

WILLS, ESTATES, TRUSTS AND CHARITIES

Churches must adapt to changing times — and laws

By John Jaffey
Toronto

The recent 10th annual "Church & the Law" seminar — practical legal advice for churches and religious charities — attracted an audience of more than 500.

Sponsored by Carter & Associates of Orangeville, Ont., in affiliation with Fasken Martineau DuMoulin LLP, the all-day seminar advised those who run religious organizations what they should be doing to adapt to changing times and changes in the law.

Criminal law

Bruce Long, former regional director of Crown attorneys in Southwestern Ontario, spoke about when to initiate a criminal investigation.

Apart from abuse of a child under 16 years old, which must be reported immediately to the Children's Aid Society (and followed up in writing), offences against a charitable organization can be either dealt with in-house or reported to police.

Bear in mind, said Long, that s. 141 of the *Criminal Code* makes it an offence to conceal an offence — but the section is seldom, if ever, used.

Offences often committed against organizations are property damage offences — usually a police matter — and fraud and theft.

In deciding whether to report fraud or theft, consideration should be given to:

- **publicity:** Internal frauds, if exposed, may have negative effects on charities. You have to balance publicity against letting a sinner off the hook.

- **cost:** Private investigators, unlike police, charge a hefty fee.

- **insurance:** Many companies require that losses be reported to the police.

- **effectiveness:** Police can get search warrants and seize computers. (However, police generally won't hire a forensic accountant.)

Long suggested that whatever you decide, you should follow certain procedures. Avoid accusations and the use of words like "fraud": You don't want to set yourself up for a lawsuit.

Contact counsel, so that you can get an objective opinion of the wrongdoing.

If the suspected offender is an employee, put him on leave or give him a transfer. Depending on the seriousness of his behaviour, how much evidence you

have and the advice of counsel, you may dismiss him for cause.

Notify the board of directors, your insurer and the affected parties — a supplier, credit card company or the bank, for example.

Appoint a single spokesperson for the organization, and warn everyone else not to talk about what happened, particularly to the media.

If you have decided to contact the police, it is essential to cooperate fully with them. Collect and preserve evidence, such as computers, cancelled cheques — even the trash in the employee's wastepaper basket.

Privacy law

Assuming every organization engages in at least one "commercial activity," the definitions in the *Personal Information Protection and Electronic Documents Act* (PIPEDA) are broad enough to apply to churches and charities.

Therefore, effective January 1, such organizations — in any province that has not enacted its own "substantially similar" privacy legislation — will be limited in its collection, use and disclosure of personal information.

Though PIPEDA's impact will

vary, every organization must, at the very least, take the following steps:

- Appoint a privacy officer who will be responsible for personal information under the organization's control.

This applies to information



Elena Hoffstein

held by third parties, such as printers.

- Carry out a privacy audit to review the impact of PIPEDA's 10 principles on your organization.

- Identify the purposes for which personal information is collected and used. (Information cannot be "re-used" for a dif-

ferent purpose, so, presumably, a mailing list for a church bulletin could not be used for a fundraising list without first obtaining consent.)

When the purpose for which information was collected has been achieved, the information must be destroyed, preferably by shredding.

- Make your privacy policies and practices available to the public, possibly by posting it on your website or printing a pamphlet.

- Maintain ongoing compliance, because conforming with PIPEDA is not a one-shot endeavour.

Tax law

Elena Hoffstein, a partner at Fasken Martineau DuMoulin LLP, summarized the complicated disbursement quota rules as a preliminary to advising charitable foundations about the now-onerous 4.5 per cent rule.

Disbursement quotas are prescribed amounts set out in the *Income Tax Act* that registered charities are required to spend on charitable activities and purposes.

see FOUNDATIONS p.14

Drafting Trusts and Will Trusts in Canada

New!

by James Kessler, Q.C. and Fiona Hunter

With Valuable Precedents on CD!

The Modern Solution that is Required Reading

When it comes to trusts and estate planning, drafting errors often prove impossible to correct, and the consequences can last a lifetime. **Drafting Trusts and Will Trusts in Canada**, by two noted trusts practitioners, combines step-by-step guidance on successful drafting with a host of valuable precedents. Presented in a clear, concise and exceptionally readable style, this "must have" text includes practical guidance on:

- Powers and role of the trustee
- Issues involving beneficiaries
- Navigating the rule against perpetuities
- Complete guide to the general contents of a trust
- Creating and structuring specific kinds of trusts
- Using Will trusts
- Plain language drafting techniques
- Important style guidelines for effective documents

A variety of excellent trust deed precedents — in hard copy and on CD — saves time and takes the uncertainty out of the drafting process.

\$125 + GST • 432 pages • December 2003 • Hardcover
ISBN: 0 433 44008-2

ORDER TODAY!

Take advantage of our 30-day RISK-FREE examination.
Call 1-800-668-6481 or Online lexisnexis.ca

Please quote reservation code 3306 when ordering

(Price & other details are subject to change without notice. If payment accompanies order we pay shipping and handling.)

LexisNexis and the Knowledge Burst logo are trademarks of Reed Elsevier Properties Inc., used under licence.
Other products or services may be trademarks or registered trademarks of their respective companies.
Copyright 2004 LexisNexis Canada Inc. All rights reserved.

Applications judge ruled entitled to use discretion in allocating estate assets

DEPENDANTS

—continued from page 9—

Bruce had not made adequate support provision in his will for his dependent adult children.

Justice Cullity ordered that the level of support should be set at \$250,000, payable by way of a lump sum to Mary in trust "to be applied to a maximum of \$10,000 for Elizabeth's expenses of completing her Master's degree at Wilfrid Laurier University and the remaining amount to be held in trust to apply so much of the income, and to the extent it is insufficient, the capital, for the care and welfare of Paul Cummings during his life."

He also ordered support arrears of \$53,300, representing the accumulated difference between Bruce's obligation to pay \$2,000 per month and his actual payments of \$378 (starting in 1994 when his employment was terminated) followed by Ruta's \$600 payments after Bruce's death.

Justice Blair agreed with Justice Cullity's disposition regarding the arrears of support. He found that even though Paul and Elizabeth did not rely on the language of the separa-

tion agreement regarding Bruce's estate's ongoing obligation to pay \$2,000 per month, but rather sought dependants' relief, the application judge could exercise his discretion in balancing all of the factors relevant to how the assets in the estate were to be allocated.

"In my view," wrote Justice Blair, "the application judge was entitled on the record before him, to exercise his discretion in limiting the arrears of support to the date of death, and to deal with the allocation of the assets of the estate in the post-death era on the basis of dependant's relief principles."

Justice Blair found that Justice Cullity was entitled to take into account not only the needs of Paul and Elizabeth but also Bruce's moral obligations toward his dependants, including his second wife, Ruta — even though she was not claiming relief under the SLRA.

Chief Justice Roy McMurtry and Justice David Doherty agreed.

Daniel Dochylo acted for the appellants. Brian Foster acted for Ruta.

Reasons in *Cummings v. Cummings*, [2004] O.J. No. 90, are available from FULL TEXT: 2336-023, 19 pp.



Diamonds —
and Poorly
Structured Trusts —
are Forever

Make Sure
Your Drafting
Stands
the Test of Time



LexisNexis™
Butterworths

WILLS, ESTATES, TRUSTS AND CHARITIES

Churches should educate clergy about their legal rights

SAME-SEX

—continued from page 9—

The constitution for unincorporated churches usually consists of a single document; for incorporated churches, there are letters patent, general operating bylaws and policy statements.

"You can't say, 'Our constitution is the New Testament,' or 'We have our own laws and traditions,'" said Carter. "You'll be more vulnerable to attack."

He emphasized that a "Statement of Faith" should always be part of a church's constitution. "It is key," he said, "the bedrock of what you are."

If applicable, the Statement of

Faith should reflect a church's theological belief in a literal and/or orthodox interpretation of

'You can't say "Our constitution is the New Testament," or "We have our own laws and traditions." You'll be more vulnerable to attack.'

Scripture. General quotes, such as those contained in the "Apostle's Creed," can be included, but he stressed that

care should be taken not to quote passages that could be construed as promoting hatred against an identifiable group.

Other constitutional documents, such as charitable objects, operating bylaws and policy statements should contain a clear linkage with the Statement of Faith.

If the church does not support same-sex marriage, its policy statements should contain words "recognizing marriage as a holy sacrament of the church and defining marriage as being between one man and one woman in accordance with its Statement of Faith."

In addition, clergy should be required to subscribe to the church's constitution, including its Statement of Faith. The policy statement should include a term requiring marriage to be solemnized only by clergy of the local church or other clergy approved

by the church who have subscribed to the Statement of Faith and the constitution of the church.



Terrance Carter

There could also be a term restricting the use of church facilities to church programs and pur-

poses, which are consistent with the Statement of Faith. Carter cautioned that facility-use policies should use neutral wording and be prepared in a manner consistent with the requirements of the *Human Rights Code*. The wording should not refer to "identifiable groups."

Finally, he recommended that churches review their existing constitutional documents to ensure they are consistent with recent developments in the law.

He also suggested conducting a "legal audit" to examine possible exposure to legal liability. This would also apply, he said, to their liturgies and teaching materials.

"It would be prudent," he noted, "for local churches and/or denominations to educate clergy of their legal rights in relation to the fulfillment of their ministerial duties and the operations of the church as a whole."

Some changes will have unintended consequences

TAX SHELTER

—continued from page 9—

These leveraged donation shelters were addressed previously by the Department of Finance by proposed statutory changes. The new draft legislation follows this previous release and clarifies that, effective February 18, the amount of the gift is reduced by the amount of the sum borrowed to make the gift if the borrowing is limited recourse (defined broadly).

An amount owing is deemed by subsection 143.2(7) to be limited recourse unless there are bona fide written arrangements to repay the debt within 10 years and interest is paid annually within 60 days of the donor's year end at least at the CCRA's prescribed rate.

Proposed new subsection 248(37) contains a very broad anti-avoidance provision which is designed to allow CCRA to ignore transactions designed to inflate the cost of property which a donor intends to donate.

Charities, which have been involved with donation programs of the types described above, are at an increased risk of CCRA audit and should consider obtaining preventative legal advice in preparation for this possibility.

While individuals who have donated through these programs will also likely see their dona-

tions challenged, some may take comfort from the proposed changes — the existence of these amendments could be viewed as an admission that the previous rules did not prevent the operation of some donation programs.

From a taxpayer's perspective it may not be surprising that the Department of Finance announced the changes that it did.

However, some of the changes will have serious (presumably unintended) negative consequences for donors in other contexts.

For example, if an owner-manager owns shares in her company, these could become caught by the new rules if she exchanges her shares for shares of another class.

A passionate art collector who has some continuing intention to donate his collection before death could also be caught by the proposed rules.

While submissions are being made to the Department of Finance requesting that these situations be revisited, donors and advisors need to operate on the assumption that the proposed amendments will become law and will, in the ordinary course, do so with retroactive effect.

Robert Hayhoe practises charity tax law at Miller Thomson LLP in Toronto.

Sask. Q.B. orders couple to repay \$220,000 to incompetent nonagenarian

By John Jaffey
Toronto

The Saskatchewan Court of Queen's Bench has ordered a B.C.

couple to repay more than \$220,000 to their incompetent, 94-year-old aunt.

The court found that in 1999, the couple dominated the nona-

genarian, by making her completely dependent on them, moving her from her Saskatchewan home, first to Calgary, Alta., then to Kamloops, B.C., and withholding contact with her relatives and friends.

Secondly, it found that they had failed to rebut the presumption of undue influence.

Justice Mona Lynn Dovell held that the gift and trusts purportedly made by the elderly woman were void *ab initio*, due to her lack of required mental capacity.

The court was told that in 1929, 20-year-old Alice Stadnyk, the youngest of seven children, married Mike Kapacila in Alvena, Sask. The Ukrainian couple worked hard, moved to Toronto in the mid-'40s and continued to work hard. They had no children.

When Mike died in 1986, Alice returned, well-heeled, to Saskatchewan, to a two-bedroom apartment in Saskatoon.

Until 1998, she was independent, capable, healthy and sociable.

But then senility began to overtake her. One of her nephews took her to live with him in his shack in Hudson Bay, Sask. — it did not even have running water — and he began to cajole her into transferring her assets to him.

He had obtained about \$120,000 when Anne and Earl Otto, the B.C. niece and her husband, found out what was happening. They "rescued" Alice, hired a lawyer to sue the nephew — then began to do the same thing.

see NONAGENARIAN p.17

Low interest rates lead to disbursement quota problems

FOUNDATIONS

—continued from page 12—

For the privilege of giving charitable receipts to donors, charitable organizations must, with a few exceptions, spend 80 per cent of receipted donations on charitable activities (including salaries paid to those in the organization and disbursements for equipment used in the charitable activity). Hoffman said the purpose of the disbursement quota is "to discourage charities from spending excessive amounts on fund raising and from accumulating excessive funds."

She noted that there are different disbursement quotas for the three categories of registered charities, namely, charitable organizations, public foundations and private foundations.

Foundations, both public and private, are also bound by an additional disbursement quota equal to 4.5 per cent of the average value of their investment property. This amount was hardly a consideration a few years ago, when higher interest rates provided a greater return on investments. Hoffman said, "Low interest rates have recently revealed a technical problem with the drafting of the disbursement quota requirements in the Act."

She illustrated by referring to "10-year gifts," which are endowments exempted from the disbursement quota yet still subject to the 4.5 per cent disbursement. These gifts cannot support themselves if they yield an investment return smaller than 4.5 per cent, in which case, foundations may not, without collapsing the entire gift, be able to realize capital gains in order to meet this disbursement requirement.

But CCRA takes the position that even a tiny encroachment into a 10-year gift means the entire amount must be brought into the 80 per cent regime. She said CCRA has been made aware of this problem and is looking into it.

Hoffstein said that the CCRA is increasingly willing to reduce an organization's disbursement obligations if it makes an application pursuant to s. 149.1(5) of the Act to have its disbursement quota reduced for that year.

The success of the application depends on the disbursement shortfall being caused by "extraordinary circumstances beyond the charity's control" — such as inordinately low interest rates.

It is a complicated area of the law, but knowing there is some leeway may make it possible for a charity to continue its work.

A New and Unique Dimension to Estate Planning

The Canadian Estate Planning Organizer™

Attract New Clients — Expand Your Services — Create New Revenue

Authors

Robert Haisman TEP and Francis De Sena LL.B.

Log onto www.cepo.ca for more information.