

7 Things Charities Should Know Before Creating a Facility Rental Policy

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Charitable organizations often rent out their facilities when they are not in use as a way to reach out to the community and/or generate additional income. However, there are important insurance, liability, and legal issues to consider before a charity decides to do so. This article will outline seven key considerations that should be discussed before creating a facility rental policy.

1. Without a proper policy, renting your facility can be messy.

A facility rental policy sets out who can rent and for what activities. This helps the charity to balance the tension between controlling facility usage and reaching out to the community and/or taking advantage of revenue opportunities. If your organization does not have a clear policy, your charity may not have a basis for refusing to rent out your facilities to groups that do not share your organization's values or purposes.

There are two human rights cases that have influenced the legal landscape in this area:

The Knights of Columbus ("Knights") case¹

The Camp Arnes ("Camp") matter²

The Knights of Columbus and Camp Arnes had human rights complaints filed against them when they respectively denied to rent their facilities to a same-sex couple celebrating their wedding and The Rainbow Harmony Project, a choir for the LGBTQ community. Unfortunately, there was confusion over each organization's values and beliefs. The proposed renters mistakenly had the impression that they would rent their facilities to anybody and everybody.

In the Camp Arnes case, the Manitoba Human Rights Commission released the following after the matter was settled:³

"The Rainbow Harmony Project recognizes that at the heart of the dispute was uncertainty by all concerned about the nature of Camp Arnes' operations or the restrictions to be applied to potential campers and other guests, or both. Rainbow Harmony Project accepts that Camp Arnes is, and is intended to be, a religious organization. Although it rents out its facilities to various individuals or groups that are not associated with its religion, Camp Arnes has always intended this service to be part of its broader religious mission and outreach and not primarily a commercial activity. As such it is entitled to apply reasonable religious restrictions to such outreach activities.

Camp Arnes recognizes that its previous materials and practices may have given rise to uncertainty about the nature of its operations and the restrictions to be applied to potential campers and other guests. . . . Camp Arnes will be distributing revised policies and implementing improved practices as a result of this dialogue and disclosing the camp's religious mandate and related policies to potential guests and campers at the front end of the application process. Camp Arnes will further have a process for dealing proactively with uncertainties or confusion that may arise in the future" (emphasis added).

The main takeaway for Christian charities from this ruling is that your Christian nature cannot simply be assumed to be known and understood by your facility users. If your charity has established moral standards for its staff and/or membership, then they should be formally outlined in an across-the-board policy (e.g., a Lifestyle and Morality Statement,⁴ denominational doctrines and creeds, or any other biblical set of standards adhered to by your ministry). These should be referenced as an integral part of your facility use policy.

The *Knights* and *Camp* matters demonstrate that the ability of a charity to set restrictions on acceptable activities based on religious principles is under serious challenge. In its response to a Reference to the Supreme Court of Canada by the Federal Government, the Supreme Court of Canada stated that a church could not be forced to use its sacred places to carry out a same-sex marriage ceremony where it was opposed to such marriages.⁵ The question is, what are "sacred places" and will this protection be extended beyond a church to other Christian charities? The

Ontario government amended its *Marriage Act* in 2005⁶ defining “sacred place” as “a place of worship and any ancillary or accessory facilities.”⁷ Notwithstanding, it appears that in restricting types of activities on religious principles, Christian charities which are not churches will be the most vulnerable to human rights claims over their rental policies.

In Ontario’s *Marriage Act* the protection is placed with the individual (e.g., pastor, minister). Though applicable only in Ontario, a best practice is to include a requirement in your rental policy that rental requests for weddings cannot be booked until the pastor’s permission is obtained. Accordingly, a special notation should be made in your facilities rental policy setting out

- a) the position of your church or charity regarding what constitutes marriage from your biblical and theological perspective;
- b) the requirement for pastoral approval for any rentals.

2. The primary purpose of your charity’s facility is to carry out your ministry’s purposes and objects.

Your charity’s facilities exist to enable you to carry out your activities to achieve your ministry’s charitable purposes and objects. It is important that you know what your charity’s objects and purposes are. You can find them in your charity’s governing document (e.g., declaration of trust, constitution, or articles of incorporation). It would be helpful to include a summary of the charity’s purposes at the beginning of the facility rental policy to inform users why the facilities exist.

It is for the charity and its directors/trustees to determine what activities the charity will actually carry out. In deciding what these activities will be, the charity must keep its purposes and objects in mind, as all of the charity’s activities must advance or work towards the charity’s purposes. *In terms of facility use, whatever activities are identified by the charity’s board as the charity’s activities must take priority over any rental activities.*

The board-approved activities of a Christian church, for example, might include

worship services (and ancillary family get-togethers after special events such as baptisms and professions of faith);

Christian weddings and Christian funerals (as defined by the church);

outreach activities (e.g., ministry programs at local senior citizen homes, Sunday school, vacation Bible school);

mission activities (e.g., relating to sending missionaries and supporting the ministries that employ them);

Christian education activities (e.g., Bible studies, catechism, promotion of Christian education);

fellowship activities that help the church grow in grace and help build the body of Christ (e.g., church picnics, youth/young adults/seniors’ get-togethers).

The following list of questions will assist the charity in determining which activities have priority. It will be necessary therefore to ask these questions about the proposed renter:

Who is the renter?

What does the renter intend to do on the property?

What does the renter actually do on the property?

Is the activity in line with our objects?

3. It's important to be upfront about your charity's Christian nature in your rental policy.

Both the *Knights* and the *Camp* cases are examples of organizations not making their Christian and religious natures clear. Both gave the outward appearance that they would rent facilities to anybody and everybody.

Though the resolution of both cases affirmed both charities' religious identity, it took an enormous amount of time, energy, money, and emotion to reach that point of clarification. It's much better to be upfront.

Some practical ways to express your ministry's Christian nature are set out in the "Facility Rental Policy - Suggested Components" document, accessible to CCCC Members at www.cccc.org/members_sample_documents_view/html/67.

4. You do not have to rent to everybody and anybody. The charity may decide how open or closed their doors will be.

All charities are unique and each will have a different notion of whom they wish to rent to and why. Those boundaries should be defined in the charity's facility rental policy development.

When determining how open or closed your charity's doors will be, there are no right or wrong answers. The important part is to express your charity's position in your facility rental policy.

If the charity wishes to use its facilities exclusively for its own purposes, the policy may be very simple: "The rental of our facilities is not permitted to any third parties as it is used solely for our charitable activities in pursuit of our purposes and objects." There would be no need for a rental agreement in such a situation.

The other end of the spectrum is where a charity wishes to be completely open to the public with no restrictions. The policy wording may also be very simple here, for example, "Our facilities are open to lease by the public subject to reasonable limits against all unsafe or illegal activity." This situation will require a comprehensive rental agreement for which we recommend you obtain legal counsel.

There are many other different points along the spectrum to consider:

a) Use of Facilities by other Charities

A charity may permit another charity to use its facilities for free on the basis that it is transferring something which was derived from its revenue (i.e., the building and specifically the ability to rent its building(s)) to another charity. Arguably, the law of trusts would apply to narrow down which charities can use the facilities on a free basis. From a trust law perspective, a charity receives property for specific purposes and only for those purposes; consequently, it follows that a charity could only permit other charities to "rent" for free, where such charities have compatible purposes and objects. However, a charity could certainly decide to charge a fee for use of facilities by charities.

b) Use of Facilities by For-Profit Companies and Organizations

A charity may decide to rent its facilities to for-profit organizations when its facilities are not in use and when it is a prudent use of resources to bring in more revenues, which in turn can be used in the charity's own activities. Any such rentals would have to be at the fair market value price (e.g., the amount that the user would pay if renting from a for-profit facility rental organization). Rentals on the basis of revenue opportunities should be at fair market value. This is needed to

avoid undermining taxable entities in the business of providing rental space; and

avoid using the charity's tax-exempt status as an undue benefit to a non-qualified donee (e.g., if you rent to businesses, they must not benefit by paying rent at a lower rate than they would from a commercial space provider).

Also, the policy would need to emphasize that these types of renters cannot be engaged in any commercial or other activity contrary to the charity's Christian nature.

c) Use of Facilities by Government

A Christian charity could permit the government, in its capacity as a representative of the public, to use its facilities on the basis of outreach to the community. The amount of rental fees on this basis would be at the discretion of the charity. It would be wise to restrict the government's use to, for example, polling stations and blood donor clinics operating through government agencies, since a Christian charity or church may not necessarily want the government to conduct civil weddings in the facility.

d) Use of Facilities by Individual Members of the Public and Non-Charity Not-For-Profits

A charity may decide to rent its facilities to individuals from the public on the basis of outreach to the community and/or revenue opportunity.

The amount of rental fees, if any, for rentals on the basis of community outreach is at the discretion of the charity. Determining what constitutes outreach and why a reduced fee, or no fee, is appropriate is a bit of a grey area. This is especially important to review with legal counsel to ensure the charity does not engage in providing resources to non-qualified donees.

There is a very fine boundary line for dealing with not-for-profit groups who are not registered charities and, therefore, non-qualified donees. The tension often arises because these groups can be good people doing good things. Keep in mind that your charity is not to provide resources to a non-qualified donee. Whether those resources are cash or free use of your building does not change the principle. The free use of your facility by a not-for-profit must be done on a bona fide basis (e.g., their activity is consistent with your charity's charitable purposes and objects and helps you achieve them).

5. Being a charity's regular donor or volunteer does not entitle a person to use the charity's facilities for personal benefit at no cost.

For individuals who have dedicated volunteer time, energy, and financial gifts to their church, the building itself can take on the feeling of being a spiritual home. However, that does not entail "ownership" or any benefits that could flow from it.

By being Canadian registered charities, churches have declared to the government that they are charitable trusts which will serve the public good. That distinguishes churches from, say, private clubs, which exist for the personal benefit of their members and can offer them benefits not available to outsiders. Accordingly, as both a public body and registered charity, a best practice is for a church to charge all parties—both members and all others—the same fee.

If a church does provide reduced rental rates for its members, the benefit it represents would be classified as an "advantage" under the split receipting rules of the *Income Tax Act (ITA)*. The *ITA* sets out very specific wording, in paragraph 248(32), to define an advantage amount:

"The amount of the advantage in respect of a gift or monetary contribution by a taxpayer is the total of

(a) the total of all amounts, ... each of which is the value, at the time the gift or monetary contribution is made, of any property, service, compensation, use or other benefit that the taxpayer, or a person or partnership who does not deal at arm's length with the taxpayer, has received, obtained or enjoyed, or is entitled, either immediately or in the future and either absolutely or contingently, to receive, obtain, or enjoy

(i) that is consideration for the gift or monetary contribution,

(ii) that is in gratitude for the gift or monetary contribution, or

*(iii) that is in any other way related to the gift or monetary contribution ..."*⁸

Based upon the broad and encompassing wording used here, the dollar value of the fee reduction between what is charged to a church member and to a non-member would constitute an "advantage" to the member. The church would need to issue a split donation receipt to reflect that.⁹ The result would be a reduction in the "eligible amount" that is available for a donation tax credit. The administrative work involved in complying with this legal requirement provides another strong reason not to have a two-tiered rental fee schedule for members and non-members.

6. Insurance is important, but it will not mitigate all your risks.

This issue, by far, is the one that has changed the most over the past few years and continues to evolve as our society becomes more litigious. Accordingly, even if you are not developing your rental policy from scratch, but just reviewing it, a comprehensive CCCC Bulletin Article, guest written by Mr. Ken Hall of Robertson Hall Insurance, is a must-read that will provide you with an excellent overview and examples of the issues at hand.¹⁰

It is important to not rely excessively on insurance coverage, but to have properly developed policy and implemented procedures to mitigate risks as much as possible. Each insurance claim increases costs (e.g., higher premiums). Facing a legal action is a significant drain on time, energy, and money better spent on your charity's activities. It also has a distracting and stressful effect on staff, volunteers, and the board.

Be sure to have the appropriate indemnity clauses in your agreement to address potential losses.

7. Your rental policy and your rental agreement should be reviewed by legal counsel.

The information provided here is intended to give you a basic understanding of the considerations involved in renting your charity's facilities. However, this is an area that demands professional review by both legal counsel and your insurance provider. Though there is a cost involved, it is a prudent investment.

Summary

It is not unreasonable to expect public challenges to your ministry's rental policy if it is at all restrictive. Accordingly, a well-thought-out rental policy that anticipates such opposition will help to provide some protection to your ministry. Nothing is fool-proof and anyone can challenge it, but how successful that challenge will be depends, in part, on how well your rental policy is written.

Sample Documents

Facility Rental Policy - Suggested

Components: www.cccc.org/members_sample_documents_view/html/67 (CCCC Member access only).

Facility Rental Agreement - Suggested Components:

www.cccc.org/members_sample_documents_view/html/66 (CCCC Member access only).

¹ *Smith and Chymyshyn v. Knights of Columbus et al.*, 2005 BCHRT 544. A helpful review and commentary can be found on this webpage produced by the Carters Professional Corporation : www.carters.ca

² You can find the case settlement set out by the Manitoba Human Rights Commission here: www.manitobahumanrights.ca

³ Read the full release at www.manitobahumanrights.ca

⁴ A CCCC template for a Biblically-based Lifestyle and Morality Standards document is available here: www.cccc.org

⁵ *Reference re Same-Sex Marriage*, 2004 SCC 79 at para. 59 scc-csc.lexum.com

⁶ www.ontla.on.ca

⁷ *Marriage Act*, R.S.O. 1990, c. M.3, section 20(7).

⁸ laws-lois.justice.gc.ca

⁹ See the CCCC Charities Handbook chapter "Split-Receipting" for full details, or online at www.cccc.org/members_ch_show/chapter_11

¹⁰ Ken Hall's article may be accessed at www.cccc.org/other_article/outside-user-groups/insurance/ or at www.robertsonhall.com/pdf/CCCC_Special_Edition_Bulletin.pdf *Bulletin Issue 1, 2016* (Posted: January 15, 2016)