

A LEGAL ANALYSIS OF CHURCH DISCIPLINE IN CANADA

and

CHURCH DISCIPLINE UPDATE

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Authored by Terrance S. Carter

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A. INTRODUCTION

For those who consider church discipline to be an anachronism akin to the Spanish Inquisition, recent legal developments may justify that more attention be paid to this little understood and often ignored area of church life. The current high profile that this once historical footnote has attracted is evidenced by the substantial press attention that has been directed toward the implementation of the medieval "Bishop's Court" in the Reverend James Ferry hearing by the Anglican Church in Toronto concerning his acknowledged homosexual activities. On the front page of Canada's national newspaper, the "Globe & Mail" on Saturday, February 1st, 1992, the headline read "Anglican Doctrine Faces Court Test"; hardly the normal front page article for a conservative newspaper. Specific reference was made to the structure and jurisdiction of the Bishop's Court, whose origins, the paper stated, "*date back to a time long before the reformation in England... used exclusively for violations of Cannon Law...*" What was interesting in that case was not the issue of homosexuality but rather the "Globe & Mail's" recognition that church

discipline is alive and functioning as an integral part of the church's ministry.

For those congregations which have never addressed the issue of church discipline or have not reviewed their disciplinary procedure in recent years, this analysis is intended to provide a summary of legal issues that may be of assistance in addressing this challenging but potentially volatile area in church polity. Included in the analysis is a section outlining practical recommendations on the implementation of church discipline, both in the context of church constitutions as well as in practice. In addition, attached to the analysis as a schedule are sample constitutional excerpts dealing with various aspects of church discipline involving both church members and staff.

What this article is not, is a commentary on the biblical basis or implementation of church discipline. It is also not a commentary on employer/employee relationships, except as recent court developments relate to the broader issue of discipline of members within the church. Further, the brevity of format required for this article precludes covering all relevant

case law or statute law and reflects an acknowledged emphasis upon legal developments and statutes in the Province of Ontario. For those churches and institutions which intend to review the matter of church discipline, it is essential that legal advice be obtained before implementing any suggestions contained in this analysis. The information contained in this article is for educational and discussion purposes only and is not intended to be relied upon as a legal opinion.

B. THE CONTEXT OF CHURCH DISCIPLINE AS A LEGAL ISSUE

Before discussing specific legal principles, it would be helpful to briefly explain the context in which church discipline functions as a legal issue before the courts. Discipline within the church would not be an issue for secular courts to deal with if an ongoing tension between church and state did not exist. In the ideal society proposed in St. Augustine's "City of God" the interests of the state and the interests of the church are seldom, if ever, at odds; as both the church and state are seen as parts of one integrated theocracy. Historically, what has developed is a separation of church and state with the church having exclusive jurisdiction over ecclesiastical matters and the state having exclusive jurisdiction over civil matters.

Within the realm of exclusive church jurisdiction, church discipline has historically been recognized as a key element in the structure of the church, not so much as a vehicle to ensure order but rather as a remedial ministry to restore fellowship amongst its membership. John Calvin stated that discipline serves the church as its sinews through which the members of the body hold together each in its own place. The Belgic Confessions of 1561 referred to the practice of church discipline as the third mark of the true church.

Tension between church and state has heightened over the centuries because of expanding jurisdiction of both institutions. This has resulted in a collision of overlapping interests in which the courts have had to intervene. On the one hand, the jurisdiction of the church has expanded into moral and social areas beyond its exclusive arena of spiritual matters. This has emanated from the church's mandate to be the whole institution for the whole regenerated man. An example of the extent to which the spiritual realm dictates all aspects of life, including property and business, are the Hutterite communities in western Canada and the Mennonite communities in Ontario. The extent to which the church is involved in the everyday lives of its members in these communities is quite different from a more traditional church with jurisdiction normally being limited to Sunday services.

As a general rule, though, the Christian church now exercises a greater degree of involvement in the lives of its members than it did even fifteen years ago. This is evidenced by the church's involvement in retirement homes, Christian education, counselling services and the articulation of stands on social issues such as disarmament, abortion, the nuclear family and public education, to the extent that church discipline acts as the sinew in holding these newly extended limbs of the body of the church together, the implementation of church discipline will come under more scrutiny by the courts where such discipline is exercised in areas which are not strictly limited to liturgy and church doctrine.

Simultaneous with the church expanding its sphere of influence, the state has also extended its jurisdiction. The state is now involved in areas that until recently had been considered purely social concerns, such as day care and non-profit housing, so much so that the proposed amendment to the Canadian Constitution may include a social charter of rights.

The extension of the state's jurisdiction into those new areas not only overlaps with some of the church's traditional interests, but also reflects an emphasis on individual rights. The church on the other hand emphasizes the collectivity of group interests manifested through a community of believers. Legislation such as the Ontario Human Rights Code¹ establishes the paramourcy of the rights of the individual over the collective rights of groups. In such legislation, the rights of the individual are clearly delineated, whereas the rights of groups are referred to only as an exception to the rights of the individual.

As the orbits of influence of both the church and state expand, incidents of conflict increase. In those situations, it is the task of the courts to balance the competing interests of both institutions. In the recent 1991 unreported decision of Kelly Parks, Holly MacIntyre and Christian Horizons², the Board of Inquiry for the Ontario Human Rights Commission succinctly summarized the role of the courts in resolving the overlapping jurisdictions of church and state when it stated that "*where a statutory or constitutional framework creates two sets of equal but competing individual and group rights, the adjudicative task is to find the balance of justice. This means that each right must be given effect, but only to the extent that one right does not overwhelm and destroy the other*".

This statement has equal application when the courts are judicially reviewing incidents of church discipline. The courts will be called upon to weigh the interests of the state in protecting the rights of the individual

and balance it against the rights of persons to voluntarily come together and function as a group of believers.

C. LEGAL PRINCIPLES

When the courts are called upon to adjudicate on church affairs and in particular upon matters of church discipline, they have traditionally been reluctant to become enmeshed in church affairs. This reluctance has more to do with the court recognizing the concept of voluntary association than an inherent respect for freedom of religion. The following synopsis of legal principles is intended to provide a framework for understanding the circumstances under which the courts will intervene to resolve disputes on church discipline and other related matters.

1. Church as a Voluntary Association

Historically, Canadian courts have considered churches to be voluntary associations of persons that come together for a collective purpose. To the extent that the individuals have voluntarily decided to be associated with the fulfilment of the religious objectives of the church, the courts have both recognized the existence of and the legitimacy in protecting the rights of the church in fulfilling those objectives. The Supreme Court of Canada in the 1940 decision of *Ukrainian Greek Orthodox Church et al. v. Trustees of Ukrainian Greek Orthodox Cathedral of St. Mary's the Protectness et al.*³ recognized that the law has stated over decades that unless property or denial of procedure is affected, the civil courts will not allow their process to be used for the enforcement of purely ecclesiastical decrees or orders. The extent to which the courts have recognized the state's legitimate interest in property and procedural matters is reviewed later in this analysis.

2. The Church's Mandate to Deal with the Whole Person

Unlike developments in the United States, Canadian courts have recognized that the Christian church, rather than being simply voluntary associations of persons restricted to doctrine and liturgies, in fact exemplifies a world view that permeates the whole person. In the 1984 decision of *Re Caldwell et al. and Stuart et al.*⁴, the Supreme Court of Canada in deciding the issue of whether a Catholic school was justified in terminating the employment of a Catholic teacher who had married a divorced man in a civil ceremony recognized the following principle: *"It is a fundamental tenet of the church that Christ founded the church to continue his work of salvation. The church employs various means to carry out His*

purpose, one of which is the establishment of its own schools which have as their object the formation of the whole person, including the education in the Catholic faith...The Catholic church is a genuine community bent on imparting over and above an academic education all the help it can to its members to adopt a Christian way of life".

The approach taken by the Supreme Court of Canada is a far cry from the juridical attitude in the United States where, as the former director of the Christian Legal Society in a 1984 article stated, *"the courts (as well as the state) are inclined to view religion almost exclusively in narrow and often institutional terms; that is, they see churches as little more than institutions, liturgies, clergy and doctrines... Thus, free exercise of religion is relegated to only those areas where the state has little if any interest (ie. doctrine) and is left with little vitality when real tensions develop"*⁵.

3. Church Membership Required

While Canadian courts recognize that the church has a valid interest in the whole person, the courts also require that before a church can exercise discipline over its members, it must be first shown that the member has voluntarily become associated with the church as a member and has succumbed to its authority. In *Re Caldwell et al. and Stuart et al.*⁶, the Supreme Court found that the school in question was justified in dismissing a teacher concerning her remarriage because evidence was led that the observation of church standards concerning remarriage were clearly part of the teacher's contract. The court also recognized that when one member strays from the standards of the church, the wayward behaviour can act as an adverse example to the rest of the church, particularly as it relates to children. The Supreme Court found that the Catholic teacher, as part of the Catholic community, had an obligation to exemplify the values of the church to children.

*"The teaching of doctrine and the observance of standards by the teacher form part of the contract of employment of teachers. They are required to exhibit the highest model of Christian behaviour"*⁷

Similarly, in a church context, it must be shown that the member being disciplined has accepted the authority of the church as set out in its constitution. By doing so, the church will be able to justify disciplining one of its members not simply on the basis of violation of church standards but also in recognition that each member had been a party either in establishing those standards or at least in voluntarily agreeing to submit to the standards already in place.

4. Procedural Fairness

Even when the church is justified in disciplining a member, the manner in which the discipline is carried out can become the subject of judicial review.

Generally, where the procedure for discipline is clearly stipulated in the constitution of a church and reflects the basic elements of natural justice, the courts have held that a review of the procedures involved in the disciplinary hearing is beyond their jurisdiction. In the recent Manitoba case of *Lakeside Colony of Hutterian Brethren v. Hoffer*⁸ a dispute arose between Mr. Hoffer and his supporters and the leaders of the Hutterite community on a question of patent infringement resulting in Mr. Hoffer and his followers refusing to obey the leadership of the colony. Three meetings of the colony were held, which Mr. Hoffer and his supporters were asked to attend. They refused to. When Mr. Hoffer and his followers were expelled from the colony they also refused to leave. The colony was then forced to terminate their membership in the colony. In upholding the decision of the church to ex-communicate Mr. Hoffer and his followers, the court stated that *"when a congregation is faced with a dissident member who chooses disobedience rather than obedience, who chooses not to ascribe to, or be governed by his church, whether that be in spiritual or temporal terms...they have the right to expel that member; to expel him, provided it is done fairly and within the precepts laid down in the rules of the church, and by a majority of the members of a particular congregation"*.

Where there is no procedure adopted or where the procedure set out in the constitution is either not followed or varied on an arbitrary basis, the courts have been quick to intervene to protect the individual who may have been unfairly dealt with. In essence, the courts have found that the church has a duty to exercise "procedural fairness" or what is otherwise called "natural justice" in the administration of its right to discipline its members.

In the 1985 decision of *Re Lindenburger v. United Church of Canada*⁹, the presbytery involved had declared a pastoral charge vacant and the minister affected applied to the court for judicial review. The court held that even though the established procedure of the Ontario Judicial Review Procedures Act,¹⁰ might not apply to a non-governmental body, since the church was a creature of statute of both federal and provincial legislatures, and since the United Church ministers to the spiritual needs of a large segment of the Canadian public, the court was justified in reviewing the procedures followed by the United Church in its disciplinary action. The court found that since the minister in question had already

tendered his resignation, the involvement of presbytery was limited to determining the date that the minister's resignation would become effective. This limited administrative task by presbytery did not warrant the courts interfering in the internal operation of the church. However, the court did confirm their expectations that church discipline matters should be conducted in such a way that the member in question receives as fair and impartial a hearing as possible.

In the 1991 decision of *McCaw v. United Church of Canada*¹¹, the court found that proper procedures had not been followed. In that case, a controversy developed amongst members of a congregation concerning the ministry style of their pastor. Pursuant to the authority given to it, the local presbytery ordered the minister to take a course of study. Subsequently, the local presbytery recommended to the conference that the minister be removed as an employee of the church on the grounds that he had not taken the directed program. The recommendation was accepted. At the trial and appeal level the court found that the minister had been wrongly dismissed and that the minister should be reinstated as a minister of the United Church of Canada. In coming to its conclusion, the court held that a number of the hearings were held without notice being given to the minister and were conducted in the absence of the interest of the minister being represented. In addition, the court found that the minister had been deprived of an opportunity of listening to what was said by the numerous witnesses who testified. Further, the minister was never told of the object of the inquiry or of the conduct on his part which had led the disciplinary procedure to be initiated.

What the court is looking for in relation to a fairness in procedure is a clear manifestation of "natural justice". In practical terms, this means that the individual should be advised of the nature of the allegations, be given notice of the hearing, be allowed to hear the evidence presented at the hearing, be afforded an opportunity to speak on his own behalf at the hearing, and be advised of the decision arising from such hearing.

The courts have also suggested that in consideration of the "spirit of Christianity", the proceedings followed should be as uncomplicated as possible. In *Lindenburger v. United Church of Canada*¹², the court stated *"the less complicated the proceedings the better, and one would hope there would not be undue resort to legalistic thinking; there is no reason why men of good will cannot, on both sides, conduct themselves in a fair manner. That is all that the law and spirit of Christianity requires of them."*

Although the courts will interfere in the internal

affairs of a church to ensure that a member of the church is dealt with according to the basic principles of due process, the extent of its willingness to do so is limited to rectifying procedural unfairness and does not extend to interfering in the internal decision making of the church. In both *Lindenburger v. United Church of Canada*¹³ and *McCaw v. United Church of Canada*¹⁴, the courts were not prepared to restore the ministers in question to their specific pastoral charges, even if a procedural injustice had occurred, as the courts felt that to do so would amount to an undue interference in the internal affairs of the United Church.

The courts are also reluctant to interfere in church procedure where it is perceived that a member who is claiming a denial of rights is attempting to avoid the legitimate procedures of the church. In the *Lakeside Colony of Hutterian Brethren v. Hoffer*¹⁵ decision, both the lower court and the appeal court concluded that the member had waived his rights to allege procedural unfairness when the member in question refused to attend meetings of the church which he had been asked to attend for the specific purpose of dealing with allegations that had been raised.

5. Invasion of Privacy

Even if a church has followed procedural steps that reflect the basic elements of natural justice, the courts may still intervene if they detect that an individual's privacy has been jeopardized. Although there does not appear to be any Canadian decisions dealing with invasion of privacy in a church context, there are American cases that have dealt with this issue and may be precursors of future developments in Canada. In the 1989 appeal decision by the Oklaholma Supreme Court in *Marian Guinn v. the Church of Christ of Collinsville, Oklaholma et al.*¹⁶, the court held that the jury at the trial level was justified in finding that the decision by the elders of the church to publicly advise the congregation and neighbouring churches about the adultery of one of its members after she had withdrawn from membership was an unjustified invasion of the former member's privacy intended to inflict emotional harm on the parishioner.

The facts of the Marian Guinn case have some similarities to the recent controversy surrounding the Bishop's Court hearing in February, 1992 involving the homosexual activities of Reverend James Ferry. Reverend Ferry had confessed to his Bishop that he was a practicing homosexual. The Bishop gave him a choice of either ending his homosexual relationship or voluntarily resigning. When Reverend Ferry refused to do either, the Bishop relieved Reverend Ferry of his duties. The Bishop subsequently read a written

statement to the local congregation the following Sunday that Reverend Ferry had been dismissed together with the reasons for the dismissal. Reverend Ferry responded by commencing legal action for wrongful dismissal and breach of confidence coupled with a claim of damages for \$600,000.00. Although an agreement was reached between the parties to refer the matter to a Bishop's Court to avoid proceeding further with the civil action, the fact that a civil suit was initiated for invasion of privacy involving a minister has very serious consequences by opening the door to similar litigation if a church member or minister who has been disciplined feels that his or her privacy has been violated.

In a non-church but related court decision, the Supreme Court of Ontario in *Hunt v. Board of Governors of Fanshaw College of Applied Arts and Technology*¹⁷ was asked to grant an order prohibiting the college from investigating allegations of unprofessional conduct of one of its instructors through the dissemination of questionnaires to students. The questionnaire was alleged to be leading and suggestive, ie. *"have you felt yourself to be the object of prejudicial or unfair treatment by this instructor?"*. In granting an order restraining the college from distributing such questionnaires, the court found that the college had an obligation to respect the confidentiality of the allegations being made against the instructor and a responsibility not to damage the reputation of the instructor any more than was necessary.

In light of the need to respect the confidentiality of the allegations being raised, a church can take steps to protect a member's privacy by prohibiting the release of any information to other members of the church unless the information being given results in an affirmative answer to the following two part question. *"Does the information need to be disseminated to assure other members of the church that the integrity of the collective ministry of the church is being maintained and can it be reasonably concluded that the said information will not unduly embarrass or prejudice the reputation of the member in question?"*

6. Withdrawal from Membership

A corollary issue to the requirement that a person be a member before a church can proceed with disciplinary proceedings is under what circumstances can an individual withdraw his or her membership in a church. This issue will often arise where the individual being disciplined decides to withdraw from membership before the disciplinary process is completed in an attempt to circumvent the jurisdiction of the church.

In the *Marian Guinn v. The Church of Christ of Collinsville, Oklahoma et al.*¹⁸ case, the plaintiff wrote to the church and stated that she withdrew her membership "immediately". Notwithstanding her resignation, the church continued to exercise jurisdiction over her by subsequently reading a letter to the church and advising other churches in the area about her adulterous relationship. The fact that the plaintiff had withdrawn her membership in the church was a key factor in the appeal court deciding that the actions of the church had violated the member's privacy contrary to her desire to be left alone.

Although the doctrine of the Church of Christ taught that membership in the church extended for life, thereby precluding unilateral withdrawal from membership, the court held that because there had been no specific waiver of the plaintiff's right to withdraw from membership either in the church constitution or otherwise, her letter to the church constituted a valid termination of her membership. This in turn had the effect of terminating the right of the church to continue with disciplinary proceedings against her after she resigned.

If church discipline is for the primary purpose of inflicting punishment against members, the retention of a member's right to unilaterally withdraw from membership in the church at any time would be understandable. However, since the biblical purpose of church discipline is to restore the member spiritually into a renewed fellowship with both the church family and God, it would be self defeating to have the church establish a doctrine and procedure for restorative discipline when the very person such process is intended to assist can preempt the legitimate remedial ministry of the church by unilaterally withdrawing from membership. For those infrequent situations when an abuse in the disciplinary process by the church does occur, an application for judicial review to the courts will continue to provide relief from unnecessary or arbitrary church action.

To avoid expedient resignations by errant members who attempt to avoid church discipline procedures, and to ensure that the remedial ministry involved in church discipline can be completed, consideration should be given to having the church constitution include a provision that a request to withdraw from church membership by a member who is under discipline will not take effect until the discipline proceedings in question are finished. This restriction, though, would not affect a member's right to unilaterally withdraw from membership at any time if that person was not under church discipline; nor could it be used to perpetually keep a person as a member of a church against his or her will under the guise of

continually declaring the member to be under the discipline of the church.

7. Attendance at Public Meetings

Although a church has the authority to discipline and remove a member from membership, termination of membership does not necessarily mean that the individual in question should be barred from attending public worship services. Just as non-members are permitted as members of the public to attend public worship services, the same opportunity should be afforded to a former member.

However, in a situation where the former member has been or is causing a disturbance, a church would be justified in requesting that the former member either cease the offending conduct or depart from the worship service. The latter could be done by giving written notice to the person causing the disturbance pursuant to the Ontario Trespass of Property Act¹⁹ or similar type of legislation in other provinces.

8. Discipline in a Non-church Context

Although a church has the right to discipline a wayward member, the method chosen to implement such discipline must not be extended into a non-church context. In the 1917 decision of *Heinrichs v. Wiens*²⁰, the Saskatchewan Supreme Court dealt with a Mennonite business man who had his membership in his local church revoked because of an unsettled business claim involving another church member. Upon terminating his membership, the members of the church according to their understanding of biblical precepts "shunned and had nothing to do" with the errant member. This resulted in a devastating boycott of his business. The court found that there had been an unlawful conspiracy to boycott resulting in the former member suffering damages.

As such, any attempt to discipline a member by directly or indirectly boycotting the business of a former member may result in a civil action of conspiracy being brought against the church and its members for monetary damages. Any decision concerning church discipline should therefore be limited to correction or if necessary, termination of membership, but should not extend to secondary disciplinary action outside of the church, such as business boycotts or picketing of the former member's home or business.

9. Apportionment of Church Assets

Can a former member or members of a church who have been disciplined by having their membership in the church terminated make a successful claim for an

apportionment of the assets of the church to allow them to start a new church? This issue might arise where a number of members have been disciplined because of differences in theological doctrine. The Supreme Court of Canada dealt with this issue in the case of *Hoffer v. Hoffer*²¹. In that case, a number of Hutterites became affiliated with the World Wide Church of God resulting in their ex-communication from the local Hutterite church. Since the doctrine of Hutteritism denies any private ownership of property, the net effect of the ex-communication was that the former members were denied any share in the co-operative farming operations of the Hutterite community in addition to exclusion from membership in the church. The court held that since the former members had joined the Hutterite community voluntarily and since the process whereby they had been excluded from church membership was proper and followed principles of natural justice, the former members were not entitled to share in the apportionment of the community's farming operations.

This decision means that dissenting members of a church who have been "properly" disciplined because of doctrinal differences will not be entitled to receive an apportionment of the assets of the disciplining church to form a new church affiliation.

10. Discipline of Employees

The ability of a church to discipline a member who is also an employee (such as a minister, church secretary, youth worker, etc.) is complicated by the effect of the Ontario Human Rights Code and similar types of codes in other provinces. Section 5(1) of the Ontario Human Rights Code states that *"every person has a right to equal treatment in respect of employment without discrimination because of race...creed, sex, marital status, family status or handicap."* Section 24(1)(a) creates a statutory exception to the rights set out in section 5 of the same code where it states that *"the equal treatment required by Section 5 is not infringed where a religious, philanthropic, educational, fraternal or social institution or organization that is primarily engaged in serving the interests of persons identified by their race, ancestry, place of origin, ethnic origin, creed, sex, marital status or handicap employs only or gives preference in employment to persons similarly identified if the qualification is a reasonable and bona fides qualification because of the nature of the employment."* The issue therefore, is whether the decision by a church to hire, discipline or fire an employee because of church related requirements is justifiable as being based on reasonable and bona fides qualifications given the circumstances

of that particular case.

What constitutes bona fides qualifications depends upon the specific facts of each case. In the 1982 decision of the Supreme Court of Canada in *Ontario Human Rights Commission v. Borough of Etobicoke*²², the court stated that *"to be a bona fides occupational qualification and requirement a limitation must be imposed honestly, in good faith and in the sincerely held belief that such limitation is imposed in the interest of the adequate performance of the work involved with all reasonable dispatch, safety and economy, and not for ulterior reasons...and it is reasonably necessary to ensure the efficient and economical performance of the job without endangering the employee, his fellow employees and the general public"*.

In the 1984 Supreme Court of Canada decision of *Re Caldwell et al. and Stuart et al.*²³, the prohibition against marrying a divorced man in a civil ceremony was considered a bona fides qualification in respect to the position of a Catholic teacher employed in a Catholic school.

In the recent 1991 unreported decision of *Garrod v. Rehema Christian School*²⁴ the Ontario Human Rights Commission dealt with an employce of a Christian school who was fired because of her extramarital sexual relationship. The Commission concluded that the exception in Section 24 of the Ontario Human Rights Code had been met because of the religious nature of the school and the expectation that teachers would comply with the religious standards of the school.

For a church to be entitled to rely on the exemption of Section 24 of the Ontario Human Rights Code in disciplining employees based on religious and moral standards, it is essential that the expectations being imposed on an employee be clearly expressed, be brought to the attention of the employee before employment commences and then be consistently followed and enforced thereafter. In the recent unreported decision of the Human Rights Commission in *Kelly Parks et al. and Christian Horizons*²⁵ the Commission found that there had been discrimination against two employees who had been let go because of sexual conduct. Although the policy manual of *Christian Horizons* included a policy prohibiting sexual relationships outside of marriage, the Commission found that the failure of *Christian Horizons* to specify that moral and sexual lifestyle was a condition of employment in either the initial employment interview or in the employment contract coupled with the acquiescence of *Christian Horizons* to extra marital sexual relationships by other employees precluded the institution from being entitled to the

exemption under Section 24 of the Human Rights Code.

The Christian Horizon case is similar to the one involving Reverend James Ferry of the Anglican Church, in that part of Reverend Ferry's submissions to the Bishop's Court was his assertion that it would be manifestly unfair for the Anglican Church to require him to abide by a prohibition on homosexual activities when the church was actively turning a blind eye to homosexual relationships by other ministers within the Anglican Church. For this reason, where a church is expecting an employee, whether it be a pastor or church secretary, to maintain a prescribed lifestyle, it is essential that those expectations be articulated in the church constitution and be included in an employment contract with the employee prior to employment being offered. In addition, the policing and enforcement of such requirements must be done diligently and without exception, otherwise a church runs the risk of being criticised for acting in an arbitrary and inconsistent manner in its treatment of employees, and thereby exposing the church to a charge of discrimination under the Ontario Human Rights Code or similar legislation in other provinces.

11. Denominational Discipline of Member Churches

Generally, church denominations in Canada are based on one of two types of structures. The first type are the hierarchical denominations consisting of a single church structure with local churches being members of the larger organization based on either a presbyterial or episcopal polity. The other type of structure are denominations made up of independent local churches based on a congregational polity which co-ordinates through fellowships, associations, federations and so forth.

Within the hierarchical denominations, such as the United Church of Canada or the Anglican Church, the church constitution will normally include a mechanism for disciplining not only church members but local churches as well. However, this is not always the case with a denomination of independent churches. While member churches of such a denomination may have provisions in their constitutions concerning discipline of members, the denomination itself may not have a provision in its constitution to deal with the issue of disciplining of its member churches. Even if there is such a mechanism in the denomination's constitution, the issue of whether or not a church has in fact become a member of the denomination is often unclear, either because of poor historical records or lax formality that failed to properly record if a church did or did not become a

member.

The consequences of either a lack of disciplinary procedure within the constitution of a denomination or the failure to properly record that the church is a member of the denomination may mean that the denomination has no ability to discipline or correct a member church. This scenario arose in the 1939 case of *Ukrainian Greek Orthodox Church v. Trustees of Ukrainian Greek Orthodox Cathedral of St. Mary's the Protectness et al.*²⁶ that came before the Supreme Court of Canada. In that case, the national denomination was unsuccessful in an attempt to restrain the activities of a local church because there was no evidence that the local church ever became part of the denomination, notwithstanding the fact that representatives of the local church had collaborated on various matters with officers and representatives of the national denomination.

As a result, if part of the function of a national denomination of independent churches is to have some measure of control or discipline over its member churches, even if it is limited to simply terminating membership of the offending church in the denomination, then the constitution of the national denomination should include a mechanism for disciplining its members. In addition, the records of the denomination should be reviewed on a regular basis to ensure that all churches that are assumed to be members of the denomination have in fact become members. Otherwise, the denomination will not have any jurisdiction over churches that have never formalized their membership in it.

12. Church Doctrine

While the courts will intervene in matters involving property, civil rights, employment and procedural matters, the courts will not become enmeshed in matters involving purely questions of church doctrine. In the Ontario Court of Appeal decision of *Balkou et al v. Gouleff et al.*²⁷ the court was asked to determine if part of the doctrine of the church included a principle of whether or not there was a prohibition on contact by the church with communistic organizations. The court refused to rule on this question by stating that the relief being requested of the court involved questions of church doctrine which in the court's view was an inappropriate subject for judicial determination.

13. Standards Established by Trust Deeds

If discipline is pursued because there is a deviation from the accepted doctrine of the congregation set out in the church constitution, it is essential to ensure that the church constitution is neither contradicted nor

supplanted by the church doctrine set out in an old trust deed by which the church may have acquired title to its current lands. In the 1929 decision of *Wodell v. Potter*²⁸ the court had to deal with a case where certain members of a congregation subscribed to a doctrine that was different from, but did not contradict, the doctrine originally required by members in the trust deed by which the congregation had originally acquired the church lands. The court held that a majority of the members of the congregation could not exclude existing members of the church by changing the doctrinal statement from what was contained in the still current deed of land on which the church had been built. The court held that the doctrine set out in the trust deed took precedent over the new church constitution and that as long as the members in question were able to subscribe to and not contradict the terms of the doctrine in the trust deed, they should not be deprived of membership in the church.

This decision has important consequences for congregations that wish to upgrade or otherwise change the requirements of membership by altering the accepted doctrine of the church from that which may have been set out in the terms of a trust deed that was often written in the last century and which few members, if any, are still familiar with. The anachronism of the trust deed may also pose problems for current church disciplinary procedure, in that a member being disciplined might be able to argue that as long as he or she complies with the normally simple terms of doctrine set out in the trust deed, that person should not be deprived of membership in the church or otherwise disciplined.

The extent to which a trust deed may take precedent over a constitution, if at all, will depend upon factors such as the strength of the wording in the current constitution, the wording of the trust deed and whether or not a member by subscribing to the current constitution, can be said to have waived his or her right to rely on the terms contained in the church trust deed. The potentially latent effect of an old but still applicable trust deed is a further example of the far reaching effect and complexities of church discipline in the functioning of a local congregation.

D. PRACTICAL CONSIDERATIONS

The Supreme Court of Canada has succinctly summarized the impression of both the courts and society generally concerning church disputes that are brought before a secular court. In *Ukrainian Greek Orthodox Church v. Trustees of Ukrainian Greek Orthodox Cathedral of St. Mary the Protectness et al.*²⁹ the court stated, "*like most church quarrels, there is*

obviously much bitterness on both sides...". The purpose of this article is to help churches understand the expectations of the court; not so much to better equip the church in litigation but rather to avoid the possibility of the matter ever having to be dealt with by a court proceeding.

Based upon the principles that have been discussed above, there are a number of practical considerations that should be reviewed by churches in an attempt to effectively implement church discipline.

Some of the recommendations that are set out below have been discussed by others in previous publications³⁰. The recommendations that are discussed in this article are *suggestion only and will need to be modified or expanded as necessary*, depending upon the particular circumstances of each church. As such, it is recommended that the following considerations be first reviewed with the church's lawyer before being put into effect.

1. To ensure that the church has an authoritative basis for implementing church discipline, its constitution should clearly set out the biblical references for discipline and dispute resolution amongst its members. The procedure for discipline should not be overly complicated but should reflect principles of natural justice by ensuring that discipline only occurs if

- (i) a specific allegation has been made,
- (ii) the subject member has received notice of the allegation as well as the place and time at which the relevant church officials will consider the allegation,
- (iii) the subject member is provided with an opportunity to be present and respond to the allegation, and
- (iv) the subject member is provided with a decision arising out of the hearing together with reasons both in relation to the veracity of the allegations as well as the type of discipline that is to be implemented.

2. The constitution should clearly indicate that membership in the local church involves submission to the authority of the church leadership as well as the rights and privileges that are normally associated with membership in a local congregation.

3. If there are policy statements of the church concerning conduct or life-style requirements that are legitimate expectations imposed on church members, those policies must be set out either in the church constitution or incorporated by reference into the constitution by stating that policy statements that are subsequently adopted by the church and approved by the membership are deemed to be part of the church constitution.

4. At the time of being admitted as a member of the church, a prospective member should be given a copy of the church constitution and asked to read it in detail. The prospective member should then be questioned by a church leader to ensure that the applicant has not only read but understood the consequences of subscribing to the constitution of the church. To evidence agreement in this regard, a prospective member should be required to subscribe in writing for membership to confirm his or her voluntary decision to become part of the local church and be subject to the authority of the church leadership. This document will provide evidentiary proof that the member has agreed to be subject to the church disciplinary process if an issue arises at a later time concerning the ability of the church to initiate discipline proceedings.

5. The constitution should specify that since membership includes a commitment by members to minister to the needs of the church, a request by a member to withdraw from the church while under discipline will not become operative until the discipline proceedings have been completed. Such a provision would permit a healing to occur to both the member and the church as a whole and would also ensure that a member who is being disciplined cannot conveniently avoid the disciplining process by unilaterally terminating his or her membership in an attempt to circumvent the legitimate restorative ministry of the church to that individual.

6. The church constitution should encourage church members as much as possible to settle personal disputes within the context of the church or through a Christian mediation service without relying upon the alternative of referring the matter to the courts. However, it would be both impractical and unenforceable for a constitution to prohibit litigation between members concerning non-church related matters.

To avoid disgruntled members either asking for judicial review of procedural matters or seeking damages against church leaders, the constitution should prohibit action being commenced against the church and its leaders concerning legitimate disciplinary procedures set out in the church constitution. This would, however, not preclude a member from seeking the court's assistance in the event that the procedures in the constitution had either not been adopted or were being enforced contrary to principles of natural justice.

8. In the event that church discipline is required, it is essential that the leaders of the church familiarize themselves and follow the procedures set out in the constitution without exception to avoid a claim by the

disciplined member that the procedure implemented had been conducted improperly, unfairly or prejudicially.

9. Throughout the disciplinary proceedings, the confidentiality of information given to church leaders must be respected. As such, only those persons involved in the disciplinary proceedings should be apprised of the information that is divulged in confidence by the person being disciplined. In the event that the church leadership decides that an announcement concerning the discipline of a member needs to be made to the church, such announcement should be directed to the members of the church and should be given orally from a prepared text. To avoid a claim for breach of privacy, any statement pertaining to the discipline of a member at a public worship service should be avoided. Instead, the matter should be dealt with at a meeting of members only. In addition, by ensuring that the information is given orally, it will avoid the possibility that a written statement is copied and distributed to persons outside of the church. The content of the information given should be limited to information for which the following two part question can be answered in the affirmative, "*Does the information need to be disseminated to assure other members that the integrity of the collective ministry of the church is being maintained and can it be reasonably concluded that such information will not unduly embarrass or prejudice the reputation of a member.*" For example, in the case of adultery, a statement that a member has been found to be in an adulterous relationship would be appropriate but the details of the relationship would not be.

10. With the exception of a request for transfer of membership, there is little justification, if any, in advising other churches of the disciplinary action taken against a member, even where such churches are within the same denomination. When a request for transfer of membership is received, a simple reference to "John Doe was not a member in good standing at the time of his departure from the church" or "John Doe left the church while under discipline" is all that is necessary. It will then be incumbent upon the other church to make inquiries of the former member concerning the reason for his or her departure from the previous church.

11. With the exception of individuals whose presence is disruptive to public worship or threatening to individual members, a former member who has been disciplined should not be barred from public worship.

12. Any decision concerning discipline should be limited to correction and/or termination of membership and should not extend to secondary

disciplinary action outside of the church, such as boycotts or picketing of a former member's business or home.

13. To avoid allegations of discrimination contrary to legislation such as the Ontario Human Rights Code arising from discipline of church employees, it is recommended that the following steps be taken:

(a) The church constitution should specify that all employees are to be members of the church, both to fulfil legitimate job qualification and to ensure that all employees will be subject to the same authority and discipline as that which is imposed on all members of the church.

(b) If church employees are expected to comply with life-style or moral conduct requirements, then those requirements should be set out not only in the church constitution but within a separate employment contract that the employee would be required to enter into before commencing his or her employment with the church. These requirements must be clearly brought to the attention of the employee during the interview procedure and should be included in job descriptions and personnel policy manuals.

(c) The church must ensure that life-style or moral conduct requirements are consistently and fairly applied to all employees of the church.

14. For those churches with adherents who are reluctant to become members of the church because of doctrinal differences, a practical alternative is to create two classes of members. One class would be "adherents" who would agree to be subject to the church constitution and the procedures set out therein but who would not be required to subscribe to the statement of faith or doctrine of the church. Although they would not be entitled to vote, they would at least be under the authority of the church. The other class would be "voting members" who would be required to subscribe to the statement of faith or doctrine of the church but who would have the additional benefit of voting rights.

15. For those churches that hold their land pursuant to an old trust deed which includes a statement of doctrine that is different from the one currently used by the church, legal advice should be sought to determine if steps can be taken to free the congregation from the terms of the trust deed. However, this is potentially a very complicated area of the law and should not be undertaken without carefully reviewing all of the legal ramifications that may be involved.

E. SAMPLE PROVISIONS ON MEMBERSHIP AND DISCIPLINE

Attached as a schedule to this article are excerpts

from various church constitutions dealing with membership, discipline and employment. The provisions are not intended to be precedents but rather to provide examples of how the issues raised in this article might be dealt with in reviewing and amending a church constitution.

There are a number of limitations, however, involved with the sample provisions.

1. They are excerpts only and therefore should not be relied upon as a seamless and coherent set of constitutional provisions. For instance, there are many provisions that have not been included because of the lack of space, such as the procedure for admitting a person into church membership.

2. They were drafted in the context of incorporated churches under federal as opposed to provincial legislation.

3. They are intended as provisions for independent local churches. Members of hierarchical denominations such as United Church of Canada and the Anglican Church would not require the provisions contained in the sample provisions, as the church constitution for those churches already deals with procedures on discipline.

4. The sample provisions on discipline do not include procedures on referring deliberations on discipline to the membership of the church. Although this is a legitimate biblical procedure, the provisions required are too long to include as a sample to this article.

5. The provisions presume a church structure that includes both a board of deacons and a board of elders.

6. The pastor has not been included on the board of deacons for reasons discussed in an earlier article by the author entitled "An Analysis of Remuneration of Directors of Charities In Ontario" in CCCC Bulletin No. 3, June 4, 1991.

7. The detail of procedure in the attached sample provision may need to be expanded or simplified depending upon the circumstances of each church. For instance, a church may wish to have its disciplinary procedures follow the more detailed requirements set out in the Ontario Statutory Powers of Procedures Act³¹ as it relates to the availability of legal counsel by parties, whereas other churches may understandably wish to ensure that a disciplinary hearing will not escalate into a full blown court battle with lawyers acting for opposite parties.

8. Finally, the samples are for educational purposes and must not be relied upon as clauses that will necessarily be either appropriate or legal for every church. As such, it is essential that any church contemplating using any of the provisions contained in the attached excerpts first review the samples with

their church solicitor.

Notwithstanding the above noted limitations, it is hoped that the sample provisions will be of general assistance to churches as they look at practical ways of coming to terms with church discipline.

F. CONCLUSION

The effects of recent court developments and governmental legislation have had a significant impact on the ability of the church to operate independently of state intervention. In consideration of the growing activism of the court in judicial review of church discipline, the best course of action that a church can take is a preventative one. In this regard, local churches would be well advised to review their constitution to ensure that it provides an effective procedure for church discipline. Such a review will prove to be a wise investment of time and effort in avoiding potential legal ramifications arising out of church discipline both now and in the future.

ENDNOTES

1. Ontario Human Rights Code R.S.O. 1990, chap.H.19 as amended.
2. Kelly Parks, Holly MacIntyre and Christian Horizons and the Matter of the Human Rights Code, unreported decision of the Ontario Human Rights Commission dated December 2nd, 1991 at 27-28.
3. Ukrainian Greek Orthodox Church v. Trustees of Ukrainian Greek Orthodox Cathedral of St. Mary's the Protectness et al., [1943] D.L.R. 670 at 671.
4. Re Caldwell et al. and Stuart et al. (1984), 15 D.L.R.(4th)1 at 5.
5. Lynn Buzzard, "Is Church Discipline an Invasion of Privacy?", Christianity Today, November 9th, 1984, 37 at 39.
6. Re Caldwell et al. and Stuart et al., supra, footnote 4.
7. Ibid.
8. Lakeside Colony of Hutterarian Brethren v. Hoffer (also cited as Wollmann et al v. Hoffer et al. (1989), 63 D.L.R. (4th) 473, at 487, subsequently confirmed by the Manitoba Court of Appeal, (1991), 77 D.L.R. (4th) 202, (an appeal to the Supreme Court of Canada is currently pending).
9. Lindenburger v. United Church of Canada (1985), 17 C.C.E.L. 143,(Div. Ct) at 153, affd(1987), 17 C.C.E.L. 172 (C.A.)
10. Ontario Judicial Review Procedures Act, R.S.O. 1990, chap J.1 as amended.
11. McCaw v. United Church of Canada (1988), 64 O.R.(2nd) 513. at 539, affd (1991), 4.O.R. (3d)481.
12. Lindenburger v. United Church of Canada, supra, footnote 8 at 152.
13. Ibid.
14. McCaw v. United Church of Canada, supra, footnote 11.
15. Lakeside Colony of Hutterarian Brethren v. Hoffer, supra, footnote 8, at 487 of the lower court and at p. 232 of the appeal court.
16. Marian Guinn v. The Church of Christ of Collinsville, Oklaholma et al, unreported trial decision of the Oklaholma District Court. No. CT-81-929 (OKla. Dist. Ct.), Tulsa County, OKla, March 16, 1984. On appeal at 775 P.2d 766; 1989 OKla. LEXIS 10, judgement was reversed and cause remanded for a retrial.
17. Hunt v. Board of Governors of Fanshaw College of Applied Arts and Technology et al. (1985), 52 O.R.(2d) 759.
18. Marian Guinn v. The Church of Christ of Collinsville, Oklaholma et al.,supra, footnote 16.
19. Ontario Trespass Property Act, R.S.O. 1990, chap T.21 as amended.
20. Heinrichs v. Wiens, [1917] 31 D.L.R. 94.
21. Hoffer v. Hoffer (1966), 59 D.L.R. (2d) 723; affd 65 D.L.R.(2d) 607; affd 13 D.L.R. (3d) 1, [1970] S.C.R. 958, 73 W.W.R. 644.

22. Ontario Human Rights Commission et al. v. Borough of Etobicoke, (1982), 132 D.L.R. (3d) 14 at 19.
23. Re Caldwell et al. and Stuart et al., supra, footnote 4.
24. Garrod v. Rehema Christian School (1991), unreported decision of the Ontario Human Rights Commission.
25. Kelly Parks, Holly MacIntyre and Christian Horizons and the matter of the Human Rights Code, supra, footnote 2.
26. Ukrainian Greek Orthodox Church v. Trustees of Ukrainian Greek Orthodox Cathedral of St. Mary's the Protectness et al., supra, footnote 3.
27. Balkou et al v. Gouleff et al. (1989), 68 O.R.(2d) 574.
28. Wodell v. Potter, [1930] 1 D.L.R. 726; confirmed by the Supreme Court of Canada, [1930] 2 D.L.R., 449.
29. Ukrainian Greek Orthodox Church v. Trustees of Ukrainian Greek Orthodox Cathedral of St. Mary's the Protectness et al., supra, footnote 3.
30. See recommendations by Lynn Buzzard, supra, footnote 5, and by J. Carl Laney, Christianity Today, November 9th, 1984. Also see recommendations by Lynn Buzzard, Church Discipline and the Courts (1986), Tyndale House Publishers Inc., Wheaton, Ill., and Scarlett Letter Lawsuits: Private Affairs and Public Judgements(1987), Vol. 10, No.1, Campbell Law Review, Winter, 1987. Further see a memorandum by Norman Keith of Mathews, Dinsdale & Clark dated December 10th, 1991, arising out of the Garrod v. Rhema Christian School, supra, 24.
31. Ontario Statutory Powers Procedure Act, R.S.O. 1990 chap. 3.22 as amended.

APPENDIX

SAMPLE CONSTITUTIONAL PROVISIONS ON MEMBERSHIP, DISCIPLINE AND EMPLOYEES PRIVILEGES, RIGHTS AND DUTIES OF MEMBERSHIP

1. Church membership shall carry the following privileges, rights and duties;
 - (a) the privilege to attend all public worship services of the church;
 - (b) the privilege to participate in the sacraments administered by the church;
 - (c) the right to attend, speak and participate at all meetings of members of the church;
 - (d) the right to a single vote at all meetings of members of the church;
 - (e) the duty to minister to one another's spiritual needs as part of the Body of Christ;
 - (f) the duty to participate in church activities and services as the Lord directs and personal circumstances permit;
 - (g) the duty to financially support the work of the church as the Lord directs and personal circumstances permit; and
 - (h) the duty to respect and submit to the authority and procedures of the church as expressed in the church constitution.

RESOLUTION OF DISPUTES AMONGST MEMBERS

Disputes amongst members of the church should, as much as possible, be resolved in accordance with principles set out in Matthew 18:15-20, Luke 17:3 and Galatians 6:1. Without limiting the generality of the said passages of Scripture, the following procedure

should be adopted as a dispute occurs amongst members of the church:

- (a) A member who believes that he or she has been wronged by another member for whatever reason shall confront such member with an explanation of the wrong which is alleged to have occurred.
- (b) If the member so confronted does not listen to the member who has confronted him or her, or if the matter is not resolved, then the member who is alleged to have been wronged shall confront the member who is alleged to have caused the wrong in the presence of one or two members of the church.
- (c) If the member who is alleged to have done the wrong still does not listen to the allegation or if the dispute is not resolved, then the member who is alleged to have been wronged shall refer the matter to the pastor, or in his absence to an elder.
- (d) The pastor, or in his absence an elder, shall then confront the member who is alleged to have caused the wrong either on their own or in conjunction with a Christian mediator in an attempt to resolve the dispute, failing which the matter shall be referred to the board of elders pursuant to the procedure for discipline of members set out herein.

RESTORATION THROUGH DISCIPLINE

Christ's exhortation to watch over one another and to bear one another's burdens in the spirit of meekness and love shall be foremost in the minds of the church elders and board of deacons who are jointly charged with the responsibility for discipline of members. The primary aim of discipline shall be the restoration of the offender to fellowship with God and with the church. The church maintains not only the right but the duty to practice such discipline in a Christian manner. In administering discipline, care shall be taken to ensure that the members of the church maintain a worthy witness of their faith before the world both for the sake of the spiritual life of each member and for the testimony of the church.

CIRCUMSTANCES GIVING CAUSE FOR DISCIPLINE

A member of the church shall be deemed to be under the discipline of the church if any of the following circumstances occur:

- (a) a member has evidenced unethical or immoral conduct or behaviour that in the opinion of the board of elders is unbecoming of a Christian contrary to biblical principles;
- (b) a member's conduct, in the opinion of the board of elders, evidences an unwillingness to either comply with, adhere to or submit to the authority or procedures set out in the church constitution herein or;

(c) a member has wronged another member and has not resolved such wrong through the mechanism for dispute resolution set out above.

PROCEDURE FOR DISCIPLINE

1. No allegation giving rise to disciplinary action against a member pursuant to the preceding paragraph shall be considered by the church unless such allegation is first set out in a signed written statement given to the board of elders indicating the nature of the allegation and providing an explanation of the basis upon which the allegation is made.
2. If the board of elders determines on a preliminary basis that the written allegation is without merit, then the allegation shall be deemed to be invalid and no further disciplinary action against the member shall be proceeded with.
3. If the board of elders determines on a preliminary basis that the written allegation warrants further investigation, then the allegation shall be referred in writing to the board of elders and board of deacons (referred to as the "combined board") for a hearing and the member against whom the allegation is made (referred to as the "subject member") shall be deemed to be under the discipline of the church.
4. To ensure that the remedial ministry of church discipline to the subject member and to the congregation is completed, any request or notice of withdrawal from membership in the church by the subject member while under discipline shall not become effective until after the discipline proceedings provided for herein have been finalized.
5. The combined board shall as soon as possible convene a hearing to further consider the allegation. The subject member shall be given fourteen (14) days written notice (which period of time shall include the date of mailing but shall exclude the date of the hearing) by registered and regular mail at his or her last known address, of the date, time and place at which the hearing will be held as well as his or her right to attend such hearing and be heard. The notice shall briefly explain the nature of the allegation and advise the subject member that the allegation will be considered by the combined board at that hearing.
6. The subject member shall be entitled to attend before the hearing to listen to the details of the allegation made and to respond thereto. The hearing shall be conducted as an inquiry by the combined board and the chairperson of the board of deacons shall act as the chairperson of the combined board. The hearing shall not be open to the public nor to members or adherents of the church. However, the subject member shall be entitled to be accompanied at the hearing by two members of the church who may

act as observers during the hearing but who shall not participate.

7. Both the subject member and the combined board may call any witnesses or evidence that is relevant to the allegation being made. No party to the hearing shall be represented by legal counsel.

8. There shall be an equal allocation of time for presentations by both the combined board and the subject member. The combined board may designate a time limitation on the hearing, provided that such limitation is applied equally to the presentation by both the combined board and the subject member and provided further that notice of such limitation of time is given to the subject member in the written notice by which the subject member was given notice of the hearing.

9. All evidence presented before the hearing shall be kept confidential, except such summary facts that the combined board determines needs to be given to the membership of the church at a subsequent meeting of members.

10. At the end of the hearing, the combined board shall convene in private to deliberate on the evidence presented. A two-thirds majority vote by the members of the combined board present at the hearing shall be required to conclude that the allegation is true, failing which the allegation will be deemed not to be proven with the result that the subject member shall no longer be subject to disciplinary proceedings by the church and shall be reinstated as a member of the church in good standing.

11. In the event that the combined board determines that the allegation is true, then the combined board shall determine the appropriate disciplinary action to be implemented pursuant to a two-thirds majority vote. Disciplinary action shall be determined and implemented with the intent of both protecting the integrity of the ministry of the church and restoring the subject member into fellowship pursuant to the principles set out in Luke 17:3 and Galatians 6:1.

12. The combined board may implement any disciplinary action in relation to the subject member that it deems appropriate, including but not limited to the removal of the subject member from positions of leadership or teaching within the church, the prohibition of offending conduct or behaviour, the requirement that an apology be given, the requirement that the subject member evidence an attitude of submission to the authority of the church or a spirit of contrition or the termination of membership. Termination of membership in the church, however, will be deemed appropriate only where, in the opinion of the combined board, no other reasonable alternative disciplinary action is available.

13. The chairperson of the combined board shall send written notification to the subject member of the decision made by the combined board by registered and regular mail addressed to the subject member at his or her last known address within ten (10) days of a decision having been made together with a succinct summary of the reasons therefore.

14. The decision by the members of the combined board on all matters of discipline shall be final and binding. In the event that the decision of the combined board is to terminate the subject member's membership in the church, then the subject member shall automatically cease to be a member of the church upon the date that the decision by the combined board is made.

15. No pronouncement on matters of discipline by the church shall be made unless given orally from a prepared text at a members meeting and only after careful and sober consideration has been made by the combined board to avoid, as much as possible, undue or unnecessary embarrassment to the subject member or other prejudicial consequences to either the subject member or to the church as a whole.

16. A member of the church who has been disciplined or whose membership has been terminated shall not be barred from public worship services unless his or her presence is disruptive to the peaceful proceedings of the public worship service as determined in the sole opinion of the combined board; in which event such individual agrees that he or she may be removed from such public worship service without the necessity of legal action, whether or not such individual is at that time a member of the church.

WAIVER

Notwithstanding anything else contained herein, membership in the church is given upon the strict condition that disciplinary proceedings or any other proceedings arising out of the church constitution shall not give a member cause for any legal action against either the church, the pastor, any associate pastor, any staff member of the church, any deacon, any elder, any officers, or any member of the church, and the acceptance of membership in the church shall constitute conclusive and absolute evidence of a waiver by the member of all rights of action, causes of action and all claims and demands against the church, the pastor, any associate pastor, any staff member of the church, any deacon, any elder, any officer or any member of the church in relation to disciplinary proceedings or any other proceedings arising out of the church constitution and this provision may be pleaded as a complete estoppel in

the event that such action is commenced in violation hereof.

WITHDRAWAL AND REMOVAL OF MEMBERSHIP

1. Provided that a member is not under the discipline of the church, a member may withdraw at any time from membership in the church. A request or notice of withdrawal from membership by a member who is under discipline shall become effective only after the disciplining proceedings provided for herein have been completed.
2. Every individual withdrawing from membership in the church must do so by notification to the board of deacons in writing together with a written explanation of the reasons for the request for withdrawal from membership.
3. Upon receipt of such request for withdrawal of membership and upon the board of deacons confirming that such individual is not under discipline of the church, such individual shall be removed from the membership roll of the church. If a member is under the discipline of the church, then notwithstanding his or her request for withdrawal from membership, such individual shall continue as a member and be subject to the authority of the church until such time that such individual is no longer under the discipline of the church.
4. In the event that a member for a period of two years is either habitually absent from the church or displays a significant lack of interest in the church, the board of deacons in their sole discretion may place that individual's membership in the church on the inactive role, provided that the board of deacons has first sent written notice by registered and regular mail to such individual prior to that individual's membership being placed on the "inactive" role.
5. A member who is on the inactive role may request that his or her membership in the church be reinstated onto the active role of members, in which event the board of deacons in their sole discretion shall determine whether such request shall be granted.
6. In the event that a member has been on the "inactive" role of members of the church for a period of two (2) years, or more then the board of deacons may in their sole discretion, terminate that individual's membership in the church by a resolution passed by a majority of the deacons present at such meeting, in which event the clerk shall send written notice by regular and registered mail to such inactive member at his or her last known address to advise such individual of their termination of membership in the church. That member's membership in the church shall be deemed to have ceased on the date of such

resolution by the board of deacons.

DEFINITIONS AND DUTIES OF THE PASTOR

The pastor is the spiritual overseer of the church and shall be deemed by virtue of his position to be a member of the church and a member of the board of elders. The duties and rights of the pastor shall be as follows:

- (a) the duty to provide spiritual leadership to the church and to work in conjunction with the board of elders in implementing such spiritual leadership;
- (b) the duty to work in conjunction with the board of elders and the board of deacons in formulating and recommending policy statements to the congregation as may be necessary from time to time;
- (c) the duty to exercise general supervisory authority over all staff members of the church, provided that the hiring or removal of staff members including associate pastors, shall require the approval of the board of deacons and/or the members of the church as required herein.
- (d) the duty to fulfil the qualifications for a church elder as set out herein and to ensure that his lifestyle does not evidence unethical or immoral conduct or behaviour that is unbecoming of a Christian contrary to biblical principles;
- (e) the duty to be in full agreement with, uphold and be subject to the church constitution.
- (f) the right to be an ex-officio member of all committees and boards of the church with the exception of the board of deacons; and
- (g) the right to receive notification of all meetings of the board of deacons and to be present and fully participate at all such meetings, provided that the pastor shall not be a member of the board of deacons nor have a vote thereon.

DEFINITION AND DUTIES OF ASSOCIATE PASTORS

If the pastor deems it necessary, associate pastors may be called by the church for the purpose of undertaking such ministries as the pastor and the church elders determine are necessary for the church. An associate pastor by virtue of his position shall be deemed to be a member of the church and a member of the board of elders. The duties of an associate pastor shall be as follows:

- (a) the duty to fulfil the ministry description established for his or her position;
- (b) the duty to fulfil the qualifications for a church elder as set out herein and to ensure that his or her lifestyle and conduct does not evidence unethical or immoral activities or behaviour that is unbecoming of a Christian contrary to biblical principles; and

(c) the duty to be in full agreement, uphold and be subject to the church constitution.

TERMS OF EMPLOYMENT FOR GENERAL STAFF

All general staff members of the church (which shall include all employees of the church except the pastor and associate pastors) shall be required to fulfil and maintain the following qualifications:

- (a) the employee must be a member in good standing of the church and be subject to the authority of the church as evidenced by the church constitution;
- (b) the employee must be personally committed to Jesus Christ as Saviour and Lord and give evidence of a consistently godly walk;
- (c) the employee must be in full agreement, uphold and be subject to the church constitution;
- (d) in recognition of the integral part that each employee plays in the overall ministry of the church, each prospective employee must review and sign an employment agreement with the church to ensure that the prospective employee recognizes that employment by the church requires that the employee's lifestyle must not evidence unethical or immoral conduct or behaviour that in the opinion of the board of elders is unbecoming of a Christian contrary to biblical principles.

POLICY STATEMENTS FOR THE CHURCH

1. In consideration of the ongoing need for the church to provide guidelines and directions to its members on practical applications of biblical teachings and Christian conduct, the church may adopt policy statements as are deemed necessary from time to time and such statements upon adoption shall be deemed to be a part of the church constitution.
2. A policy statement may be proposed or amended by either the pastor, the board of elders or the board of deacons, but shall not become operative until first approved by a unanimous vote of the board of elders and the board of deacons and ratified by a 75% vote of the members of the church present at a meeting duly called for that purpose. []

DISCLAIMER: This article is a summary of current legal issues provided as an information service. It is current only as of the date of the article and does not reflect changes in the law that have occurred subsequent to that date. The article is distributed with the understanding that it does not constitute legal advice or establish the solicitor/client relationship by way of any information contained herein. The contents are intended for general information purposes only and under no circumstances can be relied upon for legal decision making. Readers are advised to consult with a qualified lawyer and obtain written opinion concerning the specifics of their particular situation.

Church Discipline Update

A. INTRODUCTION

Since the publication of the earlier article entitled "Legal Analysis of Church Discipline in Canada" in the CCCC Bulletin No. 2, May 25th, 1992, there have been a number of important court decisions that have been released that deal with the issue of church discipline. This update has been prepared to provide a summary and commentary on those cases.

B. PROCEDURAL FAIRNESS

In two recent decisions, the courts have underscored the need for procedural fairness in disciplining both church members and clergy, whether or not the church constitution requires such procedure to be followed.

In the decision of Davis v. United Church of Canada¹ released on March 18th, 1992, two United Church ministers applied for a judicial review of the procedures which had been followed by the United Church in dealing with allegations of sexual harassment made against the respective ministers. In one case, the minister was suspended pending the outcome of a formal hearing; however, he was never provided with copies of the written charges that were made against him until a number of months after the suspension.

In the other case, a resolution was reached, an apology was given and the local church forgave the offending minister. Notwithstanding the resolution, an appeal was launched which resulted in the minister being suspended. The minister, however, was not given a copy of the notice of appeal, or made aware of the grounds of the appeal, nor was he given an opportunity to be present at the appeal hearing.

Not surprisingly, the court found that the "two United Church ministers were not well served by the United Church of Canada . . . in that the rules of natural justice were sorely breached by [the church] in the treatment of these two ministers"². As a result, the court reinstated both ministers to their former pastoral positions but stated that such an order did not preclude the church from subsequently proceeding on the merits of the matter, provided the proper procedures as set out in the church manual were followed.

What is clear from the case is that although the court will not become entangled in reviewing the appropriateness of the disciplinary decision that is made, it will actively intervene if the procedure is either contrary to the procedural requirements of the church's own constitution or is contrary to the principles of natural justice.

What constitutes natural justice in a church

discipline context has now been definitively enunciated by the Supreme Court of Canada. In Lakeside Colony of Hutterian Brethren v. Hoffer³, the Supreme Court reviewed the decision of the Manitoba Court of Appeal which had confirmed a trial court decision upholding the expulsion of Daniel Hoffer and others from the Lakeside Colony of Hutterian Brethren.

The facts leading up to the trial and the subsequent appeal have already been summarized in CCCC Bulletin No. 2, May 25th, 1992. However, for ease of reference, the important facts of the case are summarized here. A dispute arose between Mr. Hoffer, his supporters and the leaders of the Hutterite community on a question of patent infringement resulting in Mr. Hoffer and his followers refusing to obey the leadership of the colony. The matter was discussed at a general meeting of the colony. During the meeting it was determined that Mr. Hoffer should be "shunned" at meals and during worship. Mr. Hoffer refused to accept the punishment proposed. He was then told that he was expelling himself because he refused to subject himself to the discipline of the colony. The expulsion meant that Mr. Hoffer was no longer a member of the church. However, no formal vote on the expulsion by the colony was taken. This unusual result occurred because the colony collectively made decisions on a basis of consensus of those that were at meetings as opposed to a formal vote. A subsequent meeting of the colony was held to determine if Mr. Hoffer would repent and apply for re-admission to the colony. Although Mr. Hoffer had been informed of the meeting, he decided not to attend.

The decision to expel Mr. Hoffer was subsequently reviewed by a "higher court" of the colony which included the local minister. Mr. Hoffer decided not to attend. The colony then decided that they could no longer tolerate Mr. Hoffer and his followers in the colony and instructed their legal counsel to commence legal proceedings to have Mr. Hoffer and his followers physically removed from the colony. However, the lawyer's letter informing them that they had been expelled from the colony required that they vacate by a date which was before the date set for the hearing by the higher church court.

At the outset of the decision, the Supreme Court confirmed that although courts are generally reluctant to exercise jurisdiction over questions of membership in voluntary associations, particularly churches, it would exercise jurisdiction where issues of property or civil rights are affected by a person's membership in

the association. In the case at hand, the Supreme Court found that it had jurisdiction because the loss of membership by Mr. Hoffer and his followers had a profound impact upon their property rights. This was because members of the Hutterite colony do not own any property personally. Instead they hold it on a collective basis. When Mr. Hoffer and his followers lost their membership in the colony, they also lost the rights to use and enjoy the property of the colony which they had contributed to during their lifetime.

Although the Supreme Court found that it had jurisdiction, the jurisdiction did not extend to a review of the merits of the decision to expel Mr. Hoffer and his followers. Rather the judicial jurisdiction was limited to a review of the decision to determine if (i) the purported expulsion was carried out according to the applicable rules of the colony; (ii) whether those rules were enforced according to the principles of natural justice; and (iii) whether the procedure followed was done without mala fides, i.e. without bad intent.

The approach of the Supreme Court in this case is consistent with the earlier decision of Davis v. United Church of Canada⁴.

Like the Davis decision, the Supreme Court of Canada required that the procedures of the church pertaining to the matters of discipline be followed and that those procedures be done in accordance with principles of natural justice.

In relation to the requirement that the member be able to attend to make representation, it is obvious that unless a person is able to be present during the hearing and respond to the allegations being made, the results of the decision will be suspect by failing to consider both sides of the charge.

Concerning the requirement that there be an unbiased tribunal, the Supreme Court was reluctant to address the issue in a definitive manner since the appropriate standard of an unbiased tribunal in the context of a voluntary association was not argued by the parties before the court. However, the Supreme Court did recognize the fact that given the close relationship amongst members of a voluntary association, it is likely that members of the tribunal hearing the discipline matter will have had some previous knowledge of the issue in question. As such, since it is virtually inevitable that the members of the tribunal will have some prior knowledge of the relevant facts, the requirement of an unbiased tribunal does not necessarily mean that the church leaders who ultimately make the decision concerning whether a fellow church member is to be disciplined must be totally uninterested in or unassociated with the facts of the case at hand. This is not to suggest that there will

not be times where members should exclude themselves from the decision making process where there is a clear conflict of interest. However, just because a church leader is aware of the facts giving rise to the discipline process does not in itself necessitate the exclusion of that person from the decision making body.

In the case at hand, the Supreme Court was of the opinion that proper principles of natural justice had not been followed since Mr. Hoffer and his followers had not been given enough notice of the church meeting to be present and properly represent themselves. As such, the decision of the colony to expel Mr. Hoffer and his followers was overturned. More importantly, the principles enunciated by the supreme Court in reaching its decision will now have a far reaching impact upon decisions by churches and other voluntary organizations in dealing with matters of internal discipline of its members.

C. INVASION OF PRIVACY

As discussed in the earlier article on "Legal Analysis of Church Discipline in Canada", even if a church has followed procedural steps that reflect the basic elements of natural justice, the courts may still intervene if they detect that an individual's privacy has been jeopardized. Although there are few Canadian cases which have dealt with invasion of privacy, there have been a number of recent court decisions in the United States that have dealt with this issue and have evidenced a pro-active approach by the courts to intervene if an individual's privacy is jeopardized by the exercise of discipline over a church member.

One Canadian case which has addressed the issue of invasion of privacy is the unreported 1984 Quebec Court of Appeal decision of Eglise Evangelique Libre de la Province de Quebec et al. v. Vermet⁶. In that case a minister brought an application for an injunction and damages against his church denomination based upon an alleged invasion of his private life. The minister had been involved in an adulterous relationship with a member of his congregation for a number of years, with the last year and one half of the relationship being prolonged by threats by the minister. After the elders of the church began to investigate, the minister offered his resignation but advised that he would continue in his teachings in the community and coupled such statements with threats to tear the church apart and form a new church. In response, the governing body of the church decided to exclude the minister from fellowship, stating that he was guilty of adultery and making threats. The resolution was read orally at the annual general meeting of the denomination and a

copy of the resolution was sent to each of the five local churches in the denomination.

In dismissing the application, the court held that the minister was in a special class of professionals with special obligations and as such a private resignation was not sufficient. Withdrawal from the profession could, at the discretion of the governing body, be made as public as entry into the profession, as for example was the case of disbarment notices distributed by the legal profession when members are struck from rolls for breaches of ethics. The court succinctly summarized a practical approach to the case at bar by stating the following;

"In fact there are certain professions which can only be exercised if those who exercise them are answerable to and guaranteed by respected and respectable authorities. To be a priest, pastor or a rabbi is not the same as to be a vendor of peanuts. The exercise of such professions carries with it the obligation to respect the standards of the religious authorities concerned, failing which one's credentials may be removed. And it is not sufficient to resign in order to avoid the withdrawal of credentials; the withdrawal of such credentials is just as public as their granting through ordination or otherwise. For example, it is common knowledge that the bar publishes notices of radiation [disbarment] in the case of members of the bar who have contravened the profession's code of ethics."⁷

Although the court's decision addresses the issue of invasion of privacy involving ministers, it does not deal with the more sensitive issue of invasion of a church member's privacy. As the decision was based on the recognition that a minister is a professional with special obligations that justify public statements on his or her dismissal, a court might not necessarily apply the same rigorous standards if the information disseminated to other churches involves a lay member of the church as opposed to a professional minister. Whether the courts in Canada will adopt a more protective attitude, as has been evidenced in the United States when dealing with an alleged invasion of privacy of a lay member remains to be seen. However, there is good reason to be cautious in this developing area of the law, particularly in consideration of the increasing judicial recognition of individual rights.

D. STANDARDS ESTABLISHED BY TRUSTEE

In the earlier article on church discipline, a recommendation was made that if discipline is pursued because there is a deviation from the accepted doctrine of the congregation set out in the church constitution, it is essential to ensure that the church

constitution is neither contradicted nor supplanted by the church doctrine set out in an old trust deed by which the church may have acquired title to its current lands. This recommendation, though, would not have application in the Province of Quebec, where the limited use of trusts does not extend to acquiring property "in trust".

E. CONCLUSION

It is hoped that the above summary of recent case law and comments will be of assistance to churches and organizations that are becoming more conscious of the court's involvement in issues involving church discipline.

ENDNOTES

1. Davis v. United Church of Canada, Renfrew Presbytery and Bay of Quite Conf.; Hobbs v. same (1992), 8 O.R. (3d) 75.
2. Ibid, pg. 76.
3. Lakeside Colony of Hutterian Brethren v. Hoffer (1992), an unreported decision (as of yet) of the Supreme Court of Canada released on October 29th, 1992, on appeal from the Manitoba Court of Appeal (1991), 77 D.L.R. (4th) 202, confirming a decision of the Trial Court, (1989), 63 D.L.R. (4th) 473.
4. Davis v. United Church of Canada, supra, endnote 1.
5. Lakeside Colony of Hutterian Brethren v. Hoffer, supra, endnote 3, at pg. 35.
6. Eglise Evangelique Libre de la Province de Quebec et al. v. Vermet, Quebec Court of Appeal, December 18, 1984, (unreported) see 29, A.C.W.S. (2d), 487.
7. Ibid. □

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