
THE OTTAWA REGION
Charity & Not-for-Profit Law Seminar

Ottawa – February 2, 2012

Essential Charity Law Update

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Essential Update for Charities and NPOs

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OVERVIEW

- Federal Budget 2011
- Recent Federal Initiatives
- Recent CRA Publications
- Clergy Residence Deduction
- Non-Profit Organizations
- Corporate Update
- Ontario Legislative Update
- Recent Cases

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A. FEDERAL BUDGET 2011

- The 2011 Federal Budget was initially introduced on March 22, 2011 and was reintroduced on June 6, 2011 in almost identical form
- Bill C-13, which implements the 2011 Federal Budget, received Royal Assent on December 15, 2011
- Budget contains significant changes to the regulation of charities and other qualified donees, and introduces the concept of “ineligible donees”
- CRA comment on the rules in the Budget at (<http://www.cra-arc.gc.ca/chrts-gvng/chrts/bdqt/2011/menu-eng.html>)
- For more information on the Budget, see “Ineligible Individuals and Other Issues from the 2011 Budget”, presentation today by Karen J. Cooper

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B. RECENT FEDERAL INITIATIVES

1. Standing Committee of Finance Study on Tax Incentives for Charitable Donations
- Motion 559 referenced in the 2011 Budget calls for the Standing Committee on Finance (“SCOF”) to study current tax incentives for charitable donations:
 - Review changes to the charitable tax credit amount;
 - Review the possible extension of the capital gains exemption to private company shares and real estate when donated to a charitable organization; and
 - Consider the feasibility of implementing these measures
- SCOF has received the “Order of Reference” to proceed with its study

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- On September 20, 2011, SCOF approved a motion to undertake a comprehensive study of no less than 12 meetings on the current tax incentives for charitable donations with a view to encouraging increased giving
- SCOF has commenced the study and meetings are currently underway
- Numerous witnesses have received invitations to appear before SCOF, with hearing dates scheduled to commence in early February 2012
- However, when SCOF moved to undertake its study in September 2011, it slightly expanded the parameters of its review to also include consideration of the cost of changes to existing tax measures, as well as the implementation of new tax incentives

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- There is now some concern in the charitable sector that there may be no limitations on what SCOF can look at in their study and that broader issues may be brought up that fall beyond the parameters of the original motion
- The lack of limitations may cause members of SCOF to possibly focus on other issues rather than on the main issue at hand of charitable donation incentives
- The charitable sector will need to carefully monitor SCOF’s study, as the findings of the study will be reported back to the House of Commons for possible legislative consideration
- For more information on the Study, see “Ineligible Individuals and Other Issues from the 2011 Budget”, presentation today by Karen J. Cooper

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2. Bill C-470, Private Members' Bill

- Bill C-470 proposed a disclosure obligation requiring registered charities to disclose the name, job title, and annual compensation of all executives or employees of a charity who receive \$100,000 or more in compensation, including both taxable and non-taxable income
- Bill C-470 would have given CRA discretion to revoke the charitable status of a charity that paid an executive or employee annual compensation over \$250,000
- As a result of the dissolution of Parliament on March 26, 2011, Bill C-470 died on the order paper
- However, the charitable sector will need to carefully monitor what may develop in the future concerning compensation disclosure requirements

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3. Bill C-28 (Anti-spam Legislation)

- Bill C-28 creates a new regulatory scheme for spam and unsolicited electronic messages
- Received Royal Assent on December 15, 2010, and is expected to come into force in early 2012
- Charities and non-profit organizations that send "commercial electronic messages" will need to ensure that they comply with the Anti-spam Legislation
 - "commercial electronic messages" ("CEMs") are emails containing offers concerning goods, products or services, or that advertise or promote such opportunities as defined in the Anti-spam Legislation

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- Prohibition on sending CEMs without:
 - The express or implied consent of the recipient; and
 - Ensuring that certain form/ content requirements are met, including an unsubscribe mechanism
- Requests for express consent must contain certain information (e.g. purpose(s) for which consent is sought)
- Implied consent can arise from "existing non-business relationships" (e.g. a donation or gift to, membership in, and/or volunteering with a charity or non-profit organization) – subject to a two year limit
- Significant monetary penalties for non-compliance (e.g. maximum penalty is \$1 million (individuals) and \$10 million (any other person)) and private right of action is available for breach of the prohibition

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- The consultation period for CRTC's draft regulations, which were released on June 30, 2011, has passed (<http://crtc.gc.ca/eng/archive/2011/2011-400.htm>)
- The consultation period for Industry Canada's draft regulations, which were released on July 9, 2011, has passed (<http://www.gazette.gc.ca/rp-pr/p1/2011/2011-07-09/html/reg1-eng.html>)
- Whereas the CRTC Regulations outlined the form and content for compliance purposes, the IC Regulations add clarity to certain terms contained in the legislation
- See Charity Law Bulletin No. 238 and 257

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C. RECENT CRA PUBLICATIONS

1. Guidance on Working With an Intermediary in Canada

- On June 20, 2011, CRA released Guidance CG-004, *Using an Intermediary to Carry out a Charity's Activities within Canada* ("Guidance") (<http://www.cra-arc.gc.ca/chrts-gvng/chrts/plcy/cgd/ntrmdry-eng.html>)
- The Guidance assists charities who are or intend to conduct charitable activities through an intermediary within Canada
- An intermediary is defined by CRA as an individual or a non-qualified donee (e.g. a non-registered charity)
- The Guidance is a modified version of Guidance CG-002, *Canadian Registered Charities Carrying out Activities Outside of Canada*, and contains relatively little new information

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- However, the Guidance modifies the examples provided in CG-002 with respect to intermediaries (e.g. agents and contractors)
- It is recommended that charities, even if they do not conduct any activities outside of Canada, who are conducting any activities through an intermediary review both Guidances, to ensure that they are adequately documenting the necessary direction and control over their charitable resources
- For more information on foreign activities see "Foreign Activities: How to Avoid Problems", presentation today by Jennifer M. Leddy

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2. Guidance on Trust Document

- On August 15, 2011, CRA released Guidance CG-009, *Trust Document* ("Guidance") (<http://www.cra-arc.gc.ca/chrts-gvng/chrts/plcy/cgd/trsts-eng.html>)
- A trust document is one of three types of governing documents that may be used to establish a charity for the purpose of registration as a registered charity
- For designation purposes, a trust document may be used for charitable organizations and private or public foundations
- Guidance sets out the requirements for the contents of a trust document (e.g. name of trust, charitable purposes of trust, rules governing how trustees will administer all property etc.)

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- These requirements must be met for registration purposes, should the organization choose to use a trust document to be its governing document
- CRA recommends that applicants submit a draft copy of the trust document for its review because amendments to a pre-established trust may not be possible or may require court approval
- CRA will review draft governing documents, including trust documents, on a one-time basis when submitted with a complete application
- If CRA approves the application, applicants will have to submit a signed trust document prior to registration

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3. Guidance for The Promotion of Animal Welfare and Charitable Registration

- On August 19, 2011, CRA released the final form of Guidance CG-011, *Promotion of Animal Welfare and Charitable Registration* ("Guidance") (<http://www.cra-arc.gc.ca/chrts-gvng/chrts/plcy/cgd/nmlwifr-eng.html>)
- Guidance sets out guidelines on promoting the welfare of animals and charitable registration
- Focus at common law is on what is for the benefit of humans rather than what is for the benefit of animals

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4. Guidance on Arts Organizations and Charitable Registration under the *Income Tax Act*

- On November 1, 2011 CRA released draft *Guidance on Arts Organizations and Charitable Registration* ("Guidance") for public consultation (http://www.cra-arc.gc.ca/chrts-gvng/chrts/plcy/cnslttns/rts-eng.html#_edn4)
- Once finalized, the Guidance will replace Summary Policy CSP-A08 and Summary Policy CSP-A0A24
- Guidance sets out guidelines regarding the eligibility requirements for charitable registration of arts organizations
- Organizations will fall within one of two charitable heads
 - The advancement of education (2nd)
 - Other purposes beneficial to the community (4th)

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- There is a presumption that a public benefit exists in relation to second head but not the fourth head
- Arts organizations that fall under the fourth head will have to meet CRA's specific public benefit criteria
 - Artistic form and style: there must be a common or widespread acceptance of the form and style of art within the Canadian arts community
 - Artistic merit: the quality of a presentation, exhibition, performance, etc. must be sufficiently high
- Guidance would not apply to:
 - National arts service organizations, or
 - Organizations that seek to further other charitable purposes through arts programs, e.g. providing art therapy to relieve conditions associated with illness or disability

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5. Fundraising Guidance

- From the media's perspective this is the number one compliance issue for charities
- CRA is expected to release a revised Fundraising Guidance in early 2012
- For more information on the Guidance, see "Complying with CRA's New Fundraising Guidance (Revised 2012)", presentation today by Terrance S. Carter

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D. CLERGY RESIDENCE DEDUCTION

- CRA released a series of technical interpretations on the clergy residence deduction provided for in s. 8(1)(c) ITA and Interpretation Bulletin IT-141R
- For religious charities that have clergy or other employees claiming the deduction, it is important to monitor technical interpretations being issued by CRA
- Under s. 8(1)(c) of the ITA, a taxpayer may claim an income tax deduction in respect of his or her residence if he or she meets the applicable requirements

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- Firstly, under the status test, a taxpayer must be either:
 - a) A member of the clergy;
 - b) A member of a religious order; or
 - c) A regular minister of a religious denomination
- Secondly, under the function test, a taxpayer must perform one of the following functions:
 - Be in charge of or ministering to a diocese, parish or congregation, or
 - Be engaged exclusively in full-time administrative service by appointment of a religious order or religious denomination
- In a February 1, 2011 technical interpretation, an applicant was found not to be a member of a religious order (status test) because his/her organization's primary purpose was community services, i.e. not a religious order

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- In a March 10, 2011 technical interpretation, an ordained minister who worked as a spiritual care coordinator in a medical service centre was found to be eligible for the deduction
 - The provision of spiritual care for admitted in-patients, residents, clients and their families and staff was found to be ministering to a congregation under the function test
- In an April 5, 2011 technical interpretation, a university campus minister was found to be eligible for the deduction
 - The applicant was ministering to a congregation, i.e. providing religious instruction, not teaching academic instruction

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- In a June 13, 2011 technical interpretation, CRA was unable to determine whether an individual employed as a full-time student ministries associate qualified for the deduction
 - Insufficient information was provided by the applicant
- Practical implications of the technical interpretations:
 - Organizations should ensure that the charitable objects in their letters patent clearly describe the religious purpose of the organization
 - Organizations should ensure that their applications provide sufficient and detailed information explaining how the requirements under the ITA and IT-141R are satisfied
 - For further information, see Church Law Bulletins No. 3 and 38, available at www.churchlaw.ca

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E. MAINTAINING NON-PROFIT ORGANIZATION TAX STATUS

- CRA has released over the past year a series of technical interpretations on the tax status of non-profit organizations (“NPOs”) under the ITA
- There has been a lot of uncertainty resulting from by these technical interpretations
- For more information on the NPOs, see “Maintaining NPO Status”, presentation today by Karen J. Cooper

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F. CORPORATE UPDATE

1. *New Canada Not-for-Profit Corporations Act* (“CNCA”)
 - *Canada Corporations Act* (“CCA”) has not been substantively amended since 1917
 - On June 23, 2009 *Canada Not-for-Profit Corporations Act* (“CNCA”) received Royal Assent
 - CNCA was proclaimed into force on October 17, 2011
 - The new rules do not apply automatically to CCA corporations
 - CCA corporations will have until October 17, 2014 to transfer or continue under the CNCA
 - For more information, see “Overview of Continuing Under the CNCA and ONCA”, presentation today by Jane Burke-Robertson and Jennifer Leddy

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2. New Ontario *Not-for-Profit Corporations Act, 2010* ("ONCA")

- The Ontario *Corporations Act* ("OCA") has not been substantively amended since 1953
- ONCA introduced on May 12, 2010 and received Royal Assent on October 25, 2010
- Not expected to be proclaimed in force until late 2012
- It is expected that an outline of the proposed regulations will be released in early 2012 for public comment
- See *Charity Law Bulletin*. 262 "Nuts And Bolts of the Ontario *Not-For-Profit Corporations Act, 2010*" <http://www.carters.ca/pub/bulletin/charity/2011/chylb262.htm>
- For more information, see "Overview of Continuing Under the CNCA and ONCA", presentation today by Jane Burke-Robertson and Jennifer Leddy

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G. ONTARIO LEGISLATIVE UPDATE

1. *Accessibility for Ontarians with Disabilities Act, 2005*

- The *Accessibility for Ontarians with Disabilities Act, 2005* ("AODA") was introduced on October 12, 2004, and received Royal Assent on June 13, 2005
- AODA's purpose is to develop, implement and enforce accessibility standards to achieve accessibility for Ontarians with disabilities with respect to goods, services, facilities, accommodation, employment, buildings, structures and premises by January 1, 2025
- AODA applies to every person or organization in the public and private sectors of the Province of Ontario, including the Legislative Assembly of Ontario

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- AODA mandates compliance with accessibility standards within prescribed timelines in 5 areas, including customer service standards under O. Reg. 429/07 entitled *Accessibility Standards for Customer Service* ("Customer Service Standards")
- Customer Service Standards apply to designated public sector organizations and a person or organization that provides goods or services to the public or third parties, and has at least one employee in Ontario ("Provider")
- Providers must comply with the standards within the prescribed time period and file an annual report
- Compliance with Customer Service Standards was required by January 1, 2010 for the public sector and January 1, 2012 for the private sector

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a) Customer Service Standards for All Providers

- Policies, Practices and Procedures
 - Provider must establish policies, practices and procedures governing the provision of its goods or services to persons with disabilities
 - Provider must use reasonable efforts to ensure that its policies, practices and procedures are consistent with principles of dignity, independence, integration, and equality of opportunity
 - Policies must address use of assistive devices to access goods or services or availability, if any, of other measures that will enable access

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- Training for staff
 - Provider must train everyone who deals with members of the public or other third parties on its behalf and everyone who participates in the development of the policies, practices and procedures
 - Training must review AODA, the Customer Service Standards and prescribed matters (e.g. how to interact and communicate with various types of disability)
 - Training must be provided on an ongoing basis in connection with changes to the policies, practices and procedures
- Communication
 - Provider must communicate with a person with a disability in a manner that takes into account the person's disability

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- Use of service animals and support persons
 - People with disabilities are to be allowed to be accompanied by their guide dog or service animal in areas that are open to the public, unless the animal is otherwise excluded by law, in which case other measures are to be made available
 - People with disabilities who use a support person, must be allowed to bring the support person with them while accessing goods or services
 - A disabled person and his or her support person must be permitted to enter the premises together
 - Where admission fees are charged, Provider must give advance notice of what admission, if any, would be charged for a support person

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- Notice of temporary disruptions
 - Where persons with disabilities usually use particular facilities or services
 - Provider must give notice of any temporary disruption to the public by a posting in a conspicuous place
 - The posting must explain the reason for the disruption, the expected duration of the disruption and describe any alternative facilities that may be available
- Feedback
 - Provider must establish a process for reviewing and responding to feedback regarding the manner in which goods and services are provided to persons with disabilities

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b) Additional Customer Service Standards for Providers with at Least 20 Employees in Ontario

- Must prepare one or more documents describing its policies, practices and procedures and, upon request, shall give a copy of a document to any person
- Must prepare a document that sets out the steps to be taken in connection with a temporary disruption and, upon request, shall give a copy of the document to any person
- Must keep records on training, including training dates and the number of participants
- Must prepare a document describing its feedback process and, upon request, shall give a copy of the document to any person

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- Must notify customers that all the documents above stated documents are available upon request
- The above documents must be provided in a format that takes into account the requesting person's disability
- The Government of Ontario has published a number of helpful guidance documents on the Ministry of Community and Social Services website
<http://www.mcscs.gov.on.ca/en/mcscs/programs/accessibility/>

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2. Community Dialogue and Legal Workshop on Human Rights Relating to Freedom of Religion

- On September 22, 2011, the Ontario Human Rights Commission (“OHRC”) announced it would host a community dialogue on human rights relating to religious belief and practice in January 2012
- Paper proposals were solicited on the topics, such as:
 - Human rights and the protection of religious belief and practice in a secular society
 - Experiences and concerns of religious-identified individuals, groups and organizations as it relates to discrimination on the basis of creed/religion

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- On November 18, 2011, OHRC announced that it will host a legal workshop on rights relating to religious belief and practice at the end of March, 2012 to help inform the OHRC’s update of its 1996 Policy on creed and the accommodation of religious observances
- OHRC solicited proposals on the content of papers for the workshop – deadline has passed and selected proposals were to be confirmed on January 23, 2012
- Potential paper themes and questions include the following issues:
 - Human rights and the protection of religious belief and practice in a secular society
 - Relationship between Ontario *Human Rights Code* and the *Canadian Charter of Rights and Freedoms*

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H. RECENT CASES

1. *News to You Canada v. Minister of National Revenue*, 2011 FCA 192 (CanLII) (June 7, 2011)

- CRA refused application for charitable registration
- Corporate objects of applicant included research and production of in-depth news and public affairs programs
- Applicant appealed on the basis that its purposes fell within two heads of charity, the advancement of education (2nd) and other purposes beneficial to the community as a whole in a way which the law regards as charitable (4th)
- Advancement of education - production and dissemination of news and public affairs programs may improve the sum of communicable knowledge about current affairs, but are not sufficiently structured to meet the test in the *Vancouver Society* decision

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2. *Bentley v. Anglican Synod of the Diocese of New Westminster* (Docket no. 34045)

- On June 16, 2011, the Supreme Court of Canada refused to grant leave to appeal in *Bentley*
- In November 25, 2009 decision, B.C. Supreme Court ruled that the properties of four incorporated parishes were to remain within the Anglican Church of Canada ("ACC")
- B.C. Supreme Court based its decision on the parishes' incorporating statute
- Even though the parishes were separate corporations, the act of incorporation, the making and amending of by-laws, rules, regulations etc. were all subject to the consent of the executive committee and local bishop of the ACC

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- B.C. Court of Appeal upheld the lower court's decision on the basis that the purpose of the trusts upon which the parish corporations held the buildings and other assets was to further "Anglican ministry in accordance with Anglican doctrine"
- Implications of refusal to grant leave by the SCC:
 - The Court of Appeal decision remains the law
 - Based on the Court of Appeal's reasoning that the final determination of doctrine rests with the ACC and its willingness to make a determination as to who has the final say in doctrinal matters when it comes to a dispute over property, other Episcopal denominations may be affected

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3. *Nigerians in Diaspora Organization Canada (NIDO) v. Peter Ozemoyah* 2011 ONSC 4696 (CanLII) (August 15, 2011)

- No new members were ever admitted to a federal corporation yet certain individuals (other than the incorporators) called a meeting and purported to elect a new board
- Since the election and composition of the board is governed by CCA and the general operating by-laws of the corporation only the first incorporators were valid directors

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- Other purposes beneficial to the community - the Court reviewed the *Native Communications* decision and concluded that the mere dissemination of news was not charitable at law - in part because the organization identified its audience as the general public and not any group or community in need of charitable assistance
- Court held in order to be charitable, the organization's purposes must be of special benefit to the community, with an eye to society's current social, moral, and economic context
- The Court did not accept the organization's argument that presenting the news in an "unbiased and objective" form met this requirement

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4. *Victoria Order of Nurses for Canada v. Greater Hamilton Wellness Foundation*, 2011 ONSC 5684 (CanLII) (September 27, 2011)

- A parallel foundation unilaterally amended its objects so that it could disburse both existing and current funds to charities other than the operating charity that had created it
- Prior to doing so, the foundation had fundraised from the public on the basis that said funds would go to the operating charity's programs

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- Superior Court confirmed that charitable property raised for the benefit of a particular charitable purpose cannot be unilaterally applied for a different charitable purpose by simply amending charity's objects through supplementary letters patent
- The funds raised on the basis that they would go to the operating charity were to be held in trust for the charity
- To change the charitable purpose of funds, charities need to seek the approval of the Public Guardian and Trustee under the *Charities Accounting Act*, not "self-help" remedies

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5. *Hart v. Roman Catholic Episcopal Corporation of the Diocese of Kingston*, 2011 ONCA 728 (CanLII) (November 22, 2011)

- Pastor was removed from office and brought an action for damages for constructive dismissal against Archdiocese
- One of the exceptions to the general rule that the courts have jurisdiction to decide claims for wrongful dismissal is where the rules of a self-governing organization, especially a religious organization, provide an internal dispute resolution process
- A person who voluntarily chooses to be a member of a self-governing organization and who has been aggrieved by a decision of that organization must seek redress in the internal procedures of the organization

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- The courts will only interfere in the internal affairs of a self-governing organization if the internal process is unfair or does not meet the rules of natural justice or where the complainant has exhausted the internal processes
- Subject to any enabling statutory provision, if the complainant has exhausted the internal processes, the Court will not consider the merits of the decision but only whether the organization's rules were followed and the decision made in accordance with natural justice

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6. *St. John's Evangelical Lutheran Church of Toronto v. Steers*, 2011 ONSC 6308 (CanLII) (October 24, 2011)


- There was a series of disputes between the leaders and members of the congregation and the defendants (The English District Lutheran Church Missouri Synod (Canada) and The English District Lutheran Church Missouri Synod (U.S.A.)) regarding the ownership, autonomy, and operation of a church and its property
- A motion for certification of a class proceeding under the *Class Proceedings Act* ("CPA") was ultimately brought
- The parties ultimately settled their disputes, but the CPA requires a proceeding commenced or certified as a class proceeding under it to be discontinued or abandoned only with the approval of the court

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- Therefore, the class proceeding was certified on the basis of a number of common issues including: breach of fiduciary duty; negligent misrepresentation (regarding the defendants' authority and legal status to install their own church council without the approval of the members and to appropriate church property); and conspiracy (to disband and disenfranchise the class members)
- Under terms of court approved settlement, the defendants agreed to release their claim to the church's property and the church agreed to resign from the English District Lutheran Church Missouri Synod
- The introduction of a class action into a church dispute may be the first in Ontario, if not Canada

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