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MISSION DRIFT AND CORPORATE OBJECTS

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Note: The following *Church Law Bulletin* consists of the speaking notes used by the authors at a seminar given at the Canadian Conference of Christian Churches in Vancouver on September 25, 2012. As such, the following is written as informal guidance concerning the important topic of compliance with a charity's stated purposes. It has also been written primarily for religious organizations which are incorporated, but the same comments can apply to other registered charities as well.

A. INTRODUCTION

In your ministry you may find that as you go about your busy schedule, from one project to another, you may not notice the incremental shifts of focus occurring in your organization. At its founding, your organization would have had a clear mission statement, vision, and/or goal. These are reflected in the corporate objects of the organization(or "purposes" under the *Canadian Not-for-profit Corporations Act* ("CNCA"), collectively referred to in this presentation as "objects") filed with your incorporating documents at the appropriate government registry and also filed with the Canada Revenue Agency (CRA) when it was registered as charity for *Income Tax Act* purposes. The objects are in essence the lens through which all of the ministry projects must be viewed – they are the touchstone that you must go back to periodically to determine your organization's course. Yet, in many cases, we have noted that what organizations say on paper is very different from what is done in practice. If you were setting up your ministry today from scratch, would you do things differently? If so, you may have already experienced mission drift.

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It is our goal to share with you the problems that arise when charitable corporations stray from their original corporate objects and to provide some helpful suggestions concerning how you can address the problem. First let's deal with some terms and related legal concepts that will be important for you to understand as we go forward.

B. KEY CONCEPTS

1. "Corporate objects"

These are the objects (or "purposes" i.e. under the CNCA, *Society Act* (B.C.) *Non-Profit Corporations Act* (Sask)) of a corporation. They are set out in the organization's incorporating documents (which must be filed with and generally approved by the appropriate government corporate registry office in order to create the corporation). The objects describe the overall objective or reason for which the organization is set up and authorizes the corporation to carry out activities or programs that fall within the parameters of its objects. Most modern not-for-profit corporate statutes state that the corporation has the "power of a natural person", which means that the corporation can do anything to achieve its objects that a natural person could do in order to achieve its objects. Activities that are not related to, or further, the objects of the corporation are not permitted.

Under some existing corporate statutes, such as the *Canada Corporations Act* or the *Corporations Act* (Ontario), if a corporation becomes involved in activities that are not related to its corporate objects, the corporation is said to be acting "*ultra vires*", (i.e. beyond its corporate objects), which in turn could expose its board of directors to personal liability. Although more modern corporate statutes, like the CNCA and the *Ontario Not-for-Profit Corporations Act* (ONCA), eliminate the concept of "*ultra vires*", they maintain a statutory obligation for the directors of a corporation to comply with the articles of the corporation and thereby its purposes. As well, when the corporation is a charitable corporation, its directors can be found in breach of trust if they applied the charitable property outside of the charity's stated charitable purpose(s). As such, even under modern corporate legislation, a board of directors that permits the corporation to undertake activities unrelated to its objects could be unnecessarily exposing its board members to personal liability.

For a corporation to be a charity, its objects must be charitable at law. To be a legal charity, the corporation's objects must fit under one of the following headings:

- Relief of poverty;
- Advancement of education;
- Advancement of religion; and
- Other purposes not falling under any of the above three headings but are beneficial to the community as determined by the courts.

The charity's objects cannot be simply a recitation of one of the above heads of charity referred to above. The objects must be described so that it is clear what the corporation is doing and how it will use its charitable property to advance those ends. To be a charity the corporation cannot have a mixture of some objects that are charitable and some that are not – they must be exclusively charitable.

The objects must benefit the community or a large part of the community – it is not just for a few. In other words, there must be a public benefit associated with the objects. For the first three heads of charity referred to above, public benefit is presumed in Canada. For the fourth head, it must be established. For more information on what constitutes a public benefit, see the CRA Guidance on Meeting the Public Benefit Test, available at http://www.cra-arc.gc.ca/chrts-gvng/chrts/plcy/cps/cps-024-eng.html . The fact that the objects are acceptable for purposes of incorporation as well as for purposes of incorporating a charity in Ontario (which requires pre-approval from the Office of the Public Guardian and Trustee of Ontario) does not necessarily mean that CRA will find those objects acceptable. CRA will scrutinize all objects in accordance with what they understand the common law to be (as set out in various Guidances available at CRA website: http://www.cra-arc.gc.ca/chrts-gvng/menu-eng.html), and those objects will be closely scrutinized by CRA in comparison to the statements of activities submitted by the applicant along with its T2050 (Application to Register a Charity Under the *Income Tax Act*).

Some key issues that CRA may look for when assessing an organization's objects include the following:

- An organization's objects must coincide with one of the four heads of charity;
- The objects must identify the intended beneficiary group, as well as the means by which the charity will provide the charitable benefit;
- An organization must be constituted and operated exclusively for a charitable purpose;
- An organization's objects must be expressed in precise rather than broad or vague terms;

- An organization's objects must be stated as clearly as possible to ensure that the income and property of the organization cannot be applied for purposes that clearly fall outside the scope of the charity;
- Each of the heads of charity will have particular requirements pertaining to how objects should be drafted. i.e. "advancement of religion" requires certain necessary elements; and
- There may also be provincial and/or territorial requirements that apply to a charity's objects.

Therefore, if an organization seeks to become a registered charity under the *Income Tax Act,* it would be best to ensure that the charitable objects are acceptable to CRA before filing them with the corporate registry, although this is not a prerequisite.

2. "Governing documents"

These are the documents that form an organization and govern its operations. Some examples of *governing documents* are letters patent, articles of incorporation, memorandum or articles of association, *constitution*, trust documents, and *bylaws.*

3. "Mission drift"

Mission drift is where a charitable organization strays from its original or stated aims. It is recognized that, over time, charities develop and change as the needs of their beneficiaries, and the social and economic circumstances in which they operate, change. It is therefore important that charity trustees keep their charity's aims under regular review, to evaluate their ongoing usefulness and public benefit.[1]

4. "Mission"

The term "Mission", when used in the context of this presentation, is intended to be read as another word for "objects". It is not intended to refer to the "mission statement" of an organization, which may be different from the objects of the organization and as such can create considerable confusion. In this regard, it is important that if an organization has a Mission Statement, the Mission Statement is coordinated and made subject to and consistent with the actual objects of the organization.

[1] Charity Commission (UK), "Public Benefit Assessments: Emerging findings for charity trustees from the Charity Commission's public benefit assessment work: 2008-09," p. 6 found at: http://www.charitycommission.gov.uk/Library/guidance/assessemerge.pdf

C. THE PROBLEMS

1. Change Comes By Increments

There are many reasons why mission drift occurs:

- Change by Increments: These changes start slowly – the mission drift is hardly noticeable. It may be that the organization needs to partner with other groups in order to stay in operation or its outreach requires a different expertise. One project might have a slightly different take on your original objects and upon completing that project another may come along that is further afield. Each time you gain experience in the new endeavour you expand your horizons and little by little you drift.
- Change of Pace: We have noticed in some cases charity leadership simply wants to branch out in new areas of ministry "as the S(s?)pirit moves them" without any regard to their overall context. As we will discuss in one of the case studies – churches have been known to morph into all kinds of ministries that have very little resemblance of them being a "church" in the traditional sense of the word.
- Change by Funding Pressure: Charities are notorious for lacking funds to do all that leadership wants to accomplish. The need is so great but funds so few. However, this insatiable desire for funding leads to requests from other organizations, governments, or individuals who often have a different focus. To keep the doors open charities are tempted to accept funding for projects that puts them off their focus. Further, they may also get involved in for-profit ventures that are more than a "related business" as permitted by CRA (See CRA's Guidance on Related Business at http://www.cra-arc.gc.ca/chrts-gvng/chrts/plcy/cps/cps-019-eng.html) and instead become a non-charitable collateral purpose. In short, financial exigency makes mission drift all that more easy to occur.
- Change by Simply Failing to Check: Finally, mission drift may occur because an organization may not even know what its objects actually are. Often the leadership and board of an organization have never taken the time to see what the actual corporate objects of a corporation are by going back to its letters patent or articles of incorporation, nor following up to see if there has been a change of those objects contained in subsequent corporate documents i.e. supplementary letters patent or articles of amendments. In other words, mission drift can occur because an organization fails to take the time to know what the objects of an organization are. As well, if there has been a change in the objects of an organization but the new objects have not been approved by CRA, then if CRA was to conduct an audit of the organization, it would be evaluating the program and activities of the organization in

accordance with old and out of date objects as opposed to its new corporate objects. In this regard, the organization could be subject to sanction by CRA, including loss of charitable status.

2. Change May Result in Loss of Support

Not everyone in your organization may think it a good idea that there is mission drift. Consider your donors. If for example your donors started out supporting your ministry, which was an orphanage in India but over time the orphanage evolved into an all English language school – will they continue supporting it? You have to make sure that your donors are supportive of the new focus – you do not want to be in a situation where the donors thought they were donating to one project when in reality they were giving money to a totally different charitable venture. This in turn could result in donors possibly alleging breach of trust against the organization and its board of directors because donor expectations of what their donations were to be used for in relation to the original objects of the organization's are different from what their funds are currently being used for. Even if there was to be a change of objects that had been approved by CRA and filed with the appropriate government corporate registry, it would still be incumbent on the organization to communicate the change of objects to the public and to donors, in particular to ensure that there is no misunderstanding by donors concerning what their donation will be used for.

3. Board & Staff Lack of Expertise

When a charity drifts into projects that are afield from its original objects, the charity might find itself with an unqualified board and staff. The board of directors may well be incompetent to provide the necessary guidance on a growing number of matters the charity is involved with. Yet they remain legally liable to both the government and the public for the charity's work. It is simply an untenable position to be in. It is also unfair to expect a volunteer board to take on supervision in areas for which they lack expertise. If a board is supervising programs and activities for which they have no expertise, and those programs subsequently fail, the board is in a position where they may be held to account unless they have conducted the affairs in accordance with the fiduciary duty and due diligence that the law imposes on them.

Further, staff members that do not have the wherewithal to carry out the new projects taken on by the charity, particularly with regards to business ventures, just to make ends meet, may, ironically, lead to the charity's demise. Failure to meet the expectations, as contained in agreements for a charity's service, is bound to lead to serious consequences. Ironically the activities that a charity takes on to make ends meet could lead to its demise. Consider for example that recent studies in the US point out that "the lion's share of earned-income ventures [by nonprofits] do not succeed at generating revenues beyond their costs."[2]

4. Legal Considerations

Mission drift raises a number of legal considerations that are worth summarizing at this point:

- Operating an organization outside of its objects is not an option, as it can expose the organization and its board to liability arising from possible allegations of ultra virus and/or breach of trust.
- Failure to have new objects approved by CRA could lead to sanctions imposed by CRA, including revocation of charitable status.
- The board of directors remains legally responsible for the affairs of the charity – and therefore could become "ineligible individuals" under the *Income Tax Act* with regard to the involvement in future charitable works.
- If an organization does not have a competent staff to carry on the new projects it still remains legally responsible to fulfill whatever commitments it made to its service client or third party agency.
- For profit ventures raise significant issues, such as compliance with CRA Guidance on "Related Business", the possibility of the business venture becoming an unrelated non-charitable collateral purpose, the mixing of charitable and non-charitable activities, the diversion of charitable funds for non-charitable activities and the risk of financial failure putting charitable funds in jeopardy.
- Change of objects cannot circumvent the fiduciary obligation to use funds raised in the past in accordance with the objects then in place.
- Also, need to determine if Mission Drift might involve political activities and if so, then there is need to ensure compliance with CRA Guidance on Political Activities (http://www.cra-arc.gc.ca/chrts-gvng/chrts/plcy/cps/cps-022-eng.html).

[2] W. Foster, and J. Bradach, "Should nonprofits seek profits?" *Harvard Business Review*, (2005) 83 (2), 92-100, as quoted by Weisbrod, at 300.

D. WHAT TO DO?

1. Change Comes By Increments But Focus Comes By Review

Fundamentally, it is incumbent upon the board of an organization to review, at regular intervals, the corporate objects, mission statement, or vision statement if applicable, etc. to ensure that the work being carried out and its objects are synchronized. Such reviews should include all of the interested parties of your organization – board members, senior management and staff. The timing of such reviews would be as varied as are the organizations. Here are a few suggestions:

- Initial Review of Objects: All existing and new board members, as well as existing and new staff, should be given a copy of the objects of the organization when they first came on board, together with any amendments to the objects contained in subsequent supplementary letter and articles of amendment to ensure that the board and leadership of the organization are aware of what the corporate objects are.
- Board Meetings: it would be prudent during each board meeting that a few moments be taken to review what was accomplished in the meeting and whether the decisions being made are in line with the objects of the organization, particularly with regards to approving new programs and actions.
- Staff Meetings: the day to day operations of the organization will need to be reviewed during the regular staff meetings to ensure that the ministry is on side with the objects. A key time for this would be in the organizational meetings preparing for the board meetings.
- Annual Review: As part of its due diligence, the board should conduct an annual review of its corporate objects in conjunction with the completion of its T3010 to ensure that the statement of existing and new activities included in the T3010 are consistent with the objects of the organization and if not then to see if they should be a change in its objects.

2. Endowment Funds Require Flexibility

Not every organization has the ability or the interest to establish and/or receive an endowment fund, i.e. a fund with a long term time restriction with regards to the expenditure of its capital and/or income. That being said, if the board of an organization does have an intention to establish an endowment fund or agrees to receive an endowment fund from a donor, serious consideration would have to be made to ensure that there is sufficient language in the endowment documentation to address the possibility of the organization drifting away from its current objects in the future. Otherwise, if there was mission drift, the donor might have the ability to allege that the board of directors was in breach of trust law for permitting the endowment funds to be used in a manner that was different from what was authorized in the endowment documentation.

E. CONCLUSION AND RECOMMENDATIONS:

It is simply not acceptable to be involved with an existing program or get involved in a possibly new and exciting program that may stray from your organization's objects. Proper legal advice should be obtained to ensure not only compliance with the objects of the organization but also with other applicable aspects of the law. There is too much at stake. Your organization may have been around for many decades and has built up a consistent donor base with a highly respected public profile. It would be unfortunate to throw all of those advantages for doing charity to the wind. The following is a suggested list of questions to assist you in preventing mission drift in your charitable organization, with regards to both existing and future programs:

- Are all existing and new programs being considered in compliance with the corporate objects of the organization?
  - If not, seek legal advice concerning whether the program is charitable at law and in compliance with CRA Guidances.
  - Make the necessary changes to the program to make it compliant with the current objects or consider changes to the objects.
  - If changes to the corporate objects are needed, obtain pre-approval from CRA by providing CRA with a detailed statement of activities of the program that will be carried out under the new objects.
- Is the mission statement in sync with the corporate objects?
  - If not make the necessary change to ensure the mission statement is.
- Is the new venture something your organization has the expertise to carry out?
  - If not seek a partner organization that has the expertise to either assist you or act as your agent in carrying out the work.
  - If its partner organization is not a Canadian registered charity, then you will need to develop documentation to evidence direction and control of the charity.

- If carrying out a different work and the necessary legal steps have been completed to give your organization the authority to do so, have you notified your donor base of the change in focus?
    - If not, be sure to do so to ensure that donors are aware what future gifts can be used for.
    - You may be limited in accessing endowment funds to fund new programs if your activity has changed beyond the terms of the endowment – legal advice will be necessary to determine the proper steps to follow.
- Do you have a robust plan to implement your new program?
    - If not – you ought to make one – it will keep you focused on maintaining compliance with the objects.
- Have you set up a consistent and rigorous review system that keeps before the corporate mind the importance of ensuring the corporate activities are in synch with the objects?
    - If not, now is the time.
- Does the existing or new program involve some type of business activity?
    - If so, then need to determine if the activity is either a charitable purpose on its own or a related business activity within the parameters of CRA Guidance on Related Business Activities.
- Does the existing and new program involve political activities?
    - If so, need to determine if the activity is a charitable program on its own or meets the requirement for a permitted political activity within the parameters of CRA Guidance on Political Activities.

Hopefully, with a bit of due diligence, your charitable organization can stay focused on its charitable objects and avoid the risks associated with the unintended nature of mission drift.

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