
THE 2006 ANNUAL CHURCH & CHARITY LAW™ SEMINAR

Toronto – November 8, 2006

The Nuts and Bolts of Corporate and Charitable Compliance

By Esther S.J. Oh, B.A, LL.B.
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 and Charitable Compliance**

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**THE CHALLENGES FACED BY CHURCHES
 AND CHARITIES IN COMPLIANCE MATTERS**

- Although generally motivated by a sense of the greater good, there can be an inherent lack of continuity, i.e. frequent change in directors and executive staff of churches or charities
- Varied extent of commitment by volunteers
- Frequently internal differences of opinion in how to structure and operate the church or charity
- The recent case of *Rexdale Singh Sabha Religious Centre vs. Chattha* evidences the need to ensure compliance with basic corporate compliance. See Charity Law Bulletin #101 at www.charitylaw.ca

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- Consequences of legal deficiencies in corporate charitable compliance
 - Legal actions by donors and/or the Public Guardian and Trustee
 - Allegations of breach of trust
 - Revocation of charitable status
 - Confusion in corporate status
 - Loss of corporate status
 - Undertaking *ultra vires* activities
 - Court supervised audit of accounts
 - Inquires under *Charities Accounting Act*

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COMPLIANCE STARTS WITH THE CHOICE OF ORGANIZATIONAL STRUCTURES

- **Organizations as unincorporated associations**
 - Use of unincorporated association is simpler, faster and less expensive
 - But exposes members and leaders to personal liability
- **Organizations as Corporations**
 - Separate legal entity protects members from personal liability
 - Directors may still be exposed to personal liability from fiduciary and management responsibilities

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- **Organizations as Trusts**
 - A trust is a relationship between trustees and beneficiaries involving the separation of legal and beneficial ownership of property
 - Trustees are exposed to liability
- **Compliance requirements may vary in some respects depending on the choice of organizational structure used by a church or charity**

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GENERAL IDENTIFICATION AND MANAGEMENT OF LEGAL COMPLIANCE ISSUES

- **General overview of organizational and legal documentation**
 - Identify existence and the location of key organizational and legal documents
 - Develop an inventory of key documents
 - Maintain central location for key documents
 - Identify key organizational documents
 - Letters patent and supplementary letters patent, if applicable

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- By-laws
- Special resolutions
- Directors' and members' resolutions
- Directors, members and debt registers
- Copies of basic government filings
- Identify other key legal documents
 - Deeds and leases
 - Mortgages, promissory notes and other debt documents
 - Agency, partnership and joint venture agreements, contracts for service

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- License and sponsorship agreements
- Business name, trade-marks, official marks and domain names
- Charitable registration number, T3010's and correspondence from CRA
- Policy statements, i.e. sexual abuse and volunteer policy statements
- Historical record of insurance policies
- Privacy policies
- Investment policies

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- Review of key corporate documents
 - Review of letters patent
 - Is the name in the letters patent the correct name of the organization and is it consistent with the objects?
 - Are the activities of the organization authorized by its corporate objects?
 - Does the dissolution clause provide for distribution to other charities
 - Review of supplementary letters patent (SLP)
 - Have all SLPs been identified
 - Has there been a change of corporate name?

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- Has there been a change of corporate objects?
- Does the organization have historical records of all the by-laws?
- Are there divisional or chapter by-laws for the church or charity?
- Need to review the applicable corporate by-law for basic terms, such as
 - Do provisions conflict with letters patent concerning objects or dissolution?
 - Do the provisions reflect the actual organization and operational structure of the organization?

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- Does the by-law reflect recent changes to applicable corporate legislation?
- Is there an adequate indemnification provision for the directors?
- Are the by-law amendment procedures consistent with corporate legislation?
- Are the records of board decisions and/or membership meetings complete?
- Have corporate records generally been properly maintained, such as consents to be directors and applications for membership?
- Where are the corporate records kept?

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- Have necessary corporate filings and registrations been kept up to date?
 - Ontario Corporations
 - Initial Notice and Notice of Change - Form 1
 - *Business Name Act* (Ontario) registrations
 - Mandatory reporting to Public Guardian and Trustee for charitable organizations
 - Federal Corporations
 - Annual Summary (Form 3) – Canada
 - Extra-Provincial Initial Notice (Form 2) - Ontario

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- *Business Name Act* (Ontario) registrations
- Mandatory reporting to Public Guardian and Trustee for charitable organizations
- Does the organization operate and/or fundraise in any other provinces? If so, there may need to be registration as extra-provincial corporations and/or fundraisers in other provinces, together with business name registrations (see Charity Law Bulletin #45 at www.charitylaw.ca)
- Is the organization aware of the importance of proper use of corporate name and operating names?

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- Has the organization developed and implemented risk management policy statements concerning:
 - child protection
 - sexual harassment
 - bullying
 - volunteer recruitment
 - safety in the workplace
 - protocol for volunteer projects
- Has the organization conducted an up to date inventory of its assets?

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- MAINTAINING CHARITABLE REGISTRATION**
- Is the legal name of the organization and/or its operating name consistent with the records of CRA?
 - Does CRA have the current head office address of the organization?
 - Does the organization submit its annual charity information return (form T3010) on a timely basis?
 - Does the organization have board approval before filing the annual T3010?

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- Has the organization obtained approval from CRA for expanded objects as new charitable programs?
- Is the church or charity and its directors aware of the recent key amendment to the *Income Tax Act* in May/2005 concerning changes to the disbursement quota?
- Is the church or charity and its directors aware of the new penalties and sanctions that are part of the May/2005 amendments to the *Income Tax Act*?

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- Is the church or charity and its directors aware of the key amendments proposed to the *Income Tax Act* in July/2005 dealing with split receipting and anti-tax shelter provisions?
- Is the organization complying with the restrictions on political activities established by CRA? (see Church Law Bulletin #15 “*Political Activities: What Churches and Charities Can and Cannot Do*” and additional materials available at the CRA website <http://www.cra-arc.gc.ca/tax/charities/menu-e.html>)
- Is the organization complying with the restrictions on related business activities established by CRA? (see Charity Law Bulletin #37 “*New CRA Policy on Charities and Business Activities*”)

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COMPLIANCE WITH ANTI-TERRORISM LEGISLATION

- Anti-terrorism legislation is very complicated, see www.antiterrorismlaw.ca for article “*Charities and Compliance with Anti-terrorism Legislation: The Shadow of the Law*”
- Charities that carry on international operations will also need to be aware of the impact of anti-terrorism legislation in other jurisdictions

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- **Due diligence response**
 - **Need to become familiar with specifics of anti-terrorism legislation**
 - **Need to establish due diligence policy to comply with the law**
 - **Need to conduct due diligence review of directors, officers and key individuals**
 - **Monitor how monies are being raised and disbursed**
 - **Review and monitor international relationships, i.e. agency agreement and joint venture**
 - **Need releases and indemnities from third parties**

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- REAL PROPERTY ISSUES**
- Deeded land**
- **Has an environmental assessment been conducted to determine the extent of liability exposure for the organization for future acquisitions as well as existing property?**
 - **Has the organization addressed and rectified encroachments with neighbouring lands?**
 - **Are municipal zoning and legal non-conforming uses being complied with?**
 - **Has the organization reviewed its municipal property tax assessment to determine both classification and valuation and if so has there been a request for reconsideration or appeal of assessment?**

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- Leased Land**
- **Avoid clauses requiring restoration of leased premises at the end of the lease**
 - **Need to limit the extent of tenant expenses under a net lease arrangement**
 - **Ensure the right to sub-let and assign the lease, with a release, if possible**
 - **The amount of rent on renewal should be made subject to arbitration**

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- Try to obtain a covenant from the landlord to prohibit offensive uses of adjoining leased premises
- Does the lease need to be registered on title?
- Does the lease comply with CRA requirements concerning leasehold improvements? (see CRA publication entitled *“Registered Charities Making Improvements to Property Leased from Others”* (CPS-006) available at the CRA website <http://www.cra-arc.gc.ca/tax/charities/policy/cps/cps-006-e.html>)

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EMPLOYMENT AND VOLUNTEER ISSUES

- Has the organization developed appropriate policies and practices for hiring, disciplining and terminating employees and volunteers?
- Does the organization have a policy in place concerning accommodation for employees who are members of a disadvantaged group identified in the Ontario *Human Rights Code*?
- Does the organization have a policy concerning sexual harassment?

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- Is there a need to develop and adopt statements and/or manuals for employees as well as volunteers in relation to conduct and performance structure?
- Do employees and volunteers who deal with children need to be screened and supervised in accordance with an appropriate sexual abuse policy statement?
- Is the organization aware of and addressing ownership issues regarding intellectual property created by the employees and volunteers?

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- Is the organization aware of and complying with applicable statutory requirements, such as pay equity, employment standards, human rights legislation, privacy legislation and occupational health and safety prerequisites?
- Is the organization and the board exposed to criminal liability under the *Criminal Code* i.e. Bill C-45 (Westray Mines)?

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FISCAL MANAGEMENT ISSUES

- Are all salaries and benefits being paid by the church or charity?
- Are remittances for withholding taxes, GST and PST being made?
- Is the church or charity operating with a deficit and, if so, for how long?
- Are surplus funds being properly invested (see next slide for details)

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INVESTMENT ISSUES

- What investment powers apply to investment of surplus funds of the organization?
 - Investment power may be found in the letters patent or supplementary letter patent
 - Investment power may be found in incorporating legislation
 - Investment power may be found in the *Trustee Act* (Ontario), particularly for a charity, i.e. prudent investor standard

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- Does the organization need and/or have an investment policy?
 - Documenting compliance with prudent investor rule
 - Establishing requirements for delegation of investment decision making, particularly for a charitable organization
 - Proper management of endowed funds
- Are charitable funds being used to fund separate business operations of the charitable organization?
- Is there violation of the *Charitable Gifts Act* (Ontario) by a charitable organization owning more than 10% of a business as an investment?

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- DONOR RESTRICTED TRUST FUND ISSUES**
- Are there donor restricted trust funds being held by the church or charity?
 - Endowment funds
 - Research funds
 - Special project funds
 - Ten year gifts
 - Are restricted funds used only in accordance with applicable restrictions?

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- Are restricted funds being used in whole or in part for general operational purposes or are they being borrowed against? In either event there would be breach of trust.
- Are restricted funds segregated from operating funds?
- If not, is there compliance under the *Charities Accounting Act* (Ontario) to commingle restricted funds for investment purposes?
- Is the board of the charitable organization aware of the consequences of breach of trust for failing to comply with restricted funds?

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