
**CHARITY COMMISSION OF ENGLAND AND
WALES 2008-2009 REPORT ON COMPLIANCE**

*By Terrance S. Carter**

A. INTRODUCTION

In October, 2009 the Charity Commission of England and Wales (“the Commission”), published what is intended to be an annual report concerning compliance in the charitable sector entitled *Charities Back on Track: Themes and Lessons from the Charity Commissions Compliance Work* (“the Report”).¹ The Report provides statistical information, as well as case studies in an effort to educate trustees of charities in England and Wales in fulfilling their legal duties in protecting their charitable assets. Unlike the Canada Revenue Agency’s Charities Directorate (“CRA”), the Commission wears the hat of being both regulator and enabler for charities in the charitable sector. In this regard, the Commission has been equipped with updated legislative authority through the *Charities Act, 2006*, which provides the Commission with the ability to identify and investigate apparent misconduct or mismanagement in the administration of charities.

Although there are obvious differences in the extent of jurisdiction over charities between England/Wales and Canada, there is much that Canadian charities can learn from the findings of the Report, particularly from reviewing the case studies discussed in the Report. To this end, this bulletin provides a summary of key highlights from the Report that will be of general interest to Canadian charities.

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¹ Charity Commission, “Charities Back on Track: Themes and Lessons from the Charity Commission’s Compliance Work” (October 2009) online: <http://www.charitycommission.gov.uk/Library/investigations/pdfs/track09.pdf>

B. SUMMARY OF THE REPORT

1. The Commissions' Approach to Compliance

The Report stresses that the Commission's priority should be to put charities back on track in meeting their legal requirements, using remedial and protective action in a proportional manner. The Commission works to both detect and prevent abuse of charities in order to create an environment where the public has trust and confidence in the activities of charities. The majority of cases the Commission investigates are dealt with through non-statutory investigations where the Commission does not need to exercise its powers but rather provides regulatory advice and guidance to the trustees of charities. In more rare circumstances, the Commission conducts a statutory investigation under the U.K *Charities Act*, 1993², the results of which are published in a Statement of Results and Inquiry when the case is concluded.

For boards of Canadian charities, it is useful to note that the Report indicates that the most serious issues facing charities in England and Wales continue to be;

- Significant financial loss to the charity
- Serious harm to beneficiaries and, in particular, vulnerable beneficiaries
- National security concerns and terrorism
- Criminality and or illegal activity
- Sham charities, or tax shelters
- The deliberate use of charities for private benefit
- Issues that could damage the public reputation of the charity or public trust³

2. Summary of the Commissions Work for 2008-2009

One of the key themes that comes out of the Report is that poor financial management and reporting remain serious problems in the charitable sector in England and Wales. The Commission reports that it often finds a "lack of financial controls, inadequate accounting and record keeping and failures to submit accounts."⁴ In addition to financial mismanagement, the Report also notes that trustee and governance issues are a frequent problem as well. The Commission found that some trustees were not legally eligible to act as such, often due to conflicts of interest and had improper controls in place to

² Authority to conduct a statutory investigation is contained in s. 8 of the *Charities Act*, 1993. While the 2006 *Charities Act* updated and expanded on the powers of the Commission, it is still able to exercise its previous statutory powers.

³ *Supra.*, note 1 at p. 4 and 5.

⁴ *Ibid.*, at p. 6.

maintain oversight of the charity. Just as the directors of charities in Canada have a fiduciary duty to act in the best interest of the charity, so too do trustees of English charities have an obligation to “run it solely with the charity’s best interests at heart.”⁵

The Commission also found an increase in cases where vulnerable beneficiaries, like children, were not adequately safeguarded by charities. The Report highlights that procedures to ensure the protection of vulnerable beneficiaries must be in place and be “properly and consistently applied without exception.”⁶ As well, the problem of charities carrying out inappropriate political activities remains a compliance issue of concern. The Commission recognizes that a charity can undertake lawful campaigning and political activity, but that the independence of the charity cannot be compromised. The highlighting of key themes in the Report concludes with the reminder that, similar to Canada, it is “a fundamental principal of charity law that a charity, including its trading subsidiary, cannot make political donations or give other financial support, or support in kind, to a political party.”⁷

3. Case Studies and Information Relevant to other charities

The Report provides examples from statutory inquiries that the Commission has conducted in order to provide guidance for trustees in knowing what to avoid. Since generally the duties and responsibilities for charities in Canada are similar to those mandated under English charity law, the case studies in the Report are illustrative of the types of difficulties that directors in Canada could also find themselves in.

In terms of governance issues, the case studies demonstrate that discretion regarding how a charity’s assets are to be used cannot be delegated to another organization. Executing an agreement that fetters the discretion of the board will lead to a breach of fiduciary duty by the trustees in failing to comply with their responsibility to ensure assets are spent to support their charities purposes. Likewise, the Report indicates that trustees cannot defer to the opinions of a dominant trustee in making financial decisions. The Commission’s position when a dominant trustee effectively deprives the other trustees of their input into decision making is that it will constitute mismanagement of the charity.⁸

⁵ *Ibid.*, at p. 7.

⁶ *Ibid.*, at p. 15.

⁷ *Ibid.*, at p. 7.

⁸ *Ibid.*, at p. 13.

An effective complaints procedure is also a necessary accountability mechanism to ensure that the charity is managed effectively. The Report explains that part of a trustee's duty to manage the risks to their charity also includes risks to their beneficiaries, particularly if vulnerable young people are involved. The Commission also states that trustees failing, without a good reason, to address allegations of abuse will be considered to be a breach of their duty to the charity. Lastly, with respect to case studies involving the duties of trustees, the Report remarks that trustees must act at all times in compliance with the terms of their governing documents and the law, and therefore must stay aware of their legal requirements in order to exercise responsible decision making.

The case studies also deal with issues involving improper fundraising and political activities. The Report reminds trustees that organizations carrying out fundraising which claim to be registered charities but are not are in fact breaking the law.⁹ As a matter of comparison, a recent release by the Ontario Public Guardian and Trustee in July, 2009 on fundraising also highlights this same point for charities in Ontario.¹⁰

The Report goes on to indicate that charities that use a professional fundraiser must have a proper agreement in place, and are expected to tell potential donors that such fundraisers are paid and are authorized to answer questions regarding the fees paid to fundraisers.¹¹ In addition, the case studies in the Report illustrate that charities cannot directly promote government policy, or the policies of a political party for any advantage. The Commission does permit, however, the support of policies which will contribute to the delivery of a charity's purpose.¹²

Finally, the Report indicates that the Commission takes seriously any allegations of a link between a charity and terrorism. Trustees must have adequate safeguards and robust due diligence procedures in place to manage these risks. In a case study regarding Palestinians Relief and Development Fund, allegations arose whether or not the charity and its partners had promoted the ideology of Hamas, a designated terrorist organization by the European Union, the U.K and also Canada. The Commission found that the charity did not have adequate due diligence and monitoring procedures to satisfy

⁹ *Ibid.*, at p. 10.

¹⁰ For more information, see Terrance S. Carter in "Ontario Public Guardian and Trustee Provides Tips on Charitable Fundraising" in Charity Law Bulletin No. 176 (September 29, 2009) online: <http://www.carters.ca/pub/bulletin/charity/2009/chylb176.htm>

¹¹ *Supra.*, note 1 at p. 11.

¹² *Ibid.*, at p. 19.

themselves that their partners overseas were not directly or indirectly promoting terrorism. While the Commission does not wish to dissuade charities from carrying on humanitarian work overseas, it does expect the trustees to ensure that its facilities, employees and other resources are not, or do not appear to be, used to support terrorism.¹³

4. Other Developments

The Report goes on to review the Commissions policies, as well as new developments. In this regard, the Commission has taken a four strand approach to identifying and minimizing the risk of terrorist abuse of charities by promoting awareness, being more proactive in oversight, co-operating with the sector and other government regulators and intervening where necessary. The Commission is expected to publish in late 2009 a summary of feedback on it's guidance to charities to understand their obligations in relation to terrorism. The Commission reports that they have continued to strengthen their ties with other government agencies in England and Wales, but from their experience, the most effective way for charities to minimise their exposure is through "implementing robust governance arrangements, financial controls and risk management procedures and policies."

¹³ *Ibid.*, at p. 17.

C. CONCLUSION

The key priorities for the Commission for the 2009-2010 period are to continue to ensure that their work is effective and proportional to the outside observer, to improve the quality of the work of the Commission and to provide a high standard of service with everyone whom the Commission comes into contact with. Although the regulation of charities in England/Wales compared to Canada are different in many respects, Canadian charity law has its source in the English common law. As such, many of the common law concerns raised by the Commission are similar to those that arise in Canada, particularly with regard to the fiduciary duties of directors. Directors of Canadian charities and their legal advisors will therefore find the Report, particularly the instructive case studies contained within the Report, to be a useful reference tool.