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MISSION DRIFT AND CORPORATE OBJECTS



By Barry W. Bussey and Terrance S. Carter
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Introduction



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- In your ministry you may find that as you go about your busy schedule, from one project to another, you do 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. They are reflected in the corporate objects
- Yet, in many cases, what organizations say on paper is very different from what is done in practice

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- If you were setting up your ministry today from scratch, would you do things differently? If so, you may have already experienced mission drift
- You may be here because your organization has already suffered from mission drift or because you want to be proactive
- Our goal is to share with you the problems that arise when charitable organizations stray from their original corporate objects and to provide some helpful suggestions concerning how you can address the problem

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Key Concepts

“Corporate objects”

- Also known as “purposes” of a corporation under the *Canada Not-for-profit Corporations Act* (CNCA), *Society Act* (B.C.) and *Non-Profit Corporations Act* (Sask)
- The objects describe what the organization is set up to do
- They are set out in an 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)

- Most not-for-profit corporate statutes state that the corporation has the “power of a natural person”, meaning the corporation can do anything a real person can do in order to achieve its objects
- Activities that are not related to 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 unrelated 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 Ontario’s *Not-for-Profit Corporations Act* (ONCA), eliminate the concept of “*ultra vires*”, a charity (and therefore its board of directors) would likely still be found in breach of trust if it applied its charitable property outside its stated general purpose
- 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
- This requires that the corporation's objects 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 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 resources to carry out 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 all be charitable

- The objects must benefit the community or a large part of the community
- This is an essential part of establishing that there is a public benefit associated with the objects
- For the first three heads of charity, 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-qvng/chrts/plcy/cps/cps-024-eng.html>



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- 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-qvng/menu-eng.html>)
- CRA will also check to make sure the objects are consistent with the applicant's statements of activities as part of the T2050 (Application to Register a Charity Under the *Income Tax Act*)

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- When assessing an organization's objects, some of the key issues the CRA may look for are 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

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- 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

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- 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

“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

“Mission Drift”

- Mission drift is where a charity strays from the aims stipulated in its corporate objects
- Over time, charities develop and change with the needs of their beneficiaries and the social and economic climate
- It is imperative though that charity directors regularly review their corporate objects to ensure they correspond to the ministry that the charity is doing



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“Mission”

- In this presentation, we use the term “Mission” as being synonymous with “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
- If an organization has a mission statement, the Mission Statement should be consistent with the actual objects of the organization

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The Problems

There are many reasons why mission drift occurs:

Change Comes By Increments

- Changes start slowly – the drift may be hardly noticeable
- Partnerships and joint ventures can pull an organization towards its partner’s mission
- One project might divert slightly from the original mission and may lead to another project that is even further afield

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Change of Pace

- In some cases, charity leadership simply wants to branch out in new areas of ministry “as the Spirit moves them” without regard to their objects
- Churches have been known to morph into ministries that hardly resemble a “church” in the traditional sense of the word

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Change by Funding Pressure

- When charities lack funds, they may accept funding for projects that are inconsistent with their objects
- They may also embark on for-profit ventures that extend beyond a "related business" as permitted by CRA, becoming a non-charitable collateral purpose
 - See CRA's Guidance on Related Business at <http://www.cra-arc.gc.ca/chrts-qvng/chrts/plcy/cps/cps-019-eng.html>
 - More comments on related business to follow

Change by Simply Failing to Check

- Finally, mission drift may occur because an organization may not even know what its objects are
- Often the leadership and board fail to review the organization's letters patent or articles of incorporation or determine whether the objects have changed through new letters patent or articles of amendments
- If there was a change in the objects that was not approved by CRA, any audit the CRA conducts would compare the organization's programs and activities to its prior objects
- This could expose the organization to CRA sanctions, including loss of charitable status

Change May Result in Loss of Support

- People involved with your organization will expect that the organization's activities coincide with its objects
- Some of these people may disapprove of the drift
- For example, if your organization drifts from an orphanage in India to an English language school – will your donors continue supporting it?
- If a donor's contributions are used for a purpose other than the objects, the board may become susceptible to allegations of breach of trust
- Even if CRA approved the change of objects, the organization must communicate the change to the public

Board & Staff Lack of Expertise

- When a charity drifts into projects that are afiel from its original objects, the charity might find itself with an unqualified board and staff
- The board of directors may not have the necessary expertise in order to guide the new mission.
- Nonetheless, the board remains legally liable to the government and the public to satisfy its fiduciary duty of due diligence
- This would be an unfair predicament for a volunteer board to face

- Further, staff members may not have the wherewithal to execute the new projects taken on by the charity
- This is often the case for business ventures, as 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."
- Failure to meet the expectations contained in an agreement for a charity's service could lead to serious consequences
- Ironically, the activities that a charity takes on to make ends meet could lead to its demise

Legal Considerations

- Mission drift raises a number of legal considerations that are worth summarizing at this point:
 - Operating an organization outside of its objects exposes 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



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- 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
- The fact that an organization’s staff does not have the expertise to complete a project is no defence against the organization’s legal responsibility to fulfill its commitments to service a client or third party agency

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- For profit ventures raise significant issues:
 - 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
 - The risk of financial failure putting charitable funds in jeopardy

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- Even if an organization changes its objects and has the change approved by the CRA, it still has a fiduciary obligation to use funds raised in the past in accordance with the objects that were then in place (see the Victorian Order of Nurses decision in Ontario
 - <http://canlii.ca/en/on/onsc/doc/2011/2011onsc5684/2011onsc5684.html>)
- If a mission drift leads an organization to begin engaging in political activities the organization will need to ensure it is complying with CRA Guidance on Political Activities
 - <http://www.cra-arc.gc.ca/chrts-qvng/chrts/plcy/cps/cps-022-eng.html>

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What To Do?

Change Comes By Increments But Focus Comes By Review

- The board of an organization must review, at regular intervals, the corporate objects, mission statement, and/or vision statement if applicable, etc. to ensure consistency between these documents and its activities
- Such reviews should include all of the board members, senior management and staff

- Ensuring these reviews take place:
 - Initial Review of Objects: All board members and staff should be given a copy of the objects and any amendments to the objects when they first come on board
 - Board Meetings: Spend a few moments at the end of each board meeting to review whether the decisions made were consistent with the organization's objects, particularly regarding approval of new programs and actions

- Staff Meetings: Review the day to day operations of the organization at regular staff meetings to ensure the ministry is on side with the objects
 - An ideal time for this would be in the organizational meetings in preparation for board meetings
- Annual Review: As part of its due diligence, the board should conduct an annual review when preparing its T3010 to ensure that the statement of existing and new activities included in the T3010 are consistent with the objects

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 longterm time restriction on how the capital and income may be spent)
- If the board of an organization does have an endowment fund, the board must ensure the language of the endowment document addresses the possibility of the organization possibly drifting from its current objects

- Otherwise, if there was mission drift, the donor could allege the board was in breach of trust law for permitting the endowment funds to be used differently than from what the endowment document authorized
- The Robertson family fight with Princeton University is a case in point – this case generated around \$100 million in legal fees before it was settled for an additional \$50 million
- While it is an extreme case, it illustrates the importance of an organization ensuring there is flexibility built into an endowment agreement

Facts

- The Robertson Foundation began in 1961 when the Robertsons donated \$35 million in stock to the Woodrow Wilson School of Public and International Affairs at Princeton University
- The intention was “to establish . . . a Graduate School, where men and women dedicated to public service may prepare themselves for careers in government service”
- But in 2002, the Robertsons commenced legal action, arguing the university was using the funds beyond its original purpose and that less than 14% of the Wilson graduates were going into government service

Issues

- The Robertsons sought a severance of the foundation's relationship with Princeton and alleged Princeton misspent over \$207 million and hid the spending from the family members
- The university portrayed the battle as an issue of academic freedom
- The Robertson case was watched by some organizations with grave concern as an adverse determination could lead to litigation by a variety of donors across the nation

Settlement

- In December 2010 Princeton settled with the Robertson family
- Princeton maintains control of the fund under the settlement, but had to pay out \$50 million to allow the family to create a new foundation to prepare students for government service and \$40 million to cover the family's legal fees

Lessons

- Donors need to be very careful as to how they structure the control over endowments they may provide to charities
- Organizations need to ensure they have made adequate representations to their donors regarding their intended use of the funds
- Organizations will need as much flexibility as possible from the donors in anticipation of possible mission drift
- Both sides must recognize the reality of mission drift and negotiate agreeable terms



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- Failure to provide flexibility within an endowment document may result in the organization requiring a *cy prés* court order to vary the purpose of the endowment agreement if the original charitable purposes have become impossible or impractical
- An alternative solution is to include a provision in the endowment agreement stating that, in the event the original charitable purpose can no longer be fulfilled, the endowment may be used for another charitable purpose as determined in the sole discretion of the board
- Of course, the organization must also ensure that the original purpose and any alternative purpose fits within the organization's stated purpose

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Conclusions and Recommendations:

- Ensure that both existing and new programs are legally compliant and further a charitable purpose
- Do not get involved with a program that may stray from your organization's objects
- Obtain legal advice to ensure compliance not only with the objects of the organization but also with other applicable aspects of the law

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- Mission drift can cause you to become disconnected with your donors and a respected public profile
- Ask yourself the following questions to assist in preventing mission drift in your organization, with regards to both existing and future programs

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- Do all existing programs and programs under consideration comply with the organization's objects?
 - 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 bring it into compliance with the current objects or consider changes to the objects
 - If changes to the 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

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- Is the mission statement consistent with the objects?
 - If not, make the necessary changes to bring the mission statement in line with the objects
- 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 conducting the work
 - If this partner organization is not a Canadian registered charity, then you will need to develop documentation to evidence direction and control over the program

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- Once you've completed the necessary legal steps, have you notified your donor base of the change in focus?
 - If not, be sure to inform donors of what their future gifts may be used for
 - Seek legal advice to determine whether you can use funds from a pre-existing endowment to fund programs that are directed towards your new objects

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- Do you have a robust plan to implement your new program?
 - If not, make a plan. It will keep you focused on maintaining compliance with the objects
- Have you set up a consistent and rigorous review system that reminds the board and staff of the importance of keeping corporate activities consistent with the objects?
 - If not, now is the time

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- Does the existing or new program involve some type of business activity?
 - If so, then you 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 Activity
- Does the existing and new program involve political activities?
 - If so, you need to determine if the activity is a charitable program on its own or meets the requirement for a permitted political activities within the parameters of CRA Guidance on Political Activity

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Case Study 1: Rest Bay Convalescent Hotel

- The charity was set up to assist convalescents back to health. But as the community's mining industry subsided the home received fewer residents
- In response, the charity shifted its focus to providing holidays to elderly and disabled persons
- The Charity Commission did not find this purpose acceptable
- Taken from <http://www.charity-commission.gov.uk/library/guidance/assessmerge.pdf>, p. 6.

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Case Study 2: The Evolving Church

- A church began ten years ago with services in a café
- Its services were contemporary, but its objects were to maintain a place of worship with services conducted in accordance with its religious tenets
- The church now meets in small groups at peoples homes and provides teaching and disciplining more so than traditional services
- The pastor wonders if the congregation has strayed from the original object of the charity

Case Study 3: Hershey School

- Mr. Hershey established a residential school for orphan boys, with an endowment of \$5.7 billion
- The trustees proposed expanding the school into a research institute to affect more children
- While this was innovative and well intended, it was a mission drift and some alumni challenged the change in court and won
- The lesson is that having ample money to complete the original mission may lead to mission drift

See: <http://nvs.sagepub.com/content/36/2/299.full.pdf+html>

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