LAW & CHURCH LEADERSHIP SEMINAR

Evangelical Fellowship of Canada And Christian Legal Fellowship

Moncton – May 14, 2004

Presentations

- An Explanation of Bill C-250
  - Bruce Long
- Bill C-45 – An Explanation of the Civil Law Consequences Including Availability of Insurance
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An Explanation of Bill C-250

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Note: See Church Law Bulletin #2 at www.Churchlaw.ca for more details

Sections 318 and 319 of the *Criminal Code* Will Read

Section 318 - Hate Propaganda

Advocating genocide

(1) Every one who advocates or promotes genocide is guilty of an indictable offence and liable to imprisonment for a term not exceeding five years.

(2) In this section, "genocide" means any of the following acts committed with intent to destroy in whole or in part any identifiable group, namely,

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(a) killing members of the group; or

(b) deliberately inflicting on the group conditions of life calculated to bring about its physical destruction.

(3) No proceeding for an offence under this section shall be instituted without the consent of the Attorney General

(4) In this section, "identifiable group" means any section of the public distinguished by colour, race, religion (or) ethnic origin <u>or sexual orientation</u>.

3

Section 319

(1) Every one who, by communicating statements in any public place, incites hatred against any identifiable group where such incitement is likely to lead to a breach of the peace is guilty of

(a) an indictable offence and is liable to imprisonment for a term not exceeding two years; or

(b) an offence punishable on summary conviction.

(2) Every one who, by communicating statements, other than in private conversation, willfully promotes hatred against any identifiable group is guilty of

(a) an indictable offence and is liable to imprisonment for a term not exceeding two years; or

(b) an offence punishable on summary conviction

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(3) No person shall be convicted of an offence under subsection (2)

(a) if, he establishes that the statements communicated were true;

(b) if, in good faith, he expressed or attempted to establish by argument an opinion on a religious subject or an opinion based on a belief in a religious text;

(c) if, the statements were relevant to any subject of public interest, the discussion of which was for the public benefit, and if on reasonable grounds he believed them to be true; or

(d) if, in good faith, he intended to point out, for the purpose of removal, matters producing or tending to produce feelings of hatred toward an identifiable group in Canada

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(4) Not applicable

(5) Not applicable

(6) No proceeding for an offence under subsection (2) shall be instituted without the consent of the Attorney General.

(7) In this section,

"communicating" includes communicating by telephone, broadcasting or other audible or visible means;

"identifiable group" has the same meaning as in section 318;

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"public place" includes any place to which the public have access as of right or by invitation, express or implied;

"statements" includes words spoken or written or recorded electronically or electro-magnetically or otherwise, and gestures, signs or other visible representations.

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Notes

- **Are two separate offences – "communicating statements" and "promoting hatred"**
- **The "communicating statements" offence does not require Attorney General consent nor does it have 4 statutory defences**
- **Both offences allow for arrest however, it must comply with S.495 of the *Criminal Code***

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- The “promoting hatred” offence has 4 defences:
  - Truth
  - Good faith religious opinion
  - Public benefit
  - Removal of hatred and it requires Attorney General consent
- “Communicating statements” offence can result in a conviction even if 4 defences are present

9

- Identifiable group – meaning of “orientation” is unclear. If it includes “inclination” and/or “actions” may protect polygamists, bisexuals, pedophiles or child pornographers
- Passages in Koran, Torah, Bible, etc. may be designated as promoting hatred
- “Communicate”: includes all means of disseminating information
- The religious good faith defence has not succeeded in Canada

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- “Promoting hatred” may only require willful blindness
- Freedom of religion is relative to equality rights of minorities
- Defences to “communicating statements” offence include:
  - Not stir up hatred
  - Not in public place
  - Not lead to danger to public or property
  - Victim criticized for another reason

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Suggestions

Suggestions until the law is settled:

- Avoid public criticisms of identifiable groups or its activities
- Limit opinions to private conversations
- Continue to express views to M.P.s
- If targeted or investigated, rely on constitutional right to remain silent. Inasmuch as offence is directly related to intention and motive, silence is usually preferable at initial stages

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Bill C-45 – An Explanation of the Civil Law Consequences Including Availability of Insurance

by Mervyn F. White, B.A., LL.B.
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Introduction

- **Bill C-45, "*An Act to Amend the Criminal Code (Criminal Liability of Organizations)*", was proclaimed into force on March 31, 2004**
- **Bill C-45 imposes a *Criminal Code* duty on organizations and their representatives to protect their workers and the public by creating a *Criminal Code* duty similar to the duty already found in the *Occupational Health and Safety Act* (Ontario), which requires that employers take every reasonable precaution to protect their employees**
- **See Charity Law Bulletin #35 at www.charitylaw.ca for more details**

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Application of Bill C-45

- **The amendments contemplated by Bill C-45 will apply to all types of organizations, including non-share capital corporations, profit-making corporations, partnerships, and unincorporated organizations**

  "Organization" is defined in Bill C-45 to mean:

  a) **A public body, body corporate, society, company, firm, partnership, trade union or municipality, or**
  b) **An association of persons that**
     i. **Is created for a common purpose**
     ii. **Has an operational structure**
     iii. **Holds itself out to the public as an association of persons**

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Key Reforms to the *Criminal Code* by Bill C-45

1. **Imposing criminal liability on organizations will no longer require that the criminal conduct or act of the organization be committed by a directing mind of the organization**
2. **The Crown will now be able to "cobble together" the essential elements of a criminal offence, which can be attributed to separate individuals within the offending organization, in order to establish criminal liability**

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3. **Representatives of the offending organization who can commit or contribute to the physical element of the offence now includes directors and officers and all others who act on behalf of the organization**
4. **A reckless corporate culture, which is tolerated by senior management, may be sufficient to establish the mental element of the criminal offence**

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5. **Where the criminal offence is based on allegations of criminal intent or recklessness, the Crown will establish the mental element where a senior officer is a party to the criminal offence, or where a senior officer has knowledge of the offence but failed to take all reasonable steps to prevent or stop the offence**
6. **A specific and explicit legal duty will be imposed on those who direct the work or task of others, to ensure that such individuals take all reasonable steps to prevent bodily harm at work**

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Criminal Negligence – Amendments to Section 22.1

- **The physical element can be committed by the organization's representatives while the mental element of criminal negligence can stem from the organization's senior officers**
- **An organization's criminal liability for negligence can now be established through the aggregation of the representatives' and senior officers' acts, omissions and state of mind**
- **However, the act of criminal negligence must be within the scope of the representative's authority before it will be imputed to the organization**

7

Criminal Offences Other Than Negligence – New Section 22.2

- **Bill C-45 will also make it easier to hold organizations accountable for criminal offences other than negligence (i.e. criminal offences requiring intent or recklessness, which are the majority of offences in the *Criminal Code*)**
- **This new provision of the *Criminal Code* is more limiting than section 22.1 in that criminal liability is restricted to the conduct of the senior officers**

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- **Furthermore, the physical element and the mental element will still need to be derived from the same individual (i.e., from one senior officer)**
- **The definition of a “senior officer” remains broad and, thus, an organization is as equally liable for the criminal conduct of someone with operational management authority as it is for someone with policy-making authority**

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A New Duty – Section 217.1

- **Bill C-45 has also introduced a form of “criminal negligence” into the *Criminal Code* to address workplace safety, or the lack thereof, by adding section 217.1 as follows:**

  Everyone who undertakes, or has the authority, to direct how another person does work or performs a task is under a legal duty to take reasonable steps to prevent bodily harm to that person, or any other person, arising from that work or task

- **This duty to prevent bodily harm applies to both individuals and organizations as the term “everyone” has been defined to include an organization and is imposed on anyone who directs, or has the authority to direct, another person**

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- **Most importantly, it should be noted that the new provision in the *Criminal Code* covers not only “work”, but tasks as well**
- **This could potentially expose those who direct the work or task of others to criminal sanction for conduct that would traditionally be considered as negligence, and more appropriately dealt with through existing regulatory provisions, such as those found in the *Occupational Health and Safety Act* (Ontario)**

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Reasonable Steps – Organizational Due Diligence

- **However, the following may be satisfying the “reasonable steps” in completing organizational due diligence referred to in section 217.1 by an organization:**
  - **Conducting a legal audit to review the organization’s existing policies and programmes to determine whether or not they are inconsistent with applicable legal requirements**
  - **Having an ongoing audit programme**
  - **Establishing a safety system and ensuring that all reasonable steps are taken to ensure that the system is effective**

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- **Implementing business methods in response to any discovered needs**
- **Requiring that the corporate officers report to the board in a scheduled, timely fashion**
- **Ensuring that all corporate officers are aware of the standards of their industry**
- **Requiring that corporate officers immediately and personally react when they see that a system has failed**
- **Publicizing both contingency and remedial plans for dangers and problems**

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- **Exercising due diligence in selecting competent persons when any of the officers' duties are delegated**
- **Utilizing reports from outside professionals**
- **Recording all steps taken to ensure that due diligence is being exercised**
- **Making due diligence an integral part of every employee's performance review**
- **Directors and senior managers should exhort those whom they manage to reach an accepted standard of practice**

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Effect of Bill C-45 On Insurance Coverage

- **Bill C-45 may seriously affect insurance coverage for directors and officers, where such insurance coverage was previously available**
- **For example, many directors' and officers' liability insurance policies provide for a duty to defend against civil lawsuits founded in negligence, or against allegations laid under regulatory legislations, such as the *Occupational Health and Safety Act* (Ontario)**

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- **This duty to defend would impose on the insurer a duty to provide and pay for reasonable legal expenses incurred in defending a claim. Normally, such a duty to defend would not extend to allegations of criminal conduct**
- **Normally, such a duty to defend will not extend to allegations of criminal conduct, based on the public policy principle that one cannot buy insurance to cover criminal activities**
- **As such, it is possible that a director or officer could be charged under the new provisions of the *Criminal Code* for conduct that would have traditionally been considered a regulatory offence (and for which a duty to defend would have been imposed upon the insurer) and not be covered for legal defence costs**

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- **As such, the distinction between insurance coverage for non-intentional torts versus intentional torts is very important in light of the amendments introduced through Bill C-45**
- **By its very nature as a criminal charge (which contemplates either a form of criminal intent or a recklessly negligent mind), Bill C-45, and specifically section 217.1, may have the effect of creating a form of "intentional" or "criminal" negligence**
- **While this may seen illogical and contradictory at first glance, it would appear that the intent of the legislation is to create a new level or type of negligence, which is based on the recklessness of an organization, but for which the penalties imposed are more stringent**

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- **It would seem appropriate to anyone that, while a "new" form of criminal negligence has been created by the legislation, the underlying negligence – based on the foresee ability of the event – has not changed, and as such insurance coverage should be provided**
- **It should, however, be anticipated that insurers will attempt to limit their obligations to cover losses arising from such criminal negligence and will argue that it is an excluded risk**
- **Although there are reasonable arguments to be made that insurance should be extended to cover such losses, such arguments may be resisted by the insurers, and will probably require judicial review and determination**

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Implications and Recommendations for Organizations

- **Anyone who undertakes, or has the authority, to direct the activities of volunteers, members, employees or agents of charities, non-profit organizations, churches or philanthropic groups will be under a legal duty to take reasonable steps to prevent bodily harm to those persons under their control and direction**
- **It is highly recommended that organizations take immediate steps to establish a system of checks-and-balances to monitor the acts and omissions of its representatives and senior officers in fulfilling their duties**

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Conclusion

- **The conduct contemplated by section 217.1 would normally be dealt with through civil concepts of negligence law, or regulatory legislation such as the *Occupational Health and Safety Act* (Ontario)**
- **Now that such conduct may be adjudged criminal, insurers will be well-placed to deny either a duty to defend or a duty to indemnify if criminal charges are laid under section 217.1 or if a civil claim for damages is pleaded too broadly or where the conduct in question is described in terms not truly negligent**

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Same Sex Marriages - The Legal Context, Including Human Rights Issues and What Churches Can Do in Response

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A. INTRODUCTORY COMMENTS

- The purpose of this presentation is to:
  - Provide a summary of recent developments in the law to date on same sex marriage
  - Offer preliminary advice on how churches can ensure that they are in compliance with recent legal developments
- See Charity Law Bulletin #31 at www.charitylaw.ca for more details
- This area of law is in a state of flux and is highly controversial. As such, the comments that follow are of a tentative nature and are subject to change as this evolving area of the law unfolds

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B. OVERVIEW OF TOPICS

- The Legal Framework regarding same sex marriages
  - Case law developments
  - Proposed federal legislation
  - Impact of Bill C-250 (Hate Crimes) on same sex marriage issues
  - Impact of human rights legislation

3

- What churches and religious charities can do in response
  - The importance of constitutional documents
  - Review of existing constitutional documents
  - Conducting a legal audit
  - Education of clergy concerning their legal rights

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C. THE LEGAL FRAMEWORK REGARDING SAME SEX MARRIAGE

1. Recent Case Law Developments Regarding Same Sex Marriage

- ***Vriend v. Alberta* [1998] – Supreme Court of Canada**
  - **The exclusion of "sexual orientation" as a protected ground of discrimination under the *Alberta Individual's Rights Protection Act* is unconstitutional**

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- ***M. v. H.* [1999] – Supreme Court of Canada**
  - **The opposite sex definition of "spouse" under the support provisions of the *Family Law Act* (Ontario) is unconstitutional**
- ***Hall (Litigation guardian of) v. Powers* [2002] – Ontario Superior Court**
  - **In its decision, the court stated that there was "…no…single position within the Catholic faith community" in relation to same sex couples notwithstanding the traditional teaching of the Catholic Church**

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- **Recent cases that have challenged the constitutional validity of the opposite-sex requirement of marriage**
  - **B.C. case of *Equality for Gays and Lesbians Everywhere* (EGALE) [2003] British Columbia Court of Appeal, and**
  - **Ontario case of *Halpern v. Canada (Attorney General)* [2003] Ontario Court of Appeal**
    - **In the above cases the respective Courts of Appeal ruled that the existing common law definition of marriage as the "union of one man and one women" is unconstitutional**
  - **Neither the *Halpern* nor the *EGALE* cases have been appealed to the Supreme Court of Canada**

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- ***Catholic Civil Rights League v. Hendricks* [2004] Quebec Court of Appeal**

  Trial decision:
  - **The statutory opposite-sex requirement for marriage in Quebec violates s. 15(1) of the Charter**
  - **This finding was appealed to the Quebec Court of Appeal, but quashed**
  - **Same sex marriage still legal in Quebec**
- **Section 15 of the Canadian Charter of Rights and Freedoms does not specifically guarantee equality based on "sexual orientation" but the courts have found analogous grounds to those protected in section 15**

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2. Proposed Federal Legislation

- **In the summer of 2003, the federal government confirmed that it would not appeal the decisions of the Courts of Appeal in B.C., Ontario and the Quebec cases referenced earlier**
- **Proposed federal legislation was prepared by the federal government in the summer of 2003**
- **In October 2003, the federal government submitted its factum to the Supreme Court of Canada in support of a reference to determine the constitutionality of its draft legislation recognizing the union of same sex couples**

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- **On January 27, 2004, the federal government amended the reference to the Supreme Court of Canada to include a question concerning the constitutionality of limiting marriage to persons of different sex**
- **The actual wording of the proposed draft legislation entitled *Proposal for an Act Respecting Certain Aspects of Legal Capacity for Marriage for Civil Purposes* is as follows:**
  - **Section 1: "Marriage, for civil purposes, is the lawful union of two persons to the exclusion of all others."**
  - **Section 2: "Nothing in this Act affects the freedom of officials of religious groups to refuse to perform marriages that are not in accordance with their religious beliefs."**

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- **Section 2 does not establish a new right, it only recognizes what is assumed to be an existing right**
- **Changes to other federal statutes will also be made as a result of the new legislation**
- **Same sex marriage reference to be heard by the Supreme Court of Canada in early October 2004**
- **For further details see** **http://canada.justice.gc.ca/en/news/nr/2003/doc_30946.html**

3. Impact of Bill C-250 (Hate Crimes) on Same Sex Marriage Issues

- **When considering the topic of same sex marriage, churches need to be aware of Bill C-250 (Hate Crimes)** **[See presentation by Bruce Long]**

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- **Statements opposing same sex marriage might in some situations be considered as a hate crime offence**
- **Bill C-250 was given Royal Assent on April 29, 2004**

4. Impact of Human Rights Legislation

a) The *Human Rights Code*

- **Part 1 of the *Human Rights Code* enumerates areas in which individuals have the right to be treated "equally" and without discrimination**

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- **Section 1 states as follows regarding the provision of services:**

  Every person has a right to equal treatment with respect to services, goods and facilities, without discrimination because of race, ancestry, place of origin, colour, ethnic origin, citizenship, creed, sex, sexual orientation, age, marital status, same-sex partnership status, family status or disability

- **Section 5 of the *Human Rights Code* states the following regarding employment**

  5(1) Every person has a right to equal treatment with respect to employment without discrimination because of race, ancestry, place of origin, colour, ethnic origin, citizenship, creed, sex, sexual orientation, age, record of offences, marital status, same-sex partnership status, family status or disability

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- **However, section 24 of the *Human Rights Code* permits discrimination to occur in the context of employment where:**
  - **The nature of the employment requires the discrimination**
  - **The qualification is a reasonable and bona fide qualification for the employment**
  - **Example: A requirement that a minister subscribe to a church's Statement of Faith and charitable objects**

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- **Section 11(1) of the *Human Rights Code*:**

  Extends the prohibition of discrimination into areas that are not contemplated by Section I of the *Human Rights Code*, where the discrimination results in the exclusion of an "identifiable group" as set out in the *Human Rights Code*, except generally when the requirement, qualification or factor is reasonable and bona fide in the circumstances

- **Section 18 of the *Human Rights Code*:**

  The rights under Part I to equal treatment with respect to services and facilities, with or without accommodation, are not infringed where membership or participation in a religious, philanthropic, educational, fraternal or social institution or organization that is primarily engaged in serving the interests of persons identified by a prohibited ground of discrimination is restricted to persons who are similarly identified

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b) The *Canadian Human Rights Act*

- **Section 3 defines "prohibited grounds of discrimination" as follows:**

  For all purposes of this Act, the prohibited grounds of discrimination are race, national or ethnic origin, colour, religion, age, sex, sexual orientation, marital status, family status, disability and conviction for which a pardon has been granted.

- **Section 5 defines "discriminatory practice" as follows:**

  5. It is a discriminatory practice in the provision of goods, services, facilities or accommodation customarily available to the general public

  (a) to deny, or to deny access to, any such good, service, facility or accommodation to any individual, or

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(b) to differentiate adversely in relation to any individual, on a prohibited ground of discrimination.

c) Recent key human rights decisions

- ***Trinity Western University v. British Columbia College of Teachers* (2001), Supreme Court of Canada held:**

  "The freedom to hold beliefs is broader than the freedom to act on them. The freedom to exercise genuine religious belief does not include the right to interfere with the rights of others."

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- ***Ontario (Human Rights Commission) v. Brillinger* [2002] – Ontario Superior Court**
  - **In furtherance of his religious beliefs, the owner of a printing shop felt he could not assist in the printing and distribution of information intended to spread the acceptance of homosexual lifestyles. However, he had not refused service to homosexual customers**
  - **In finding the owner in violation of the *Human Rights Code* the court upheld the "right to be free from discrimination based on sexual orientation in obtaining commercial services"**

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D. WHAT CHURCES AND RELIGIOUS CHARITIES CAN DO IN RESPONSE

1. The Importance of Constitutional Documents

a) The legal nature of religious organizations

- **Churches and other religious organizations are a voluntary association of persons who come together for a collective purpose as reflected in their respective governing agreement, namely their constitution**
- **A church constitution is a civil law document that can only reflect church law if it is made a part of the church constitution**

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b) The need for churches and religious charities to clearly articulate their identity and beliefs through a constitution

- **Since a church is nothing more than what the individuals forming it decide it to be, it is essential for churches to clearly state what they believe and, where possible, relate those beliefs to Scripture**
- **If the church fails to articulate what it is and what it believes, it will be left up to the courts to determine it on behalf of the church. The church may then be left more vulnerable to challenge under proposed federal legislation, the *Human Rights Code* and Bill C-250**

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- **The way in which the church articulates what it believes is through the church constitution**
- **For unincorporated churches, a constitution is usually a single document that is neither issued nor sanctioned by the government**
- **For incorporated churches, the constitution usually consists of a collective of the following documents:**
  - **Letters patent**
  - **General operating by-law**
  - **Policy Statements**

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2. Possible Options Regarding Specific Constitutional Documents

- **In light of recent changes in the law, churches and other religious organizations can take the following steps**

a) Statement of Faith

- **A Statement of Faith should always be part of the constitution of a church**
- **Scripture is open to differing interpretations. A more literal and/or orthodox interpretation would likely be more consistent with a position not in support of same sex marriage**

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- **If applicable, the church's Statement of Faith should reflect the church's theological belief in a literal and/or orthodox interpretation of Scripture**
- **General Scriptural passages such as those contained in the Apostle's Creed can be inserted in the Statement of Faith**
- **However, Scriptural passages that may be construed as promoting hatred against an identifiable group may leave the church open to civil and even criminal liability**

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- **According to the case of *Owens v. Saskatchewan (Human Rights Commission)* [2002] (Sask. Q.B.) Scriptural references may be found to be promoting hatred**

b) Charitable objects

- **The church's charitable objects are set out in its letters patent and should clearly indicate a religious purpose with references, where possible, to Scripture, i.e. "propagating the Gospel of Jesus Christ"**
- **The church's charitable objects should also make reference to upholding the church's Statement of Faith, where applicable**

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c) General operating by-law

- **The general operating by-law should define membership**
- **Conditions for church membership could include:**
  - **Adherence to the church's constitution and its Statement of Faith**
  - **Members would be subject to church authority**
  - **A requirement to sign a membership statement by a member indicating they agree to comply with the church constitution and its Statement of Faith**

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- **Individuals involved in or leading church ministries or programs, as well as key employees, could collectively be required to be members**
- **The by-law should also have a provision authorizing the directors to implement operating policies for the church, together with an effective discipline procedure**

d) Policy Statements

- **Policy Statements can be of assistance in articulating a practical manifestation of the church's beliefs**

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- **Churches should ensure that their Policy Statements make reference to being applied in accordance with the church's Statement of Faith, where applicable**
- **Policy Statements must be prepared in a manner that is consistent with applicable human rights legislation**
- **Examples of the types of Policy Statements that a church might adopt with regard to same sex marriage are as follows:**
  - **A policy on marriage including the following, where applicable:**

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- **If the church does not support same sex marriage in accordance with a literal and/or orthodox interpretation of Scriptures, the policy should contain a statement recognizing marriage as a holy sacrament of the church and defining marriage as being between one man and one woman in accordance with its Statement of Faith**
- **Clergy should be required to subscribe to the church's constitution, including its Statement of Faith**
- **Marriage can only be solemnized by clergy of the local church or other clergy approved by the church who have subscribed to the Statement of Faith and constitution of the church**

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- **The clergy is confirmed to have the right to decide whether or not he or she wishes to proceed with solemnizing a marriage if doing so would be contrary to his or her religious beliefs**

– **A facility use policy providing for the following:**
- **Restricting use of church facilities to church programs and/or members and for purposes which are consistent with the Statement of Faith and constitution of the church**
- **Since a church can discriminate in terms of membership and services per s. 18 of the *Human Rights Code,* a church may restrict the use of the facilities to only those holding membership status**

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- **If church facilities are restricted for use by members, a church that does not support same sex marriage may have the ability to prohibit the use of its facilities for conducting same sex marriages by non-members and members alike**
- **However, such facility use policies must be prepared in a manner consistent with the requirements of the *Human Rights Code* and therefore cannot exclude an "identifiable group"**
- **Churches are cautioned to draft their Policy Statements utilizing neutral wording where possible and avoid negative or pejorative wording or wording that refers to an "identifiable" group**

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- **Churches are cautioned against implementing conduct or lifestyle statements which may be construed as discriminating against an identifiable group contrary to the *Human Rights Code***
- **Churches should ensure that their Policy Statements are enforced in a consistent manner, otherwise, the following may occur:**
  – **The church may waive its ability to enforce**
  – **The church may be vulnerable to allegations of discrimination for inconsistency in enforcement**

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- **An example is where the church neglects to enforce provisions in a conduct statement with regard to a particular activity, i.e. prohibition on drinking alcohol, but enforces prohibition against adultery**

- **The church needs to set out a procedure of church discipline reflecting principles of fairness and natural justice. For further details, see an article on church discipline at http://www.carters.ca/pub/article/church/1995/disciplin.pdf**

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3. Review of existing constitutional documents

- **If the church has an existing constitution, it should be reviewed to determine whether the church's documents are consistent with recent developments in the law**
- **The church should determine if its Statement of Faith and Policy Statements are part of its constitution**

4. Conducting a legal audit

- **Given the severity in liabilities for non-compliance with changes in the law, churches should consider a legal audit of all of their policies and constitutional documents, as well as of their liturgies and teaching materials**

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- **The purpose of a legal audit would be to:**
  - **Review whether the church's existing constitutional documents may be inconsistent with applicable legal requirements under Bill C-250, the *Human Rights Code* and proposed federal legislation on same sex marriage**
  - **Review whether the documents reflect any discrimination or promotion of hatred against an identifiable group**

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5. Education of clergy concerning their legal rights

- **It would be prudent for local churches and/or denominations to educate the clergy of their legal rights in relation to the fulfillment of their ministerial duties and the operations of the church as a whole**
- **The draft federal legislation recognizes the freedom of officials of religious groups to refuse to perform marriages contrary to their religious beliefs, but does not recognize a similar freedom for religious groups as contemplated by *Halpern***
- **It is therefore important for local churches and/or denominations to provide education on the rights of both the clergy as well as the rights of the church in general**

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F. SUMMARY COMMENTS

In summary, in light of the recent developments in the law concerning same sex marriages, churches should consider some or all of the following:

- **Where applicable, a church should articulate its adherence to a literal and/or orthodox interpretation of Scripture**
- **This adherence could be reflected in the constitutional documentation of the church, including its charitable objects, and should, where applicable, encompass a clear religious purpose with reference to upholding the Statement of Faith of the church**

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- **Churches should avoid Scriptural references in its Statement of Faith where such Scriptural passages may be construed as promoting hatred against an identifiable group**
- **The church's general operating by-law should define membership, authorize Policy Statements and establish a procedure for church discipline**
- **Individuals involved in or leading church ministries or programs, as well as key employees, should also be required to be members**

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- **Policy Statements may be of assistance in articulating a practical manifestation of the beliefs of a church**
- **If the church does not support same sex marriage in accordance with a literal and/or orthodox interpretation of Scriptures, a Policy Statement on marriage should contain a statement recognizing marriage as a holy sacrament of the church and defining marriage as being between one man and one woman in accordance with its Statement of Faith**
- **Prepare an appropriate facility use policy to restrict use of church facilities to church programmes and /or members**

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- **Policy Statements should be drafted using neutral wording where possible and avoid negative or pejorative wording or wording that refers to an "identifiable" group**
- **In preparing Policy Statements, churches will need to prepare them to be in compliance with legal developments regarding the solemnization of same sex marriages, Bill C-250 and the *Human Rights Code***
- **Churches are cautioned against implementing conduct or lifestyle statements which may be construed as discriminating against an identifiable group contrary to the Human Rights Code**

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- **Churches must ensure their Policy Statements are enforced in a consistent manner**
- **A legal audit should be considered for existing and proposed policies and constitutional documents to review whether those documents are in compliance with recent developments in the law**
- **Local churches and/or denominations should educate their clergy regarding the legal rights of clergy as well as the church**

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LAW & CHURCH LEADERSHIP SEMINAR
Evangelical Fellowship of Canada and Christian Legal Fellowship
Moncton – May 14, 2004

The Impact on Christian Counseling and Church Discipline Arising from the Recent Jehovah Witness Case

by Mervyn F. White, B.A., LL.B.
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Introduction

- **Matthew 18:15-18 has traditionally been interpreted as directing Christians to resolve their disputes without recourse to the courts**
- **Clergy have frequently recommended the application of Matthew 18:15-18 to their congregants as being in keeping with the Scriptures**
- **A recent court decision in Ontario, however, has questioned the appropriateness of relying on Matthew 18:15-18 in resolving disputes and the correctness of clergy's advice to that effect**
- **See Church Law Bulletin #3 at www.churchlaw.ca for more details**

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Facts in the *V.B. v. Cairns* Case

- **In 1998, the plaintiff commenced an action against church elders who participated in counseling meetings and the Watch Tower (the governing body of the Jehovah's Witnesses in Canada) for negligence in having had the plaintiff confront her father, whom the plaintiff accused of sexually abusing her**
- **After reviewing the facts of the plaintiff's case, Justice Molloy held that in certain situations, advising victims to confront their abusers pursuant to Matthew 18:15-18 may be tantamount to negligence, if the victim suffers harm as a result of the confrontation**

3

Findings of the Court with Respect to Matthew 18:15-8

1. **Matthew 18:15-18 did not apply to situations involving child abuse**
2. **The Watch Tower was vicariously liable to the plaintiff in negligence for the conduct of elders who advised the victim that Matthew 18:15-18 applied to her situation**
3. **The first meeting and the resulting confrontation between the plaintiff and her father, was undertaken in negligence as it was based on the elder's negligent application of Matthew 18:15-18 in this situation**

4

4. **The second meeting was not undertaken in negligence, as it did not involve a confrontation between the plaintiff and her father pursuant to Matthew 18:15-18 but was undertaken as a quasi-judicial proceeding to discipline the father**

5

Implications of This Case

- **Justice Molloy's ruling establishes a precedent for liability being imposed against churches, clergy and pastoral counselors in situations where they provide negligent counseling or advice**
- **It appears to undermine any argument that advice, counsel or direction based on the Scriptures, or carried out by clergy in his or her professional capacity, is protected as an expression of religious beliefs which should be free from interpretation or interference by the state**

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- **Canadian courts have traditionally been willing to limit the right to freedom of religion in situations where the welfare of a child is endangered**
- **Under the circumstances of this case, Justice Molloy held that there is an obvious close and direct relationship between a member of the clergy and a parishioner seeking advice**
- **Justice Molloy's ruling is important in that he held that Matthew 18:15-18 was misapplied in the plaintiff's situation, and that such misapplication constituted negligent advice**

7

Problems with Justice Molloy's Interpretation

- **Justice Molloy held that the Watch Tower was negligent when one of its church elders advised the victim that her situation was subject to Matthew 18:15-18. Justice Molloy made a finding that Matthew 18:15-18 does not apply to situations involving breaches of "God's laws"**
- **This interpretation is questionable at Matthew 18:15-18 makes no such distinction between private disputes between people, such as disputes over financial matters as "lesser matters or sins", and "serious sins against God's laws"**

8

- **What is troubling about reliance upon the language of "God's laws" is that there is no indication as to what are "God's laws", or which laws of God, Justice Molloy would deem to be too serious to be covered by Matthew 18:15-18**
- **Finally, Justice Molloy's interpretation doesn't accord with commonly held beliefs about "God's laws", and the application of Matthew 18:15-18**

9

Conclusion

- **Christian denominations that rely on Matthew 18:15-18 should review their internal policies regarding when and how they apply this passage**
- **At the very least, if denominations are going to rely on Matthew 18:15-18, they should ensure that their interpretation has a should basis in scripture and put policies in place to exclude its use where the resolution process could reasonably be foreseen to re-victimize the victim or cause greater harm, such as in the case of abuse**

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- **Finally, clergy should ensure that any advice they give is firmly rooted in the Scriptures, and is in keeping with the interpretations placed on the same by their respective denominations**
- **However, relying on the position of a denomination may not be the final answer as to whether clergy might be found negligent in their advice**

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LAW & CHURCH LEADERSHIP SEMINAR
Evangelical Fellowship of Canada
and Christian Legal Fellowship
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Investigating Criminal Activities Including Sexual Abuse in the Church – How to Respond and How to Protect the Church

By Bruce Long, B.A., LL.B.

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- Child abuse requires report to C.A.S.

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- Consider section 141 of the Criminal Code
  - Do not accept benefit in return for no reporting

3

- Theft and fraud offences are costly in terms of financial losses and losses of donor confidence

4

- Allegations of sexual offences require different procedures at each of three phases:
  - Before a charge or civil claim
  - The investigatory phase
  - Post charge or civil claim

5

- Provide legal assistance to alleged offender as soon as possible

6

- The right to remain silent is often not adhered to with significant consequences

7

- One incident may result in:
  - Criminal charge
  - Civil action
  - Church discipline

8

- **The right to remain silent is often not adhered to with significant consequences**

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LAW & CHURCH LEADERSHIP SEMINAR
Evangelical Fellowship of Canada and Christian Legal Fellowship

Moncton - May 14, 2004

Important Recent Changes to the *Income Tax Act* and CRA Policies Affecting Churches

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OVERVIEW OF PRESENTATION

- **Summary of Additions and Changes to CRA Website from 2002 to 2004**
- **Selected Discussion of Proposed Income Tax Amendments Affecting Charities**
- **Selected Discussion of New Policies From CRA Affecting Charities**
- **Selected Highlights from the 2004 Budget**

This power point presentation consists of excerpts from a paper entitled "Recent Changes to the *Income Tax Act* and Policies Relating to Charities and Charitable Gifts" dated March 4, 2004 and Charity Law Bulletins # 40 and #41 available at www.charitylaw.ca

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A. SUMMARY OF ADDITIONS AND CHANGES TO CRA WEBSITE IN 2002 to 2004

- **Refer to: www.ccra-adrc.gc.ca/tax/charities/menu-e.html for all CRA resource materials**
- **Changes to the CRA website cover the following topics:**
  - **Legislative Amendments**
  - **Circulars**
  - **Information Letters**
  - **Policy Statements**
  - **Fact Sheets**
  - **Bulletins**
  - **Brochures**
  - **Newsletters**
  - **Summary Policies**
  - **Consultation Papers**

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B. PROPOSED CHANGES TO THE *INCOME TAX ACT* AFFECTING CHARITABLE RECEIPTING

Revised Draft Technical Amendments to the *Income Tax Act* were introduced on February 27, 2004. The major changes proposed by the February 2004 Amendments, including the December 20, 2002 Amendments, the February 18, 2003 Budget and the December 5, 2003 Draft Amendments are summarized below:

1. New Definition of Gift
  - **The traditional common law definition of a gift requires:**
  - **The donor must have an intention to give**
  - **There must be a transfer of property**

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- The transfer must be made voluntarily without contractual obligation
- No consideration or advantage can be received by the donor

- Therefore a contract to dispose of property to a charity at a price below fair market value would not generally be considered a gift at common law for which a charitable receipt could be issued for the difference in price
- Similarly, a gift to a charity that entitles the donor to receive a benefit of a material nature would not be a gift at common law for which a receipt could be issued even if the value of the gift significantly exceeded the benefit received

5

- Draft amendments to the *Income Tax Act* in December of 2002 and December of 2003 create a new concept of "gift" for tax purposes which permits a donor to receive a tax credit under the *Income Tax Act* even though the donor receives a benefit, provided that the value of the property exceeds the benefit received by the donor
- However, the idea that a gift can provide a benefit back to the donor is foreign to the common law concept of a gift
- The draft amendments reflect an importation of the civil law concept of gift which permits a benefit back to the donor

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- While a gift with an advantage may be deemed a gift under the *Income Tax Act*, it will not necessarily be a gift at common law and therefore there will be no transfer of title
- Utilizing a contract in order to transfer title may raise questions of donative intent that could preclude a gift for tax purposes
- In order to document the transfer of title where there is an advantage to the donor, and the expectation of a charitable receipt, the alternative of doing so by making use of a charitable trust should be considered

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2. New Split-Receipting Rules

- The key requirements of what will be recognized as a gift for income tax purposes for split receipting based on the new definition of gift reflected in the December 2002 and December 2003 amendments are as follows:
  - There must be voluntary transfer of property with a clearly ascertainable value
  - Any advantage received by the donor must be clearly identified and its value ascertainable

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- There must be a clear donative intent by the donor to benefit the charity
- Donative intent will generally be presumed provided that the fair market value of the advantage does not exceed 80% of the value of the gift
- The eligible amount of a gift will be the excess of the value of the property transferred over the amount of the advantage received by the donor

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- The amount of the advantage is the total value of all property, services, compensation or other benefits to which the donor, or a person not dealing at arms length with the donor, has received or obtained or is entitled either immediately or in the future as partial consideration for or in gratitude for the gift or that is in any other way related to the gift
- Excluded from the value of the advantage is token consideration for the gift calculated on the basis of a "*de minimis* threshold" of the lesser of 10% of the value of the gift and $75.00

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- The charitable receipt will now need to identify the advantage and the amount of the advantage as well as the eligible amount of the resulting gift
- The advantage can be received prior to, at the same time as, or subsequent to the making of the gift
- It is not necessary for a causal relationship to exist between the making of the gift and the receiving of the advantage as long as they are "in any other way" related to each other

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- Therefore, if a donor makes a gift in consideration of the charity employing his spouse, or the charity hires his spouse in gratitude of the gift being made in the future, then the value of the advantage may need to include the current value of the employment of the spouse
- In addition, the advantage could even be provided by third parties unbeknownst to the charity, which fact may necessitate that charities make inquiries of donors if they have received a related benefit from anyone

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- **A receipt can be issued where the advantage received by the donor (less any token consideration based upon the "*de minimis* threshold" of the lesser of 10% of the value of the gift and $75.00) does not exceed 80% of the value of the gift.**
- **For example, the ticket price for a table of 8 at a fundraising dinner is $2,000.00, the fair market value of the dinner is $800.00, the value of complimentary items; i.e., the door prizes and table gifts is $300.00**

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Total price for a table of 8		**$2000.00**
Less:		
- value of dinner	**$800.00**	
- complimentary items	**$300.00**	
(complimentary items exceed the lesser of 10% of $2000.00 or $75.00)		
Total value of advantage received by the donor		**$1,100.00**
Eligible amount of charitable receipt		**$ 900.00**

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- **Split receipting at auctions**
  - **Generally, since the bid value at an auction is considered to be the fair market value, no charitable receipt can be issued for an auctioned item**
  - **However, when the value of an item can be clearly determined and is disclosed to all bidders in advance, the eligible amount for receipting would be the difference between the amount bid and the posted value**
  - **Where donative intent is established (i.e. in instances where the posted value of the item is not more than 80% of the accepted bid), a receipt may be issued for the eligible amount**

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- **Purchases of service at auctions**
  - **Where a purchased service has an established fair market value that has been identified to all bidders at the auction before the opening bid, a receipt can be issued to the purchaser for the "eligible amount" where donative intent exists**
  - **The eligible amount for the value of the service would be the difference between the amount paid and the amount of the advantage**
  - **See Registered Charity Newsletter No. 17 at http://www.ccra-adrc.gc.ca/E/pub/tg/charitiesnews-17/news17-e.html for other examples of split receipting**

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3. Charitable Annuities:

- **CRA indicated in Technical News No. 26 in December 2002 that the previous administrative position with regard to charitable annuities has no basis in law and cannot be continued as a consequence of the amendment to subsection 248(33) of the *Income Tax Act***
- **Instead, a new administrative policy has been proposed which provides for a charitable receipt based on the difference between the cost of the annuity and the gift, rather than the difference between the anticipated annuity payments and the amount of the gift**

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Facts:

- **A donor makes a $100,000 contribution to a charitable organization**
- **The donor's life expectancy is 8 years (and the donor lives 8 years)**
- **The donor is to be provided annuity payments of $10,000 per year (total of $80,000)**
- **The cost of the annuity to provide the $80,000 payment over 8 years is $50,000**

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Former tax treatment under IT-111R2	**Proposed tax treatment under Technical News No. 26**
• **the donor receives a tax receipt of $20,000 for the year of donation, being the amount of $100,000 in excess of the annuity payments of $80,000**	• **the donor receives a tax receipt of $50,000 for the year of donation, being the amount of $100,000 in excess of the $50,000 cost to provide the annuity**
• **All of the $80,000 annuity payments are tax free**	• **$30,000 of the $80,000 annuity payments will be included as income of the donor over 8 years, with the balance of the $50,000 to be tax free**

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4. New Definition of Charitable Organizations and Public Foundations

- **In the December 2002 draft amendment, the definitions of charitable organizations and public foundations were amended by replacing the "contribution" test with a "control" test**
- **The rationale for amending the definitions is to permit charitable organizations and public foundations to receive large gifts from donors without concern that they may be deemed to be a private foundation**

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- **The previous "contribution" test meant that where more than 50% of the capital of a charity was contributed from one donor or donor group then the charity would be deemed to be a private foundation subject to more stringent activity and disbursement requirements**
- **The new "control" test means that while a donor may donate more than 50% of the capital of a charity, the donor or donor group cannot exercise control directly or indirectly in any manner over the charity or be in a non arms length relationship with 50% or more of the directors or trustees of the charity**

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- **As a result of the introduction of a "control" test, the convoluted business rules in relation to "control" will become applicable as a result of the phrase "controlled directly or indirectly in any manner whatever"**
- **Charities will now need to be careful that they do not unwittingly become designated as a private foundation instead of either a charitable organization or public foundation**

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5. The Evolving Shutdown of Tax Shelter Donation Programs

Definition of Tax Shelter:

- **A tax shelter is defined under the *Income Tax Act* as any property for which a promotion represents that an investor can claim deductions or credits which equal or exceed the actual amount of the investment within four years of its purchase**
- **The definition of tax shelter was amended in the February 2003 Budget to include tax credits on charitable donations and limited recourse debt**
- **This meant that tax shelter donation programs with promises of net return on investments were required to be registered as tax shelters**

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Description of Tax Shelter Donation Program:

- **The potential misuse of tax shelter donation programs continued to be scrutinized by CRA and was not limited to only "art flips"**
- **The position of CRA was set out in a CRA Fact Sheet entitled "Art-Donation Schemes or 'Art-Flipping'". The mechanism commonly utilized in these schemes is explained as follows:**
  - **Step 1: A promoter gives a person the opportunity to purchase one or more works of art or another item of speculative value at a relatively low price and works with the person in donating the items to a Canadian registered charity**

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– Step 2: The person donates the art or other item and receives a tax receipt from the charity that is based on an appraisal arranged by the promoter that is substantially higher than fair market value

– Step 3: When the person claims the receipt on his or her next tax return, it generates a tax saving that is higher than the amount paid

- These donation programs turn on the fact that the item in question is purchased at a substantially lower price than its much higher fair market value, and that a donation receipt is issued by a registered charity for the fair market value when the item is donated to it

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Warnings By CRA:

- CRA provided warnings to charities considering becoming involved in donation tax shelters
  – CRA's Fact Sheet entitled "Canada Customs and Revenue Agency Reminds Investors of Risks Associated with Tax Shelters" stated that registration as a tax shelter "does not indicate that the CRA guarantees an investment or authorizes any resulting tax benefits" and that "CRA uses this identification number later to identify unacceptable tax avoidance arrangements"

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– CRA's Fact Sheet concerning Art-Donation Schemes or 'Art-Flipping' indicated that third party penalty can include charities that receive the donation if "it knows – or if it can reasonably be expected to have known – that the appraised value were incorrect"

Proposed Amendments to the *Income Tax Act*:

- The December 5, 2003 and February 2004 proposed amendments to the *Income Tax Act* attempt to shut down tax shelter donation programs by severely restricting the tax benefits from donations made under tax shelter donation arrangements

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New Deeming Provision:

- The proposed amendment deems the fair market value of property donated for the purpose of issuing charitable receipts to be the lesser of (i) the fair market value of the property and (ii) the cost (or the adjusted cost base where applicable) of the property to the tax-payer immediately before the gift is made in the following three situations:

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- If the tax-payer acquires the property through a "gifting arrangement" as defined in section 237.1 of the *Income Tax Act*, i.e. where it is represented that the acquisition of the property would generate any combination of tax credits or deduction that in total would equal or exceed the cost of acquiring the property in question, whether or not it was acquired within three years
- If the tax-payer acquired the property less than three years before the gift was made

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- If it was reasonable to conclude that when the tax-payer acquired the property, the tax-payer expected to make a gift of the property, with the donor possibly having to prove that the donor did not have an expectation to make a gift when the property was acquired

- The deeming provision does not apply to inventory, real property situated in Canada, certified cultural property, publicly traded shares and ecological gifts

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- The deeming provision also does not apply to situations where the gift is made as a consequence of the donor's death
- The proposed December 5, 2003 amendments with regards to gifts of property, if passed, will apply to gifts made on or after December 5, 2003

Limited Recourse Debt:

- The December 5, 2003 draft amendments also preclude charitable receipts for limited recourse debt in respect of gifting arrangements

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- Limited recourse debt is a form of tax shelter in which the tax-payer incurs a debt for which recourse is limited and which can reasonably be considered to be related to a charitable gifting arrangement
- Even in situations where the recourse is not limited, the debt may be deemed to be a limited recourse debt unless the arrangement in writing to repay the debt within 10 years and interest is paid annually within 60 days of the debtor's taxation year at not less than CRA prescribed rate
- If a gift includes a limited recourse debt, then the amount of the loan would be deducted from the amount of the gift

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Substantive Gifts:

- **The February 2004 draft amendments propose the insertion of a new subsection 248(38) that applies to gifts made after that date**
- **Subsection 248(38) is intended to prevent a donor from avoiding the application of the Deeming Provision by disposing of property to a charity and then donating the proceeds of disposition, rather than the donor donating the property directly to the charity**
- **The property disposed of by the donor is referred to as "substantive gift" and only applies to capital property and eligible capital property not already exempted under subsection 248(38)**

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- **When a person disposes of property to a charity and donates the proceeds of disposition to either that charity or to another charity that does not deal at arm's length with the charity that purchased the property from the donor, then the property is referred to as a "substantive gift"**
- **Under those situations, the Deeming Provision in subsection 248(35) would apply and the fair market value is "deemed" to be the lesser of the fair market value of the substantive gift and the cost, or if the substantive gift is capital property of the tax-payer the adjusted cost base, of the substantive gift to the tax-payer immediately before disposition**

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Anti-Avoidance Rule:

- **In addition to the deeming provision, the December 2003 draft amendments introduced an anti-avoidance rule in subsection 248 (37) that if one of the reasons for a series of transactions that includes a disposition or acquisition of property is to increase the amount of the FMV of the gift, then the cost of the property for receipting shall be deemed to be the lowest cost to the donor to acquire the property in question or "an identical property" at any time**

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Practical Implications:

- **Charities will be required to inquire of donors of gift in kind when the property donated was acquired by the donors. Where possible, a written confirmation should be obtained from the donors to evidence the date of acquisition**
- **If the deeming provision applies, then the charity will need to inquire of the donor to determine the amount of the ACB of the gifted property, if applicable**
- **Charities may be required to inquire of donors of gifts in kind to determine whether the donors had an expectation to make a gift at the time when the donor acquired the property**

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- **Charities receiving gifts of private shares will need to determine if the shares were acquired within three years prior to the making of the gift or whether such shares had been exchanged for another class of shares i.e. in an estate freeze, either within three years or for the purpose of making a gift**
- **The proposed amendments in relation to limited recourse debt, if passed, will apply to gifts made on or after February 19, 2003**

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6. Revocation of Registration of Charities

- **Pursuant to the proposed December 2002 Amendments, subsection 149.1(2), (3) and (4) will be amended to permit the revocation of the charitable status if a charity "*makes a disbursement by way of a gift*" which is not a gift made "*in the course of charitable activities carried on by it*" or not a gift "*to a donee that is a qualified donee*" at the time of the gift**
- **All gifts made by a charity must be made in the course of furthering its charitable activities or transferred only to qualified donees**

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7. Additional Qualified Donee

- **The February 27, 2004 Draft Amendments expand "qualified donees" to include a municipal or public body performing a function of a government in Canada**
- **This amendment is in response to the Quebec Court of Appeal decision in *Tawich Development Corporation v. Deputy Minister of Revenue of Quebec,* 2001 D.T.C. 5144**

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C. SELECTED DISCUSSION OF NEW POLICIES FROM CRA AFFECTING CHARITIES

1. New Policy Statement on Political Activities

- **The courts have held that an organization that has been established for a political purpose cannot be a registered charity. Political purposes have been defined by the courts as purposes seeking to:**
  - **Further the interests of a particular political party; or support a political party or candidate for public office;**
  - **Retain, oppose, or change the law, policy or decision of any level of government in Canada or a foreign country**

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- A charity's ability to participate in political activities have been controversial and highly confusing for a long time
- CRA's Policy Statement on Political Activities gives clarification to charities from a administrative, not legislative standpoint
- The Policy Statement gives a broader interpretation of what are charitable activities as opposed to political activities
- CRA has established three categories of involvement by charities in political activities:
  - Charitable activities
  - Prohibited activities
  - Permitted political activities

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- Examples of charitable activities:
  - Distributing the charity's research on a particular topic relevant to its charitable purpose
  - Releasing and distributing a research report to election candidates
  - Publishing a research report online
- Examples of prohibited activities:
  - Supporting an election candidate in the charity's newsletter
  - Distributing pamphlets that underline the government's lack of contribution to the charity's goals
  - Preparing dinner for campaign organizers of a political party
  - Inviting competing election candidates to speak at separate events

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- Examples of permitted political activities:
  - Buying a newspaper advertisement to pressure the government
  - Organizing a march to Parliament Hill
  - Organizing a conference to support the charity's opinion
- Limits on using charitable resources for permitted political activities:
  - Under the *Income Tax Act*, a charity must devote substantially all of its resources to charitable activities
  - Substantially "all" is defined by the CRA as 90% or more, meaning that a charity may not devote more than 10% of its total resources per year to political activities

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- Smaller charities with less than $50,000 annual income can devote up to 20% of their resources to political activities; income between $50,000 and $100,000 can devote up to 15%, and income between $100,000 and $200,000 can devote up to 12%
- Resources used towards permitted political activities are not applied to meeting a charity's disbursement quota for receipted donations

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2. New Policy on Business Activities

- **Running a business is generally not a charitable activity**
- **However, a related business will be permitted subject to certain limitations**
- **A related business is defined as a business activity connected to a charity that is used in the furtherance of the charity's charitable purposes**
- **There are two kinds of related businesses:**
  - **Businesses that are linked to a charity's purpose and subordinate to that purpose, such as:**

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- **A hospital's parking lots, cafeterias, and gift shops for the use of patients, visitors, and staff**
- **Gift shops and food outlets in art galleries or museums for the use of visitors**
- **Book stores, student residences, and dining halls at universities for the use of students and faculty**
- **Therefore, a church that operates a bible book store would likely be carrying on a permitted related business because the selling of bibles is related to the charitable purpose of the church**

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- **Businesses that are run substantially by volunteers, i.e. 90% are volunteers, are deemed to be a related business even if if the business is not linked to the charitable objects of the charity**
- **Unrelated business: Is a business activity that is neither related nor deemed related, i.e. if a church decides to buy and sell computers for profit, or run a catering business with paid employees.**
- **Charities cannot participate in unrelated businesses, as they risk being refused or losing charitable registration status**

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3. New Policy on Holding of Property for Charities

- **CRA has recognized that organizations that hold title for registered charities can be registered as charities themselves**
- **Charities may want to use charitable title-holding organizations in order to protect their assets from liability associated with operation**
- **Examples would be separate foundations for:**
  - **Land holdings**
  - **Equipment and/or management facilities**
  - **Licensing of Intellectual Property**

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4. New Policy on Third Party Fundraisers

- **A charity can use a third party organization or fundraiser as an agent to organize a fundraising event**
- **However, the fundraiser, as agent, is responsible to the charity as principle and the charity is liable for the actions of the agent**
- **Therefore, a charity must retain control over all monies earned and all receipts issued in relation to a fundraising event**

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D. SELECTED HIGHLIGHTS FROM THE 2004 BUDGET

1. Overview

- **The 2004 Federal Budget (the "Budget") represents a major initiative by the Federal Government in rewriting the tax rules concerning the taxation and administration of charities**
- **The Budget reflects to a large extent the proposals of the Voluntary Sector Initiative's Joint Regulatory Table, particularly as it relates to intermediate taxes and sanctions**

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- **The Budget also rectifies a number of technical problems regarding disbursement quotas involving charities**

2. Intermediate Sanctions and Related Matters

Intermediate taxes and penalties

- **The Budget proposes a more responsive approach to the regulation of charities under the *Income Tax Act* by introducing sanctions that are more appropriate than revocation for relatively minor breaches of the *Income Tax Act***
- **The sanction will apply in respect to taxation years that begin after March 22, 2004**

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Taxation of Gross Revenue

- **Gross revenue generated by a registered charity from prohibited activities will be taxed at rates between 5% for first infractions up to 100% for repeat infractions**

Suspension of Tax Receipting Privileges

- **Registered charity tax receipting privileges will be suspended for using donated funds other than for charitable purposes and for failure to comply with certain verification and enforcement sections of the *Income Tax Act***

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- **Where a registered charity provides undue benefits to "any person", including "trustees", there will also be the imposition of a 105% tax for a first infraction and 110% tax for a second infraction on the amount of the undue benefit**
- **Directors of charities will become obligated to ensure that the salaries paid to its employees are reasonable in the circumstances**

Monetary Penalties

- **Imposes monetary penalties of $500.00 for failure to file annual returns, together with the publication of the names of late or non-filers**

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Tax on Gifts and Transfers to Other Registered Charities

- **Where a registered charity issues receipts with incomplete information, there will be a 5% penalty on the eligible amount stated on the receipt for a first infraction, and a 10% penalty on repeat infractions**
- **Where a charity is involved in delaying the expenditure of money on charitable activities by transferring the funds to another registered charity, both charities involved will be jointly and separately liable for the amounts so transferred, together with a 10% tax on such amounts**

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3. Annulment

- **The Budget will provide explicit authority to the Minister to annul an organization's registration in circumstances where the organization was registered in error**
- **The benefit of an annulment is that the normal 100% Part V revocation tax under the *Income Tax Act* will not apply**

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4. Appeals Regime

Internal Reconsideration Process

- **The Budget will extend the application of CRA's existing internal objection review process to notices of a decision regarding**
  - **Denial of applications for charitable status**
  - **Revocation or annulments of a charity's registration**
  - **Designation of a charity as a private or public foundation or charitable organization**
  - **Imposition of any taxes or penalties against a registered charity**

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External Appeals Process

- **Appeals from decisions concerning refusal to grant registered charitable status or revocation of registered charitable status will need to continue to be made to the Federal Court of Appeal**

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5. Disbursement Quota Rules

Reduction of Disbursement Quota Rate

- **The Budget proposes to reduce the 4.5% disbursement quota that currently applies to public and private foundations to a more manageable rate of 3.5%**

Extension of 3.5% Disbursement Quota to Charitable Organizations

- **In the past, only public and private foundations were subject to a disbursement quota upon its capital assets not used in charitable activities**

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- **The Budget proposes that the reduced 3.5% disbursement quota on capital assets will also apply to charitable organizations**

Realizing Capital Gains from Endowments

- **The Budget proposes to rename 10 year gifts as endowments**
- **It appears that the intent of the Budget is to allow the expenditure of capital gains accruing on the original endowment, provided that the terms of the endowment do not preclude the expenditure of capital gains**

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- **The previous anomaly that 80% of the disbursement of the capital gain had to be added to the disbursement quota of a charity will now be alleviated by reducing the 80% disbursement quota by the lesser of 80% of the capital gain realized on the disposition and 3.5% of the value of all property not used directly in charitable activities for administration**

Transfer of Endowments

- **The Budget proposes that an endowment received by a registered charity from another registered charity would result in the same treatment as if the endowment had been received directly from the original donor**

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Gifts Transferred to Charitable Organizations

- **The Budget proposes that all transfers from one registered charity to another, including transfers to a charitable organization, will be subject to the 80% disbursement requirement**

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6. Gifts Made By Way Of Direct Designation

- **Where an individual has designed in his/her will a charity as a direct beneficiary of the individual's RRSP, RRIF or life insurance policy, the Budget proposes to treat such gifts as endowments for the purposes of the disbursement quota rules**
- **This will mean that direct designation of RRSP, RRIF and life insurance proceeds will be subject only to the 3.5% disbursement quota while they are held as capital and then subject to the 80% disbursement quota requirement in the year in which they are disbursed**

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7. New *Not-for-Profit Corporations Act*

- **The Budget also includes a commitment by the Federal Government to introduce a new *Not-for-Profit Corporations Act* that will reduce the regulatory burden on the not-for-profit sector, improve financial accountability, clarify the roles and responsibilities of directors and officers, and enhance and protect the rights of members**

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New Privacy Legislation & the Church - What Churches Need to Do in Response

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Introduction

- **Overview of some of the developments that have occurred in the area of privacy law within Canada**
- **Specifically focusing upon the *Personal Information Protection and Electronic Documents Act* which came into force on January 1, 2001 (PIPEDA)**
- **Review of impact of PIPEDA on charitable and not-for-profit organizations**
- **See Charity Law Bulletins # 28 and #42 at www.charitylaw.ca for more details**

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PIPEDA

- **On January 1, 2001 PIPEDA applied to organizations involved in the operation of a federal work, undertaking, or business**
- **On January 1, 2004, PIPEDA applied to all other organizations engaged in the collection, use and disclosure of personal information in relation to commercial activities**

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- **PIPEDA contains the following important definitions**

"Organization"

- **Includes an association, partnership, person, corporation, or a trade union**

"Personal Information"

- **Information about an identifiable individual but does not include the name, title or business address or telephone number of an employee of an organization**

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- **Only that information which can be ascribed to an identifiable individual and does not include general databases which do not allow for the identification of individuals**

"Commercial Activity"

- **Any particular transaction, act or conduct or any regular course of conduct that is of a commercial character, including the selling, bartering or leasing of donor, membership or other fundraising lists**
- **Includes any transfer of personal information for profit**

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- **Charities and not for profit organizations may be caught by the act if they engage in "commercial activities"**
- **"Commercial activities" for a charity or not for profit organization may include a related business (as interpreted by *Income Tax Act*), or alternatively, may include an exchange of value which requires that a charity or not for profit organization incur an expense not normally incurred by it**
  - **e.g. of "commercial activities"**
  - **Charitable golf tournament**
  - **Sale of books, hymnals, magazines**
  - **Sale of promotional items**

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- **There are no exceptions in the application of PIPEDA based upon the size of the organization**
  - **i.e. A small corner convenience store will be forced to comply with PIPEDA in relation to personal information about clients who rent movies**
- **Compliance with PIPEDA will impose onerous, expensive and time consuming administrative requirements on organizations which collect, use or disclose personal information**
- **Failure to comply will lead to sanctions under PIPEDA**

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Application of PIPEDA to Charitable and Non-Profit Organizations

- **On March 31, 2004, the Office of the Privacy Commissioner of Canada ("Privacy Commission") released a fact sheet which clarifies the application of PIPEDA to charities and non-profits**
- **The fact sheet states: "The bottom line is that non-profit status does not automatically exempt an organization from the application of the Act"**

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- Whether a charitable or non-profit organization will be subject to PIPEDA depends on whether the organization engages in the kind of commercial activities as defined by PIDEDA:

  the presence of commercial activity is the most important consideration of determining whether or not an organization is subject to the Act. Section 2 of the Act defines "commercial activity" as:

  "… any particular transaction, act or conduct or any regular course of conduct that is of a commercial character, including the selling, bartering or leasing of donor, membership or other fundraising lists"

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- It is the position of the Privacy Commission that collecting membership fees, organizing club activities, compiling membership lists, mailing out newsletters, and fundraising are not considered commercial activities
- Some clubs, such as many golf clubs and athletic clubs, may be engaged in commercial activities which are subject to the Act
- Each charitable or non-profit organization must review its activities to determine whether or not it engages in commercial activities and thereby subject to PIPEDA

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Requirements of PIPEDA

- If a charity or not for profit organization determines that it is subject to PIPEDA, then it must comply with part 1 of PIPEDA
- Part 1 of PIPEDA incorporates the CSA "Model" code for the Protection of Personal Information (The Model Code)
- The Model Code was created to establish a voluntary national standard for the protection of personal information; compliance with the Model Code was strictly voluntary and there were no sanctions imposed upon an organization that did not comply with the Model Code

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- The Model Code incorporates 10 primary principles related to the collection, use and disclosure of personal information
- The following 10 principles have now been incorporated into PIPEDA and a breach of three principles may lead to sanctions under PIPEDA

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10 Principles

1. Accountability

- An organization is responsible for personal information under its control and shall designate an individual or individuals in the organization who will be accountable for compliance with PIPEDA
- Organizations will also be responsible for information that it transfers over to third parties

2. Identifying Purposes

- An organization must identify the purposes for which personal information is collected and used at the time of, or before the collection of the personal information

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3. Consent

- The consent of the individual providing personal information is required at or before the collection of the personal information
- The form of consent (i.e. expressed or implied) will depend on the sensitivity of the information that the organization collects

4. Limited Collection

- The collection of personal information shall be limited to that personal information which is necessary for the purposes identified by the organization and shall be collected by fair and lawful means only

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5. Limited Use, Disclosure and Retention

- Personal information shall not be used or disclosed for purposes other than those purposes for which it was collected except with the consent of the individual or as required by law

6. Accuracy

- Personal information collected shall be accurate, complete and up-to-date as is necessary for the purposes for which it is to be used

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7. Safeguards

- Personal information shall be protected by security measures appropriate to the sensitivity of the information
- Organizations should ensure that they have both physical security measures in place i.e. locked filing cabinets and technical security measures in place i.e., fire walls and encryption

8. Openness

- An organization shall make readily available to individuals, specific information about its policies and practices related to the management of personal information including but not limited to:

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- The name or title, and the address of the person who is accountable for the organization's policies and practices
- The means of gaining access to personal information held by the organization
- A description of the type of physical information held by the organization, including a general account of its use

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9. Individual Access

- Upon request, an individual shall be informed of the existence, use and disclosure of his or her personal information; shall be given access to that information; shall be given the opportunity to challenge the accuracy of that information and have it amended if necessary

10. Challenging Compliance

- An individual shall be entitled to address a challenge concerning compliance with the principles to the designated information officer or individual (See Principle No. 1)

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What Happens If There Is Non-compliance?

- An individual who has concerns that an organization is not complying with PIPEDA may do the following:
  - Complain to the Privacy Commissioner
  - The Privacy Commissioner may attempt to mediate the complaint
  - The Privacy Commissioner may also make recommendations. However, the recommendations are not binding
  - If the matter remains unresolved, the complainant or Privacy Commissioner can make an application to the Federal Court

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- Federal Court may:
  - Order the organization to correct its practices
  - Order the organization to publish a notice of any action taken or proposed to be taken to correct the problem
  - Award damages against the organization

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How Can an Organization Comply with PIPEDA?

- Following are some basic recommendations to assist in complying with PIPEDA:
  - Appoint a compliance officer or officers who will be responsible for compliance by your organization
  - Carry out a privacy audit; review impact of privacy principles on your specific organization

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- Develop a privacy policy, ensure that individuals are aware of the policies and practices relating to an organization's management of personal information
- Revise your contracts; each organization should ensure that personal information that is transferred is protected by contractual means
- Ensure consent; the type of consent that an organization obtains, will depend on the sensitivity of the information the organization collects
- Develop appropriate security measures; both physical and technical security measures
- Maintaining ongoing compliance; compliance with PIPEDA is not a one time occurrence

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Concluding Comments

- Once personal information is obtained, it is a valuable commodity
- PIPEDA is designed to ensure that no inappropriate use of such personal information is made
- Compliance with PIPEDA is mandatory
- Failure to comply will lead to possible sanctions and a loss of credibility

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- Although a charity may not be subject to PIPEDA, it is still important for the charity to adhere to the underlying privacy principles, as donors and members expect charities to recognize an individual's right to privacy
- For these reasons, it is still recommended that charities have a privacy policy and implement the privacy policy to provide all the safeguards as standardized in PIPEDA

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