AVOIDING MISSION DRIFT: A DUE DILIGENCE APPROACH

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A charity is a very organic entity. After a charity has been established, it is not uncommon to find that its focus, mission, objectives, and programs have gradually evolved. "Mission drift" often refers to the gradual diversion of a charity's activities from its stated purposes. It does not refer to a deliberate and strategic change that is knowingly undertaken by a registered charity. Rather, mission drift describes the changes that usually go unrecognized or unaddressed by the charity's board of directors. This article reviews some of the most common reasons for mission drift, discusses the potential consequences, and offers some practical and proactive solutions.

Common reasons for mission drift

Mission drift may result from one of many causes, including changes in the personnel of the organization, changes in the needs of the community or beneficiaries served by the charity, and reaction to the organization's financial burdens. There are many ways an organization's personnel may lead it astray from its objects over the course of time. This may result from long-time board members, staff, and volunteers losing sight of the charity's original purpose and failing to consult the organization's charitable objects. It may also be caused by successors to the organization's leadership positions bringing a slightly different vision and neglecting to familiarize themselves with the corporate objects.

Another cause of mission drift could be that the beneficiaries whom a charity was originally established to serve have changed over time. For example, Charity XYZ was established years ago for the relief of poverty in a particular neighbourhood. As immigration gradually changed the demographic in the neighbourhood, the charity found the need to provide assistance for the settlement of new immigrants. Then, as the immigrants settled in, the charity found it needed to operate after school programs to help youths from these immigrant families cope with issues at school and home. Over time, the charity found the need to operate programs and housing for senior immigrants. While the charity's response has been consistent with the needs of the community the charity is located in, it has not been consistent with its original charitable objects.

The need for funding or revenue may also lead charities away from their charitable objects. Mission drift occurs when a charity accepts funding in exchange for operating programs that are outside the charity's original mission. An example would be a charity directed at helping at-risk youth accepting funding to operate an after-school program for at-risk youth and to provide vocational training for their parents who are unemployed. Operating the latter program would put the charity offside with its own mission. With a new funder, one would anticipate that the recipient charity would be very careful in reviewing the funder's requirements and identifying areas where the charity is required to direct the funds into programs that are outside of its mission. However, with on-going funders imposing new requirements, a charity may easily be put offside if it does not carefully review the requirements on an on-going basis.

As well, it may be equally problematic for charities to turn to revenue-generating business or social enterprise in response to financial pressures. While charitable organizations and public foundations are permitted to engage in "related business," activities that fall outside of this category are off-side with the *Income Tax Act* and Canada Revenue Agency's (CRA) administrative policies. Private foundations, on the other hand, are forbidden from engaging in any business activity, regardless of whether or not it is "related." A business activity is considered "related business" if it is either run substantially by volunteers or if it is linked and subordinate to the charity's purpose (Canada Revenue Agency, 2003a). In relation to social enterprises, there are parameters in which charities may conduct community economic development activities that improve economic opportunities and social conditions (Canada Revenue Agency, 2012a).

Another common example of mission drift caused by efforts to raise funds is when a charity puts so much focus on its fundraising activities that raising funds become a collateral purpose of the charity, putting it off-side with CRA's policy on fundraising (Canada Revenue Agency, 2012b); or engaging in political activities outside of what is permissible under CRA's policy on political activities (Canada Revenue Agency, 2003b; Prendergast, Man, Cooper, & Carter, 2012).

Consequences of mission drift

Mission drift can have consequences on the organization as a whole and on the board of directors specifically. The consequences for the organization may be severe, depending on whether the charity's new activities are charitable in nature. If the new activities of the charity are charitable in nature (such as moving from a charity that engages in programs that relieve poverty to operating programs for the relief of the aged, as in the example above), the charity will need to update its objects and to ensure that the new objects are acceptable to CRA. However, if the charity drifts to engaging in activities that are offside with the parameters under the *Income Tax Act* or CRA's policies (such as fundraising becoming a collateral purpose of the charity), this may result in the imposition of sanctions or even the revocation of its charitable status.

The consequences that mission drift may bring upon directors are also severe. Directors have a responsibility to be aware of the laws and compliance issues affecting the corporation. One of the most obvious (but often missed) areas of compliance is the requirement to comply with the organization's stated objects. A charity is generally restricted to carrying on activities that are contemplated by its objects, which are contained in its letters patent, articles, or constitution. If a charity carries on activities that are outside its corporate powers, it is said to be acting *ultra vires* its objects. The doctrine of *ultra vires* means that all actions of the corporation that are outside the capacity authorized in the constating document's objects are void and of no legal effect and are not capable of being ratified at a later date.[1] *Ultra vires* acts may also be subject to attack by any third party and even by the corporation. This may also raise personal liability implications for the charity's directors.

Some jurisdictions have removed the concept of *ultra vires* by statute (such as the *Canada Not-for-Profit Corporations Act*). This means that the statement of purpose in the articles will not void activities carried on by the corporation that are outside the authorized purposes of the corporation. However, directors could still be exposed to allegations of breach of trust from donors if the charity's property was used for activities that did not correspond to its stated charitable objects.

Due diligence to avoid mission drift

In light of these serious consequences, it is important that charities adopt mechanisms to prevent mission drift before it occurs. The appropriateness of specific mechanisms will differ from charity to charity, depending on the organization's governance structure, constituency, etc. What is common to all charities, however, is that focus comes from review. The following are a few suggestions for charities looking to avoid the pitfalls of mission drift.

The board of directors should review the programs of the charity regularly to ensure that they are consistent with the charity's objects. Such reviews can be conducted at board meetings, annual board retreats, etc. At a minimum, the review should be done annually to ensure that any problems are identified and dealt with as early as possible. One good opportunity to review this issue is during the completion of the T3010 annual information return, which requires the charity to set out new and on-going programs.

A new director should promptly receive a copy of the charity's up-to-date governing documents to ensure that he or she is aware of the charity's objects. Regular board training is also important to ensure that directors are kept up-to-date with the requirements of the *Income Tax Act* and CRA's policies.

Senior staff should also review the charity's objects because they often oversee the implementation of the charity's programs. As well, training should be provided to staff and volunteers to develop an environment of general understanding of the basic principles with which the charity must comply. This is because staff and volunteers are "on the ground" implementing the charity's programs. Along with careful review and planning of a particular program by the board, care should also be taken to ensure that the implementation of the program is not offside. For example, a charity operating a soup kitchen for the relief of poverty may be offside if its staff keep inviting at risk youths to come to the soup kitchen for after-school activities.

A charity may also want to adopt a program review policy to ensure that all of its programs are carefully reviewed and implemented in accordance with the principles outlined above. Similarly, a charity may also want to adopt a funding review policy to ensure that all requirements of the funders are reviewed in light of the charity's objects and mission. A committee may be mandated with reviewing the programs/funding and reporting its findings to the board.

Another practical step in avoiding mission drift is to refrain from including the charity's corporate objects in its by-laws. For charities that are incorporated, most incorporating jurisdictions require the corporate objects be set out in a document that is separate from the corporate by-laws, such as in letters patent or articles of incorporation. Changes to the corporate objects as stipulated in these separate documents requires approval from the governing authority. Many charities also set out the corporate objects in the by-laws as well so that they are easily accessible to their members. The downside of this approach is that, over time, members (and often the board) may revise the corporate objects as they are set out in the by-laws, forgetting that the charity is governed by the corporate objects as they are set out in the letters patent or articles of incorporation. As such, the best option is to refrain from setting out the corporate objects in the by-laws, and instead to set them out only in a separate document to be given out to the members. Alternatively, the by-laws must state clearly that the corporate objects in the by-laws are "as set out" in the letters patent or articles of incorporation.

For charities that also have mission statement or vision statement, care must be taken to train directors, staff, and volunteers by clarifying the fundamental principle that the charity must operate within the objects in its governing documents. Therefore, mission and vision statements must be carefully drafted so that not only do they reflect the mission and vision of the organization, but also they are consistent with the charity's objects as expressed in its governing documents.

There are many reasons why a charity may inadvertently stray from its original charitable purposes. Irrespective of the cause, the consequences can be devastating for the charity and its directors. The best solution to mission drift is structured prevention that uses review procedures to keep board members, staff, and volunteers conscious of the charity's purpose as stipulated in its charitable objects.

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Note

1. See, for example, *Bamford and ors. v. Bamford and ors.*, [1969] 1 All E.R. 969 (C.A.); *Irving Oil Limited v. Central and Eastern Trust Co. et al.*, (1978), 5 B.L.R. 29 (N.S.C.A.), varied [1980] 2 S.C.R. 29.

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