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FEDERAL COURT OF APPEAL ALLOWS CRA TO WITHDRAW COMPLIANCE AGREEMENT

*By Terrance S. Carter**

A. INTRODUCTION

In the recent case of *Christ Apostolic Church of God Mission International v. Canada (Minister of National Revenue)*[1] ("*Christ Apostolic Church*"), the Federal Court of Appeal decided that the Canada Revenue Agency ("CRA") could withdraw a compliance agreement it had made with Christ Apostolic Church of God Mission International, in the course of an audit of its charitable status. As a result, the Court upheld CRA's decision to issue a notice of intention to revoke the church's charitable registration.

This *Charity Law Bulletin* provides a general background on the use of compliance agreements between CRA and registered charities, and comments on the Court's decision to refuse to uphold the agreement in this particular case.

B. COMPLIANCE AGREEMENTS BETWEEN CRA AND CHARITIES

Generally, compliance agreements are agreements that are negotiated between CRA and registered charities due to the charities' failure to comply with their requirements under the *Income Tax Act* (Canada).[2] Typically, a deficiency is identified as a result of a CRA audit, and a compliance agreement provides the charity with a chance to address and correct such non-compliance. The availability and use of compliance

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[1] 2009 FCA 162.

[2] R.S.C. 1985, c. 1 (5th Supp.).

agreements as an "intermediate" sanction is set out in CRA's *Guidelines for applying the new sanctions* (the "Guidelines").[3] The Guidelines describe compliance agreements and the applicable procedures as follows:

> Such an agreement is reached through discussion with and agreement from the charity. The terms of the agreement are spelled out in a formal document called a compliance agreement that is signed by both the charity and the CRA. The agreement identifies the problems, the steps the charity will take to bring itself into compliance, and the potential consequences to the charity of not abiding by the agreement.
> …
> The decision… is made by individual auditors across the CRA. The auditor may discuss the matter with staff in the Charities Directorate and their subsequent decision requires the approval of their immediate supervisors. Auditors will then contact the charity to negotiate a compliance agreement…[4]

The compliance agreement is one of several tools that may be used by CRA to address non-compliance. Listed in terms of progressive severity, they are: (1) education; (2) compliance agreement, (3) sanction (e.g. financial penalty or suspension); and (4) revocation. The Guidelines specify that CRA may choose the type of tool that is appropriate for the seriousness of the non-compliance, and therefore, there is no general principle that CRA must address non-compliance in a progressive or gradual fashion. However, the Guidelines do state that "[i]t is [CRA's] goal, in cases where the non-compliance is less severe, to work with charities through a compliance agreement as a first measure."[5]

While there is no rule in the Guidelines that CRA cannot change from one method to another, there is also no indication in the Guidelines that compliance agreements, as duly negotiated and signed by both parties, should not be binding. This was the issue that the Federal Court of Appeal had to decide in *Christ Apostolic Church*.

C. THE DECISION

The Court's reasons for judgment are only four paragraphs long and the entire decision has been reproduced below for ease of reference:

> This is an appeal pursuant to section 172 of the *Income Tax Act*, R.S.C. 1985, c. 1 (5th Supp.), of the decision of the Minister of National Revenue to issue a notice of

[3] Canada Revenue Agency, *Guidelines for applying the new sanctions*, online: http://www.cra-arc.gc.ca/tx/chrts/plcy/nwsnctns-eng.html.
[4] *Ibid.*
[5] *Ibid.*

> intention to revoke the registration of the appellant church as a charitable organization. Having reviewed the record and heard counsel for the appellant, we have not been persuaded that there is any basis for reversing the Minister's decision.
>
> The appellant's principal argument is that the "compliance agreement" it signed during the course of the audit at the request of the auditor could not be unilaterally withdrawn by the Minister. We see no merit in this argument. The compliance agreement was subject to review by the Minister after considering the results of the audit. It was open to the Minister, after reviewing the audit report, to conclude that the appellant's non-compliance was so substantial that it could not be remedied by the promises made by the appellant in the compliance agreement.
>
> The appellant also argues that the Minister failed to observe the requirements of natural justice and procedural fairness in deciding to revoke the appellant's registration as a charity without first giving it the chance to argue that the compliance agreement should have been a sufficient sanction. However, the record discloses that during the objection process, the appellant could have made submissions to that effect but failed to do so. That failure cannot be attributed to any procedural failure on the part of the Minister.
>
> For these reasons, the appeal will be dismissed with costs.[6]

D. COMMENTARY

The Court's decision now provides CRA with authority to change a particular sanction from a compliance agreement, which has been signed by both CRA and a registered charity, directly to the revocation of charitable status if it so chooses. More specifically, the decision indicates that a compliance agreement can be unilaterally withdrawn by CRA and, therefore, is obviously not binding on CRA.

As a matter of procedure, the decision indicates that the compliance agreement was subject to review by the Minister after considering the audit results. This procedural step of reviewing a compliance agreement is not stated in the Guidelines, and it is unclear whether it was a condition of the compliance agreement itself that the finality of the agreement was subject to review.

Although the decision does not reveal much about the particular facts of the case, the Court does indicate that the compliance agreement was signed "during the course of the audit."[7] As such, it is not entirely clear at what point the compliance agreement was signed. This creates questions regarding the procedure used by

[6] *Christ Apostolic Church*, *supra* note 1 at paras. 1-4.
[7] *Ibid*. at para. 2.

CRA in this particular case. If the compliance agreement was made *before* the audit was complete, it is conceivable that the final results of an audit might have revealed that, using the Court's words, the "non-compliance was so substantial that it could not be remedied by the promises made… in the compliance agreement."[8] However, if this were true, it may have meant that CRA entered into a compliance agreement prematurely without having a full understanding of the nature of the charity's non-compliance. On the other hand, if the compliance agreement was signed *after* the audit was complete, but was then subject to review by the Minister, it would mean that there would never be finality associated with signing a compliance agreement, although the passage of time would presumably diminish the possibility that CRA would withdraw the compliance agreement.

The Court's decision in *Christ Apostolic Church* creates a considerable amount of uncertainty for registered charities that are presented with the option of entering into a compliance agreement with CRA. Notwithstanding the possibly unique facts of this case, charities need to be aware that CRA may now withdraw a compliance agreement and use other types of sanctions, including revocation. The sanction process that was introduced by the 2004 Federal budget, though, should not be creating this level of instability for charities. As such, CRA should issue an update to its Guidelines to clarify its position, concerning under what circumstances CRA will reserve the right to withdraw a compliance agreement.

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[8] *Ibid*.

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