholders, but controlled by members
 - governed by constitution and bylaws
- separate legal person
 - rights of a natural person
 - limited liability for members



Governance Risks

Risks for Unincorporated Organizations

- Unincorporated organization is not a separate legal entity
 - has no legal status apart from its members
 - cannot enter into contracts, acquire assets, acquire rights, or sue / be sued in its own name
 - Members and directors are not shielded from personal liability via the “corporate veil”
- Existence is not perpetual



Governance Risks **Incorporated Structures**

- Other uses for incorporation
 - side by side organizations
 - asset protection
 - separate activities to limit liability / insurance needs
 - create parallel charitable foundation



Governance Risks

Legal Structure: Risk Management

- 1 If unincorporated, consider whether incorporating is appropriate or necessary for your organization
- 2 Consider utilizing multiple corporations for high risk activities in order to reduce liability exposure and protect your assets
- 3 If relevant, consider establishing separate legal entities for fundraising versus operations
- 4 Consider implementing effective indirect control of certain activities through contracts and / or licensing agreements as an alternative to overt corporate control



Governance Risks

Documents: Constitution and Bylaws

- Not-for-profits guided primarily by their constitution and bylaws, or “constating documents”
 - Constitution sets out: name, purposes (objects), restriction on member benefit and dissolution clause
 - only conduct activities/spend funds that advance objects in constitution
 - Bylaws are the primary governance document
 - required to contain certain provisions



Governance Risks

Documents: Risks - Ambiguity

- Ambiguity and poor drafting is the primary source of legal risk for constating documents
 - unclear provisions in constating documents may lead to challenge of actions or decisions by members and/or third parties
 - dissolution clause narrow or outdated
 - bylaw provisions re members
 - board composition, election, term
 - meetings, quorum, proxy voting



Governance Risks

Documents: Risk – Lack of Compliance

- If your constating documents do not permit a certain type of activity, the organization might be acting outside its legal capacity and could face liability
 - Note section 32 of the *Society Act*: “The funds and property of a society must be used and dealt with only for its purposes in accordance with its bylaws”
- A non-profit and its directors could face repercussions if decisions are not made in accordance with its bylaws
 - bylaws compared to a contract between organization and members
 - e.g. meeting without quorum, improper resolution, faulty election



Governance Risks **Documents: Best Practices**

- Regularly review and self-audit compliance
 - review by the entire board and senior staff once/year
 - re-orient, re-familiarize and re-engage board
 - adjust practice to match constating documents or amend constating documents (to the extent permissible) to match practice
- poor document management and record keeping may result in late filings and otherwise lead to a breach of statutory obligations
 - e.g. filing of special resolutions with registrar



Governance Risks

Documents: Risk – Poor Management

-
- Other key documents carry certain legal requirements:
 - minutes of meetings: necessary to properly document decisions
 - resolutions: different thresholds for passing
 - registers of directors and members: required to keep and update regularly
 - regulatory filings, annual reports, accounting records, financial statements
 - poor document management and record keeping may lead to a breach of statutory obligations:
 - late filing, dissolution
 - filing of special resolutions with registrar



Governance Risks

Documents: Risk – Poor Management

- How long do you keep documents?
 - minutes of meetings, resolutions, annual reports, registers, filings
 - **FOR AS LONG AS THE ORGANIZATION EXISTS + 10 YEARS**
 - accounting records, financial statements, agreements, other documents
 - **7 – 10 YEARS AFTER EXPIRY**



Governance Risks

Documents: Risk – Best Practices

- Every organization should have a minute book which includes:
 - constating documents
 - resolutions and minutes
 - registers of directors and members
 - regulatory filings, annual reports
- Larger organizations need to develop and maintain a policy and procedures manual
 - privacy policy, benefits policy, harassment policy
 - internal policies specific to organization's needs



Governance Risks

Documents: Risk Management

- 1 Develop and maintain an inventory of key documents
- 2 Review constating documents annually to ensure that:
 - board is familiar with important documents
 - organization is operating for the objects stated in constitution and in compliance with its bylaws
 - constating documents accurately reflect how the organization is structured and operated
 - amend if necessary (and if permitted)
- 3 Ensure records are properly maintained and the necessary corporate filings and registrations are kept up to date



Governance Risks **Tax Status**

- Just because an organization is incorporated as a not-for-profit under legislation does not mean it is tax-exempt
- Tax status is a federal matter, determined under the Income Tax Act and regulated by CRA
- Organizations that are unaware of the distinction may operate in a way which jeopardizes the organization's tax-exempt status



Governance Risks **Tax Status**

- PSOs generally cannot qualify as charities
- But may qualify as non-profit organizations under the *Income Tax Act*
 - both charities and NPOs are tax exempt
 - but charities can issue tax-receipts; NPOs cannot
- NPOs can lose tax exempt status if they operate “for a profit”
 - cannot intend to make more than you anticipate spending



Governance Risks

Tax Status: Risk Management

- 1 Clarify and confirm tax status under *Income Tax Act*
- 2 Ensure that you are not operating for a profit
 - fees charged cover realistic cost of operating
 - no margin built in to contract
 - reserves do not exceed realistic needs
- 3 Ensure fundraising practices comply with guidelines for your organization



Governance Risks Director Duties

- Directors are bound by specific legal duties by statute and at common law
- A “director” includes “a trustee, officer, member of an executive committee and a person occupying any such position by whatever name” (per the *BC Society Act*)
- **Fiduciary duty:** must “act honestly and in good faith and in the best interests of the society”
- **Duty of care:** “must exercise the care, diligence and skill of a reasonably prudent person”
- **Duty of Obedience:** must act within the scope of constating documents and other rules and regulations that apply to the organization
- Other statutory duties (e.g., under employment and tax legislation)



Governance Risks

Director Duties: Risks

- Directors who breach a legal duty may face legal action against themselves personally by members / third parties
- Example: director has conflict of interest but still participates in decision-making (breach of fiduciary duty)
- Example: board makes a quick, poorly informed decision that causes a loss to the non-profit (breach of duty of care)
 - But: errors in business judgment do not automatically = liability
 - The expected standard of care is based on the specific individual's background



Governance Risks

Director Duties: Risk Management

See Handout 1: Checklist for Directors

- 1 Educate your directors on their legal duties
 - Codes of conduct can be useful policy documents to articulate legal expectations
 - New directors should receive an orientation to the organization and its important documents and rules (constitution bylaws, policies) by the existing board.
- 2 Ensure decisions are made in an informed, prudent manner as would be expected of a person with similar knowledge and experience – document decision-making with properly kept minutes and resolutions
 - Perfection not required
 - Monitor and review operations on an ongoing basis; attend meetings regularly; engage in full and frank discussion; demonstrate thorough understanding of issues and materials



Governance Risks

Director Duties: Risk Management (cont'd)

- 3 Ensure decisions are being made for best interest of the organization
 - Implement a conflict of interest & disclosure policy – define what conflict of interest is
 - Directors with conflicting interests should make disclosure and withdraw from voting
- 4 Consider indemnifying and insuring your directors (“directors’ and officers’ liability insurance”) – seek advice from legal & insurance professionals
 - Bylaws must provide for the power to indemnify your directors
- 5 Ensure individuals are authorized to enter into contracts as signing officers on behalf of the organization and are identified as such (and not in their individual capacity)
- 6 Consider using committees as an alternative to a large board



Governance Risks **Member Relations**

- Canadian courts view the relationship between an incorporated non-profit and its member as contractual, with the bylaws forming the “terms” of the contract
- Members have rights (and obligations) that flow from membership
 - Beyond the constitution and bylaws, these can arise from the common law and legislation
- Substantive rights include those related to voting and access to information
- Procedural rights or “Natural Justice” arise in the context of a dispute and include the right to receive notice and be heard by an unbiased decision maker
- Internal governance procedures set out in legislation and constating documents must be followed as a matter of law



Governance Risks

Member Relations: Risks

- Most societies will go through a period of internal discord at some point – legal risks arise when the bylaws are ignored or are unclear
- Courts may intervene where a member's rights have been violated: expensive, bad for reputation, divisive and distracting
- A refusal to admit someone as a member may well be addressed by the courts if the reason for doing so is a potential violation of human rights legislation
- So long as decisions that may affect members are adopted in good faith and in accordance with the rules, courts generally will not interfere with a non-profit's internal affairs



Governance Risks

Member Relations: Risk Management

- 1 Understand and comply with your constitution, bylaws, and applicable legislation
- 2 Avoid disputes by implementing protocols for review and reporting to members on the work and health of the organization
- 3 Good housekeeping will help contain disputes
 - Members' rights and obligations clearly set out; bylaw amendments filed immediately; membership lists kept accurate; etc.
- 4 Ensure there are fair and transparent processes for dealing with disputes with (and between) members
- 5 Consider specifying in advance non-litigious processes to resolve internal disputes (e.g. mediation / arbitration, public-inquiry type committees, etc.)
- 6 The Board should have a long-term vision and philosophy of governance: abrupt changes to either can seed discord



Key Sources of Legal Risk

Governance Risks

- Legal Structure
- Documents
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Operational Risks

- Tort Liability
- Human Resources
- Privacy

Asset-Related Risks

- Real Property
- Intellectual Property



Operational Risks **Tort Liability**

- Torts: “private wrongs”; typical remedy is damages
 - *Intentional torts*: liability for intentionally inflicting harm on another (e.g., battery)
 - *Negligence*: liability for failing to take reasonable care to prevent foreseeable harm to another
- Requirements for negligence:
 1. Plaintiff owed defendant a duty of care
 - Many established categories, including coach-athlete
 2. Defendant breached the standard of care expected of them
 - That expected of a reasonable person in similar circumstances
 - Special standards (coaches = standard of a “reasonably careful parent”)
 3. The Defendant’s breach caused harm or loss to the plaintiff



Operational Risks

Tort Liability: Risks

- Non-profits can be held *vicariously liable* for the acts of their employees / volunteers even if the organization and board itself did not act negligently
 - The Supreme Court of Canada has held that the mere fact that an organization works through volunteers does not diminish responsibility for screening or supervision
- Test is complex, but key factors are:
 - Whether the relationship between the employer and employee is sufficiently close
 - Whether the wrongful act was sufficiently connected to the conduct authorized by the employer
- Note: individuals retained as independent contractors may be legally considered employees despite the intentions of the employer



Operational Risks

Tort Liability: Risk Management

- 1 Undertake all reasonable measures to reduce the risk of your operations
 - Exercise reasonable care in hiring and training staff / volunteers, implement safety policies, invest in safety equipment, etc.
 - Monitor staff and volunteers, particularly when they are in a position of authority over others
- 2 Administer effective liability shields in the form of informed consents, disclaimers, releases, waivers and indemnities
- 3 Ensure that your legal structure is such that, in the event a tort claim is brought, liabilities can be contained
- 4 Ensure adequacy of insurance coverage (e.g., make full written disclosure each year of all risks to your insurer to avoid denial of coverage; request regular written reports on existing coverage and recommendations to enhance coverage; etc.)



Operational Risks **Human Resources**

- Employment legislation (*BC Employment Standards Act*)
 - Establishes min. standards for employment in BC (hours, holidays, hiring and termination processes, agreements, etc.)
 - “Employee” also includes “a person an employer allows, directly or indirectly, to perform work normally performed by an employee”: may capture some volunteer relationships
- Human rights legislation (*BC Human Rights Code*)
 - Prohibits employment discrimination on certain grounds (e.g. race, sexual orientation, disability). Applies to volunteers.
 - Exceptions: “*bona fide* occupational requirements” & s.41 (non-profits can preference employing members of an identifiable group whose interests the organization seeks to promote)
- Workplace health & safety legislation: must take every reasonable precaution to maintain a healthy & safe workplace



Operational Risks

Human Resources: Risks

- Directors / officers can be held personally liable for certain breaches
 - *Employment Standards Act* – liable for unpaid wages
 - *Income Tax Act* – liable for failing to withhold / remit employee taxes
 - Charges can be laid for failing to implement basic safety precautions
- Mistaken understanding of relationship with individual providing services
 - A person the non-profit considers a volunteer or independent contractor might be considered an employee under the law
 - If a court later finds relationship was in the nature of employment, the organization could be found liable for not complying with relevant laws
- Funding uncertainty: cancellation or reduction of funding not an acceptable “cause” for termination (must still meet *ESA* requirements)
- Liability for failing to appropriately screen paid staff and volunteers (especially those working with vulnerable individuals)



Operational Risks

Human Resources: Risk Management

- 1 Ensure directors / officers are aware of, and are complying with, applicable statutory requirements (key tools: policies and education)
 - Recruit staff and volunteers openly, fairly and systematically
 - Take every reasonable precaution to ensure safety of employees and volunteers (e.g. training, health & safety protocols)
- 2 Accurately classify relationships. Documentation should support the classification and make the rights and obligations of all parties clear
- 3 Carefully screen applicants when necessary. If a valid criminal record check is legitimately required, make this an explicit condition of employment / volunteering
- 4 Where funding is uncertain, consider fixed term employment contracts with specific provisions related to funding uncertainty



Operational Risks **Privacy**

- Growing pressure to justify collecting and to protect personal information
- BC's *Personal Information Protection Act* (PIPA): regulates collection, use and disclosure of personal info by private sector, including non-profits
- Requires consent to collect, use or disclose personal information
 - Includes “any information about an identifiable individual”, such as employee personal information; applies to volunteers
 - Excludes publicly available contact information
 - Some exceptions to consent requirement, but notice is still necessary
- Non-profits are responsible for personal information under their control
 - Must develop policies and practices to meet obligations under PIPA
 - Must designate point person to ensure compliance
- Use of info restricted to purpose for which it was collected
- Criminal record checks: must have legitimate purpose for requiring, and generally must have consent (some exceptions)



Operational Risks **Privacy: Risks**

- Breach can trigger complaint to Privacy Commissioner, who may then conduct a review
- Commissioner could:
 - Make certain orders regarding access to and use of the information
 - Require an organization to stop collecting, using or disclosing personal information / destroy
- Affected individuals can sue the organization if they suffered actual harm as a result of the breach
- Certain “extreme” breaches constitute an offence (e.g., if the organization disposes of personal information with an intent to evade a request for access)
- Be wary of selling, exchanging or otherwise distributing member and donor lists



Operational Risks

Privacy: Risk Management

- 1 Evaluate your collection and treatment of personal information
 - Is it necessary?
 - Is it secure?
 - Is consent required?
- 2 Ensure that a privacy protocol is in place that complies with PIPA
 - When drafting / reviewing your protocol, a good standard to keep in mind is CSA's *Model Code for the Protection of Personal Information*
- 3 Where uncertain, obtain consent to collect / disclose personal information



Key Sources of Legal Risk

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Asset-Related Risks

- Real Property
- Intellectual Property



Asset-Related Risks

Real Property: Issues / Risks

- Non-profits that own real property face several sources of legal risk:
 - Potential liability exposure when permitting third parties to use property (see *BC Occupiers' Liability Act*)
 - Environmental liability
 - Non-compliance with municipal zoning and bylaws
- Non-profits that lease property should also be aware of several legal considerations, including, for example:
 - Whether the lease includes personal guarantees or indemnities?
 - Whether provision has been made for re-negotiating and assigning the lease?
 - Whether the lease includes a clause requiring restoration of leased premises?
 - Note: tenants are also typically exposed to occupiers' liability



Asset-Related Risks

Real Property: Risk Management

- 1 Ensure directors and staff are aware of the potential liability exposure when permitting third parties to use your property
 - Implement a facility use policy and facility use agreement with appropriate releases, indemnification, and evidence of liability insurance
- 2 Owners:
 - Review municipal property tax assessments; ensure municipal zoning and legal non-conforming uses are being complied with
 - Address and rectify encroachments on neighboring lands, encumbrances on your own title, etc.
 - In relevant, ensure an environmental assessment been conducted to determine the extent of possible liability exposure for the organization
- 3 Tenants: Review lease to ensure it meets the organization's needs – note and address potential areas of uncertainty and risk



Asset-Related Risks

Intellectual Property: Issues / Risks

- Branding and identity may be critical to growing membership, achieving organizational objectives, and raising funds
- IP can be a valuable asset. Registrable forms include:
 - Trade-marks - words & symbols (names, slogans, logos, etc.) that distinguish an organization or its products or services
 - Copyright - literary, artistic, dramatic or musical works
 - Other - patents, industrial designs, trade secrets, domain names (?)
- Risk: liability for infringing on other's IP
- Risk: loosing your own IP by not adequately protecting it
 - Common law rights to trade-marks and copyright may be lost if someone else registers them
 - IP created by an employee belongs to the organization – generally not so if created by independent contractor or volunteer



Asset-Related Risks

Intellectual Property: Risk Management

- 1 Inventory potential IP assets
- 2 Consider registering trade-marks / copyright
 - Expensive, so prioritize based on organizational value
- 3 Use appropriate markings (™, ®, etc.) as applicable
- 4 Require third parties using IP to enter into a licensing agreement
- 5 Identify IP owned by others you may be using and seek permission in writing
 - Note: if you want to show the public that a business is supportive of a campaign by using their logo, obtain permission in writing with scope, duration and any restrictions spelled out (common for sponsorship agreements to include such details)

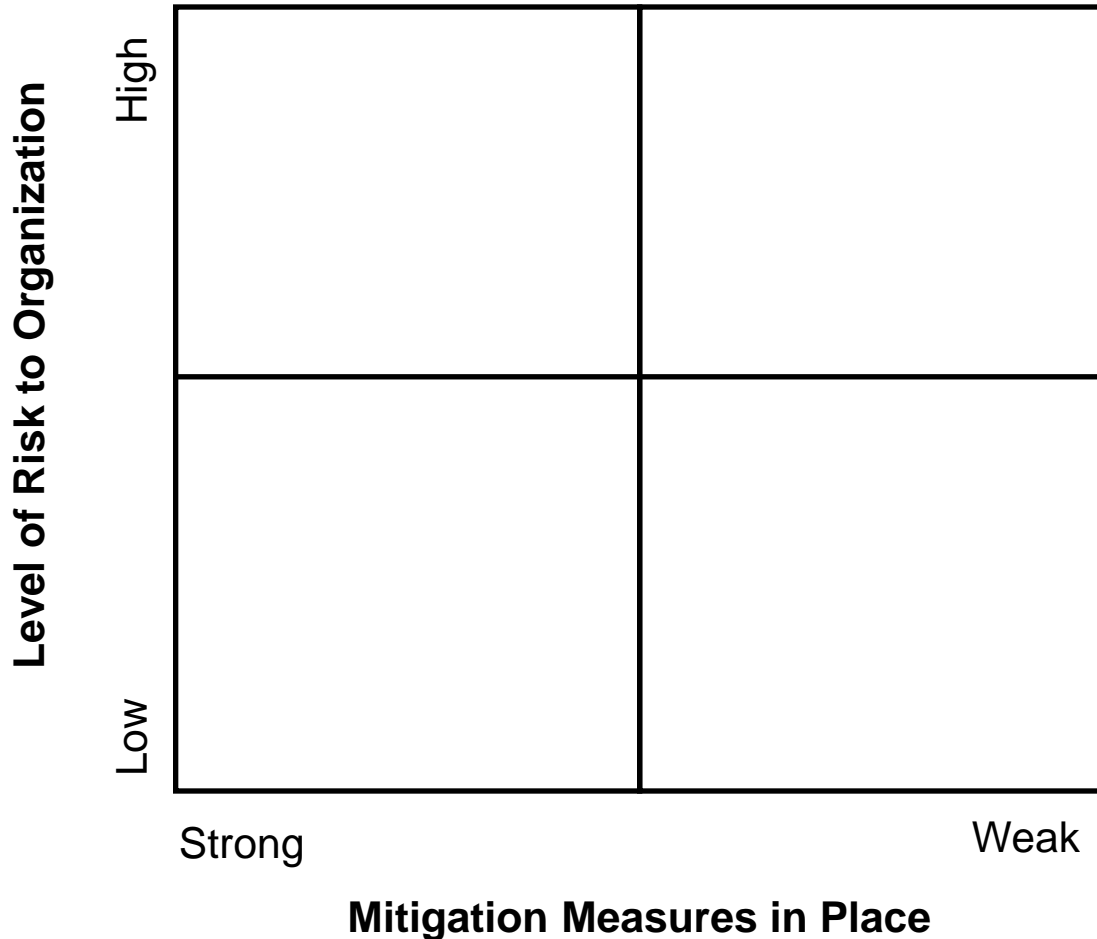


Exercise

- **Individually (10 minutes):**
 - Using the “Legal Risk Matrix” provided, classify as best you can the legal risks you perceive your organization to face
- **In Groups of 3 to 5 (10 minutes):**
 - Share your results and discuss
 - What types of risk were people most / least concerned with?
 - How do you plan to address them?



Legal Risk Matrix



Sources of Legal Risk

1. Legal Structure
2. Documents
3. Tax Status
4. Director Duties
5. Member Relations
6. Tort Liability
7. Human Resources
8. Privacy
9. Real Property
10. Intellectual Property



Group Discussion

Discussion
Final Questions?
Comments?



In Closing...

- Non-profits carry as much potential liability as any organization; lack of understanding and poor planning only increase the potential risk
- Awareness, planning and education are your first and best lines of defense
 - Consider establishing a Legal Risk Management Committee to review assets, legal structure, legal relationships, key documents and activity-related legal risks
 - Develop risk management policy statements (e.g., for volunteer conduct and recruitment, privacy, safety in the workplace, director conduct, etc.)
 - can be very time intensive, so prioritize based on your exposure
- Though not a panacea for risk, use indemnities and waivers to shift or limit liability as best you can
- Insurance is a last line of defense, not risk mitigation strategy
- Seek a legal opinion when uncertain or making important decisions



Thank you!

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