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CHARITY & THE LAW UPDATE

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Updating Charities and Not-for-Profit Organizations on recent legal Developments and risk management considerations

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EDITORS NOTE

Charity & The Law Update is published without charge for distribution to charities and not-for-profit organizations across Canada and internationally. It is published approximately 3 times a year as legal developments occur. The format is designed to provide a combination of brief summaries of important developments as well as feature commentaries. Where a more lengthy article is available on a particular topic, copies can be obtained from our website at www.charitylaw.ca. The information and articles contained in this *Charity & The Law Update* are for information purposes only and do not constitute legal advice and readers are therefore advised to seek legal counsel for specific advice as required.

1. UPDATE FROM THE COURTS

A. CHRISTIAN BROTHER'S DECISION EXPOSES CHARITABLE TRUST ASSETS TO TORT CREDITORS

BY: TERRANCE S. CARTER

1. Introduction

The recent Ontario Court of Appeal decision in Christian Brothers of Ireland in Canada (Re) released on April 10th, 2000, 47 O.R. (3d) 674, (available on the internet at **www.ontariocourts.on.ca/decisions/2000/April/christian.htm**) is likely to create serious problems for churches and charities across Canada concerning the protection of their charitable trust property from tort creditors. This decision may also have serious impact upon the ability of charities to raise monies from donors, particularly monies for endowment funds in situations where donors expect that their gifts will be protected from creditors of the charity. Leave to appeal to the Supreme Court of Canada from the decision is currently being sought and is being supported by a number of concerned charities.

2. Case Summary

The Ontario C. of A. decision arose out of an appeal from a lower court judgment (see Christian Brothers of Ireland in Canada (Re) (1998), 37 O.R. (3d) 367 concerning a

question of exigibility of charitable property. The lower court decision involved an application to determine the issue of whether property held in trust by the Christian Brothers of Ireland in Canada ("CBIC") was available to compensate tort creditors of CBIC, which was being wound-up under the Winding-Up and Restructuring Act R.S.C. 1985 c. W. 11. The matter had arisen because the CBIC had general corporate assets totaling four million dollars ($4,000,000.00) but judgments by tort victims from the Mount Cashel Orphanage in Newfoundland totaling in excess of thirty-six million dollars ($36,000,000.00). A primary issue dealt with by the lower court was whether two schools located in British Columbia that the CBIC purportedly owned in trust were exigible to satisfy claims by tort victims

The lower court was only required to deal with the general legal principles involving the exigibility of charitable property. The specific issue of whether the two schools in British Columbia were owned in trust by CBIC had been referred to the jurisdiction of the B.C. Courts. In dealing with the issue of exigibility of charitable property, the lower court made a distinction between general corporate property of the CBIC and property that was held pursuant to a special purpose charitable trust where there was clear indicia that a trust had been established. The lower court held that general corporate property of a charity is not immune from exigibility by tort creditors. However, property held as a special purpose charitable trust by a charity would not be available to compensate tort creditors of a charity unless the claims arose from a wrong perpetrated within the framework of the particular special purpose charitable trust in question.

In the Ontario C. of A. decision, Justice Feldman agreed with the lower court that there was no general doctrine of charitable immunity applicable in Canada. However, Justice Feldman stated that once the lower court judge had determined that there was no doctrine of charitable immunity in Canada, it then became redundant for the judge to analyze whether special purpose charitable trusts of a charity were exigible to pay the claims of tort creditors. As a result, the C. of A. held that all assets of a charity, whether they be beneficially owned or they be held pursuant to special purpose charitable trusts, are available to satisfy claims by tort victims upon a winding-up of a charity.

Notwithstanding the decision by the C. of A. that special purpose charitable trust were not a factor in determining the question of exigibility, Justice Feldman went to considerable lengths to confirm that charities can still hold specific property pursuant to a special purpose charitable trust and that a charity and its directors must hold and deal with such assets as charitable trust property, including the obligation to seek judicial variation of a special purpose trust through a cy-présorder where the applicable charitable purposes become impossible or impracticable. In this regard, the C. of A. stated at paragraph 76 as follows:

The Authors of Tudor on Charities 8th ed. (1995), p. 159, have extrapolated from this law the proposition that a charitable company may hold particular property in trust for specific charitable purposes, distinct from its other property, and that "clearly to misapply such property would be a breach of trust". I agree with the authors of Tudor on Charities as to the obligations of the charity when it accepts such a gift but with the following qualifications: (a) as long as the charity is in operation, and (b) subject to any cy-prés order of the court, the charity would be obliged to use the funds for the purpose stipulated by the trust.

If Justice Feldman was prepared to recognize the legal enforceability of a special purpose charitable trust on a charity with all the fiduciary obligations associated with property being held in trust, then it follows that the other general attributes of a trust, ie., that trust property is not subject to claims by creditors of the trustee, should also apply. If Justice Feldman's decision was to be applied to other trusts, then any property held by a trustee would arguably become susceptible to claims by creditors of the trustee. However, since such result does not reflect general trust law in Canada, for Justice Feldman to suggest that the basic elements of a trust should be applied differently for special purpose charitable trusts than for other trusts creates an inconsistency which may have been driven more by policy considerations in support of tort victims of sexual abuse than a traditional application of trust law.

3. **Impact of the Decision**

Justice Feldman, in an attempt to contain the impact of the decision, was careful to note that the decision was limited to a very specific fact situation, ie. only where:

- there are claims by tort victims against a charity;
- the general assets of the charity are insufficient to satisfy the resulting judgments;
- the charity is no longer operating; and
- the charity is being wound up pursuant to a winding-up order under the Winding-up and Restructuring Act.

These limitations, though, are generally arbitrary and provide little comfort to charities and their legal counsel who may be concerned that the decision could become the "thin edge of the wedge" that may lead to future court decisions exposing special purpose trust property, such as endowment funds, to claims by tort victims in a broader context instead of only in the limited fact situation of the CBIC decision.

In addition, the C. of A. decision may negatively impact the operations of charities across Canada in at least four crucial areas:

- First, tort victims will now be encouraged to pursue claims against charities, particularly larger charities, knowing that there may be "deep pockets" that had been previously untouchable but can now be readily accessed.
- Second, property and/or funds held as special purpose charitable trusts, particularly endowment funds, that many charities depend upon for their continued existence, will now be susceptible to claims by tort victims. This in turn may prejudice the ability of some charities to continue operating and could result in either the bankruptcy or dissolution of some charities that are particularly vulnerable, such as religious denominations, local charities and educational institutions.
- Third, the ability of donors to create enforceable special purpose trusts will be thwarted where claims by tort creditors cause those special purpose charitable trusts to be applied in ways totally different from what was originally contemplated by the donors. Such result ignores the overriding jurisdiction and mandate of the court to apply special purpose

charitable trusts cy-prés where the original charitable purpose has become either impossible or impracticable.

- Fourth, donors will be reluctant to give large gifts directly to charities, such as endowment funds, that otherwise had been thought to be protected as special purpose charitable trusts when no assurance can be given to donors that such special purpose charitable trusts will be immune from present or future creditors of the charity.

The combined overall "chill effect" that will likely result from the negative impact of the C. of A. decision may very well prejudice the financial stability of a large segment of the charitable sector in Canada and could even affect its long term viability. This in turn may require that various levels of governments fill the void that may result from the loss of social services presently being provided by charities impacted by the decision.

4. Developing a Strategy in Response

Since it is uncertain whether anything can be done to "credit-proof" existing special purpose trust funds, the task for professionals who advise charities and donors will be focused on how to structure future special purpose charitable gifts so that they will not become exigible by tort creditors of the charity. Some strategies that could be considered on this issue, subject to legal advice, include the following:

- creating a special purpose charitable trust by the donor giving the intended gift to a community foundation or a trust company to be held in trust for the benefit of a specific named charity;

- creating a special purpose charitable trust by the donor giving the intended gift to a arms length parallel foundation established to advance only the purposes of the intended charity; or

- structuring a donation as a conditional gift with a condition subsequent that would become operational upon the winding-up, dissolution or bankruptcy of the charity accompanied with a "gift over" to another charity that had similar charitable purposes, or alternatively, providing that the gift revert back to the donor.

All of these options, and in particular the utilization of conditional gifts, would require addressing a number of important legal issues, including determining the income tax consequences to the donor. For a more thorough discussion concerning structuring restricted gifts and conditional gifts, reference can be made to two articles by the author entitled Donor Restricted Charitable Gifts: A Practical Overview and Looking a Gift Horse in the Mouth: Legal Liability in Fundraising both of which are available at www.charitylaw.ca .

5. Conclusion

Pending a successful appeal to the Supreme Court of Canada, the Ontario C. of A. decision in the CBIC case will likely have a devastating impact upon the future ability of charities to raise monies as special purpose charitable trusts, and may expose existing charitable trust property to claims of tort victims, in particular tort victims with claims arising from sexual abuse. It is hoped

that leave to appeal to the Supreme Court of Canada will be granted and that the Supreme Court will have an opportunity to reverse the C. of A. decision and reaffirm the more reasonable approach taken by the lower court. However, given the current trend of the Supreme Court of Canada to extend vicarious liability to charities arising from claims by victims of sexual abuse, it is not at all certain whether the Supreme Court will reverse the C. of A. decision. This would be unfortunate result for the future of charities in Canada.

2. FEDERAL LEGAL UPDATE

A. RECENT CHANGES AT CCRA

The Charities Division of Canada Customs and Revenue Agency "CCRA" (formerly "Revenue Canada") was changed on June 1st, 2000 from a Division to a Directorate and is now known as the Charities Directorate. This change in name represents an elevation in the status of the Charities Division within the structure of CCRA.

In addition to this reclassification, Carl Juneau, former Assistant Director of Technical Interpretations of the Charities Division, has been promoted to the position of Director of Policy and Communications Division for the Charities Directorate of CCRA.

A further change is that Neil Barclay has stepped down as Director of the Charities Division (as it then was) effective as of June 1st, 2000. Ms. Eniko Vermes will be acting as the Interim Director of the Charities Directorate until a permanent Director is appointed.

B. REVISED DRAFT POLICY FROM CCRA ON EDUCATION, ADVOCACY AND POLITICAL ACTIVITIES

A revised draft policy from CCRA on Education, Advocacy and Political Activities, RC4107(E), Draft #2, was released on April 18th, 2000. A copy of the revised draft policy can be found on the internet at www.ccra.adrc.gc.ca . The revised draft policy is a substantial rewrite of the earlier draft that had been issued by CCRA in June 1998 and represents a considerable shift in position by CCRA on what will be considered by CCRA to be acceptable advancement of education and what will be considered to be unacceptable political objects or actions. This change in policy resulted in part from the 1999 Supreme Court of Canada decision in Vancouver Society of Immigrant and Visible Minority Women which established an expanded definition of what will be considered to be advancement of education. A case summary of the Vancouver Society decision can be found in Charity & the Law Update, Volume 1, Number 4, dated December 22nd, 1999 at www.charitylaw.ca

C. RESPONDING TO THE NEW INTERPRETATION BULLETIN IT-141R ON CLERGY HOUSING DEDUCTION ELIGIBILITY

A Draft of Interpretation Bulletin IT-141R on Clergy Residence Deduction eligibility was initially released by CCRA on October 29th, 1999. The final form of IT-141R was released by CCRA on May 4th, 2000. Interpretation Bulletin IT-141R sets out the basis for claiming clergy housing deductions in accordance with Section 8 (1) (c) of the Income Tax Act and incorporates the criteria set out in the decision of Judge Bowman of the Tax Court of Canada on February 26th, 1999.

For a religious charity that is intending to be recognized as a "religious order" under IT-141R, it will be important to review the contents of its letters patent and general operating by-law. It may be necessary that its charitable objects and possibly even the structure of the charity may need to be amended to substantiate the status of the charity as a "religious order" as described in IT-141R. In particular, it may be prudent to include a definition of a "religious order worker", or similar terminology in the general operating by-law for the charity to fulfill the requirements of what constitutes a "religious order" as set out in the Interpretation Bulletin.

D. UPDATE ON BILL C-6, PERSONAL INFORMATION, PROTECTION AND ELECTRONIC DOCUMENTS ACT

BY: MERVYN F. WHITE

On April 4th, 2000, the Personal Information Protection and Electronic Documents Act (" The Act") was passed by the House of Commons, and received Royal Assent on April 13th, 2000.

The Act provides for the protection of personal information by the private sector. It fills a gap in privacy legislation in Canada, and responds to recent privacy initiatives in the European Union ("EU"). In 1995, the EU passed legislation which introduced privacy protection to the private sector. It also required that non-member countries would have to comply with the privacy requirements contained in their legislation if they wish to do business with EU.Charities need to become familiar with the contents of this important legislation to ensure that their collection and use of donor information conform to the guidelines contained in the Act. The full text of the Act can be accessed at the Federal Government's website at www.parl.gc.ca.

The Act contains six parts with Part 1 having the most importance for charities. Part 1 of the Act establishes a right of private citizens to the protection of personal information collected from them and used by organizations and businesses in the course of carrying on commercial activities. The definition of "commercial activity" means "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." The definition of "organization" is inclusive in

language, and includes an association, partnership, person or trade union. As such, a charity would be an organization defined in the Act.Under Part 1 of the Act, an organization is responsible for ensuring that certain legislated standards of care are met with respect to personal information in its possession, including information that has been transferred to a third party for processing. In transferring information, an organization will be required to use contractual or "other means" to ensure that the recipient party provides a comparable level of protection while the information is being processed by it.Organizations will be required to establish policies and practices designed to give effect to the principles set out in the Act, including,

(a) implementing procedures to protect personal information;

(b) establishing procedures to receive and respond to complaints and inquires;

(c) training staff and communicating information to staff about the organizations information protection policies and practices; and

(d) developing information to explain the organization's policies and practices concerning personal information collection and use.

The collection and use of personal information by an organization is to be governed by a series of principles, which are modelled on the Canadian Standards Association's Model Code for the Protection of Personal Information. The ten principles include

(a) accountability: an organization shall be responsible for the personal information it collects and uses;

(b) identifying purposes: an organization shall identify the purpose for which personal information is collected and used;

(c) consent: an organization shall obtain and ensure the ongoing consent of the person giving personal information;

(d) limiting collection: an organization shall ensure the limited use, disclosure and retention of personal information;

(e) limiting use, disclosure, and retention: an organization shall ensure that personal information is not used or disclosed for purposes other than those for which it is collected, except with the consent of the individual or as required by law;

(f) accuracy: an organization shall ensure the accuracy of the personal information collected;

(g) safeguards: an organization shall ensure that safeguards appropriate to the sensitivity of the personal information collected are put in place;

(h) openness: an organization shall ensure that there is openness to the general public respecting the policies and practices of the organization relating to it's management of personal information;

(i) individual access: an organization shall ensure that, upon request, an individual is provided with information about the existence, use and disclosure of his or her personal information and providing access to that information;

(j) challenging compliance: an individual shall be able to address a challenge to the organization concerning it's compliance with these principles.

Charities will have to ensure that the manner in which they collect, use and maintain personal information from donors corresponds with the provisions of the Act.

The provisions of the Act will negatively impact the practice of some charities which sell or barter their donor lists. Commercial fundraisers will also be significantly restrained in the manner in which they collect and use personal information of donors. Failure to comply with the provisions of the Act will carry serious penalties, along with a loss of credibility as Canadians become accustomed to the rights which they have gained under the Act.

Part 1 of the Act will come into force and effect on January 1st, 2001

3. ONTARIO LEGAL UPDATE

A. PENDING REINSTATEMENT OF CORPORATE INDEMNIFICATION IN ONTARIO

In the earlier issue of Charity & the Law Update, Volume 1, Number 4 dated December 22nd, 1999, an explanation was given about the loss of corporate indemnification of directors and officers that had unintentionally occurred through an amendment to the Ontario Corporations Act under Bill 25 enacted July 1st, 1999. Remedial legislation to rectify this oversight is expected later this year, but in the meantime charities under the Ontario Corporations Act do not presently have the corporate power at present to adopt an indemnification by-law.

Whether or not the legislation to be introduced will be made retroactive back to the date that corporate indemnification was lost on July 1st, 1999 is unknown. As a result, for any charity that adopted a corporate indemnification by-law between July 1st, 1999 and the pending proclamation date of remedial legislation, it would be prudent for the charity to seek advice from its legal counsel to determine whether or not the remedial legislation is retroactive or whether a replacement indemnification by-law will need to be adopted after the remedial legislation becomes effective.

B. PUBLIC GUARDIAN AND TRUSTEE TO STUDY THE POSSIBILITY OF DELEGATION OF INVESTMENT DECISION MAKING

In Charity & the Law Update, Volume 1, Number 4, a summary was given concerning the position of the Attorney General of Ontario that trustees are unable to delegate investment decision making under recent changes to the Trustee Act that came into force on July 1st, 1999. Since then, representatives of the Charities and Not-for-Profit Section of the Canadian Bar Association of Ontario have met with the Attorney General, as well as with legal advisors of the Attorney General Staff, concerning the impracticality of charities not being able to delegate investment decision making. In response, the Attorney General, through the Public Guardian and Trustee, has indicated an interest in studying the possibility of establishing a list of criteria within which trustees could delegate

investment decision making to an agent. It is possible that legislation establishing parameters for delegation of investment decision making may be brought before the provincial legislature later in the fall.

C. UPDATE ON PENDING REGULATIONS UNDER THE CHARITIES ACCOUNTING ACT

The long expected regulations under Section 5.1 under theCharities Accounting Act concerning remuneration of directors and the ability to purchase directors and officers liability insurance has still not been released by the Attorney General of Ontario. The considerable delay that has occurred in the issuance of the regulations over the last twenty four (24) years may be an indication of difficulties that the government is encountering in striking an appropriate balance between authorizing remuneration of directors while at the same time ensuring that the fiduciary obligation of directors to put the interests of the charity foremost is not compromised in doing so.

No date has been set for the release of the anticipated regulations. It is therefore very much a "wait and see" situation. In the meantime, directors of charities in Ontario are not able to receive any remuneration From 2 the charity, either directly or indirectly, other than reimbursement of reasonable out of pocket expenses, without first obtaining court authorization.

4. FUNDRAISING UPDATE

A. SUMMARY OF IMPROPER ISSUANCE OF CHARITABLE RECEIPTS

1. General Comments

To recognize legal liability issues involving fundraising requires, in part, an understanding of situations where charitable receipts may be improperly issued. The tax issues, though, that are involved under the Income Tax Act (ITA) concerning the issuance of charitable receipts are so many and are so detailed that it would be impractical to summarize all of the applicable rules in a brief overview such as this article.

What would be of assistance would be to provide a summary of the resource materials from CCRA that are available on this subject together with a brief summary of some of the more common instances when a charity may become involved in the improper issuance of charitable receipts.

2. Resource Materials from CCRA on the Issuance of Charitable Receipts

All the resource materials referred to below are accessible by referring to the Canada Customs and Revenue Agency website at **www.ccra-adrc.gc.ca.** A few of the more important publications from CCRA concerning when charitable receipts can be issued are listed below.

a) Publications

- A booklet entitled Tax Advantages of Donating to Charity-RC4142 (e) 1507, released on October 3rd, 1999 that provides a succinct

summary of the tax advantages of donating to charities, as well as situations where charitable receipts cannot be issued.

- A pamphlet entitled Gifts and Income Tax/P113 that provides a general summary on the topic that would be helpful for board members or prospective donors.

- Registered Charities Newsletters, No. 1, August 1991; No. 2, Spring 1992; No, 3, Winter 1992/93; No. 4, Spring 1994; No. 5, Winter 1995/96; No.6, Summer 1996; Special Release, Autumn 1996; No. 7, Summer 1998; No. 8, 1999 that provide more detailed and practical interpretations of CCRA's position concerning the numerous rules affecting the issuance of charitable receipts.

b) Interpretation Bulletins

- IT-110R3 Deductible Gifts and Official Donation Receipts;

- IT-111R2: Annuities Purchased From Charitable Organizations;

- IT-111R2SR: Annuities Purchased From Charitable Organizations;

- IT-226R: Gift to a Charity of a Residual Interest in Real Property or Inequitable Interests in a Trust;

- IT-244R3: Gifts by Individuals of Life Insurance Policies as Charitable Donations;

- IT-288R2: Gifts of Tangible Capital Properties to a Charity and Others;

- IT-297R2: Gifts in kind to Charity and Others.

c) Information Circulars

- IC75-23: Tuition Fees and Charitable Donations Paid to Privately Supported Secular and Religious Schools;

- IC-80-10R: Registered Charities: Operating a Registered Charity;

- IC-84-3R4: Gifts in Right of Canada;

3. Synopsis of Improper Issuance of Charitable Receipts

- The following is intended as a brief synopsis gleaned from the above CCRA resource materials of some of the more common situations involving fundraising where a charity may either knowingly or unknowingly have become involved in the improper issuance of charitable receipts. The situations that are listed are of a selective nature and do not purport to cover every situation where a charity may otherwise be improperly issuing charitable receipts.

- A charity cannot issue a receipt where the donor receives an inducement or gift, or where the fair market value of such inducement or gift exceeds the lesser of $50.00 or 10% of the amount of the donation.

- Contributions of services may not be acknowledged by the issuance of a charitable receipt. A gift must involve the gift of property. A contribution of services, that is time, skill, or effort, is not considered to be a gift of property and therefore will not qualify for a charitable receipt.

- The purchase of goods or services from a charity cannot be acknowledged by the issuance of an official charitable receipt for income tax purposes for all or any part of the payment for such purchase. Where a donor can both purchase an item from a charity at the same time as making a donation, the purchase and gift must be treated as two separate transactions that are carried out independently. A charitable receipt can only be issued for a payment that is solely a donation. A charity cannot issue a split receipt for the portion of the payment/donation in excess of the fair marked value of the item being purchased.

- A charity may not issue an official receipt where the donor has directed the charity to give the funds to a specified person or family.

- Donations that are subject to a general direction from the donor that the gift be used in a particular program operated by the charity are acceptable, provided that no benefit accrues to the donor, the directed gift does not benefit any person not dealing at arms length with the donor, and the decisions regarding utilization of the donation within a program rests with the charity.

- A charity cannot issue receipts for 100% of a student's tuition fees paid to a privately funded secular or religious school by having the tuition fees paid by the parents indirectly through a scholarship fund operated by the school or by another charity associated with the school that purports to grant "scholarships" for tuition fees to children attending the school.[(1)]

- A charity may not issue a charitable receipt if the donor has directed the charity to give the funds to a non "qualified donee" as defined under subsection 149.1(1) of the ITA. Most foreign charities or foreign affiliates of a Canadian charity, with the exception of a "prescribed

university", would not meet the definition of a "qualified donee" and as such gifts directed to them would not be eligible for an official charitable receipt.[(2)]

- The payment of a basic fee for admission to an event or program will not qualify as a charitable donation for tax receipting purposes, with the exception of the purchase price of a ticket to attend a "dinner, ball, concert or show or a like event" where the charitable receipt is limited to the price of the ticket less the fair market value of the event.

- A charitable receipt cannot be issued for the price of admission to a "dinner, ball, concert, or show or like event" that includes participation in a lottery or draw for prizes or awards which have more than a nominal value.

- A charitable receipt cannot be issued for any portion of the admission price to a dinner coupled with an auction, since an auction is not considered to be a "like event", unless individuals are invited to bid and can bid at the auction without paying the admission price for the dinner.

- A charitable receipt cannot be issued for payment of a membership fee for a charity that entitles members to attend events, receive literature, receive services or be eligible for entitlement of any material value. However, membership fees that only provide the member with the right to vote at meetings and to receive reports of the activities of the charity are not considered to be of material value, unless such reports are otherwise only available for a fee.

- A charitable receipt cannot be issued for the payment of a lottery ticket or other chance to win a prize.

- A charity that receives a gift in kind can only issue receipts for the fair market value of the gift as of the date that it was donated. When a gift in kind has a fair market value of $1,000.00 or more, a qualified written appraisal is required to justify the amount shown on the receipt.

- If an individual gives a security to a charity that is a "non qualifying security" as defined under subsection 118.1(18) of the ITA, a credit for the donation will be denied at the time that the gift is made and the donor will only be entitled to receive a charitable receipt if the charity subsequently disposes of the "non qualified security" within a period of sixty (60) months from the date of the gift. A "non

qualifying security" is defined as including shares, obligations or securities of a corporation or person with whom the donor does not deal "at arms length". Specifically excluded from the definition of "non qualifying securities" are shares, obligations and other securities listed on prescribed stock exchanges and amounts deposited with financial institutions. Excluded as well from "non qualifying securities" are "excepted gifts" as defined under subsection 118.1 (19) of the ITA as gifts that meet the following requirements:

- they are limited to shares of a corporation as opposed to debt;

- the donee charity must not be a "private foundation";

- the donor must deal at arms length with the donee charity; and

- the donor must deal at arms length with each director, trustee, officer and like official of the donee charity.

The practical effect of the definition of "excepted gift" and "non qualifying security" is that no charitable receipt can be issued by a charitable organization or a public foundation at the time that the gift is made for the gift of shares or securities of a corporation that are not the shares or securities of a publicly traded company on a "prescribed stock exchange" as defined or where such gift is made by a director, trustee, officer or other like official of the charitable organization or public foundation or by anyone related to or otherwise not dealing at arms length with such person.

- In accordance with Resolution 21 in the 1997 Federal Budget intended to stop "loanbacks", subsection 118.(16) provides that the amount of a charitable tax credit that a donor can claim will be reduced in a situation where a gift is made to a charity, other than a gift of a "non-qualifying security", and within 5 years thereafter if;

(i) the charity holds a "non-qualifying security" of the donor where the charity acquired the security no earlier than 5 years before the gift was made; or

(ii) the charity allows the donor to use the property so gifted within 5 years of the original gift, the use of such property was pursuant to an agreement made or modified no earlier than 5 years before the making of the gift, and the use of the property was not in the course of the charity's charitable activities.

Pursuant to Section 118.1 (16) and (17) of the ITA, and depending upon the applicable circumstances, the amount of the tax credit or deduction that had been claimed for the gift will have to be reduced by the amount the charity gave to acquire the "non qualifying security" or by the value of the property the charity allows the donor to use.

- A gift to a charity for the use of vacation property, usually auctioned by a charity at a fundraising event, has now been determined by CCRA to

be ineligible as a receiptable gift. An earlier position by CCRA setting out circumstances under which a charitable receipt could be issued for the fair market value of a gift of vacation property was explained in a letter by Carl Juneau, Assistant Director of Charities (as he then was), in the fall of 1998.(3) The letter was considered to be a reasonable interpretation of Department policy at that time.

- However, the Rulings Directorate, which is responsible for policy at CCRA, in April 1999, reversed the earlier position and stated that since a receiptable gift requires the voluntary transfer of property without consideration, the mere granting of a right to use property for a limited period of time did not constitute an acceptable "transfer of property". Canada Customs and Revenue notified taxpayers of its change in position in Bulletin ITTN-17 released on April 26th, 1999. As a result, effective as of April 26, 1999, loans of vacation property to a charity will no longer be considered to be a gift of property for which a charitable receipt can be issued.(4) This will no doubt cause problems for charities that have relied upon such gifts as part of a successful charity auction event.

5. INTELLECTUAL PROPERTY AND INTERNET UPDATE

A. NEW ICANN DOMAIN NAME DISPUTE POLICY CAUSES CONFUSION

In Charity & the Law Update, Volume 1, Number 4, an explanation was given about the importance of securing domain names on the internet involving the corporate and/or operating names of a charity. The importance of securing domain names has become all the more pressing as a result of the new Uniform Domain Name Dispute Resolution Policy for resolving dispute over ownership of internet domain names that became effective as of January 1st, 2000. The Policy was developed and adopted by ICANN (the Internet Corporation for Assigned Names and Numbers) in October 1999. The key part of the new Uniform Domain Name Dispute Resolution Policy is that any registered owner of a domain name will be required to submit to a mandatory administrative proceeding to determine ownership of a domain name whenever another party as a complainant asserts that:

(i) the domain name of the registered owner is identical or confusingly similar to a trade-mark or service mark in which the complainant has rights;

(ii) the registered owner of the domain name has no rights or legitimate interest in respect to the domain name; and

(iii) the domain name in question has been registered and has been used in bad faith.

The difficulties with the new Uniform Domain Name Dispute Resolution Policy is that the international arbitrators who have been authorized to make administrative decisions under the new Policy are rendering decisions that are inconsistent and confusing. As a result, there is no certainty at the present time in predicting whether a challenge to a domain name will be successful. This uncertainty means that a charity should not assume that it will be able to recover an important domain name that it has lost to another party by relying upon the Uniform Domain Name Dispute Resolution Policy.

The better approach is for a charity to take immediate steps to obtain and secure internet domain names for all of its corporate and operating names as quickly as possible utilizing as many top level domain names as possible, ie., .com, .org, .net and .ca. (once the .ca registration system becomes more flexible after its rules are revamped later this year). The advantages in a charity obtaining multiple internet domain names is twofold;

(1) The charity will have available to it numerous key domain names that it can use at sometime in the future without having to worry if another party may have already obtained the domain name in question. Domain names are obtained on a "first-come-first served basis" and therefore the race is generally won by the swiftest.

(2) By securing multiple domain names that might otherwise be taken by other parties that involve similar operating names or trade-marks of the charity, the charity avoids potential confusion to users on the internet. This reduces the possible loss of the goodwill by a charity with regards to its various operating names that have become trade-marks. By taking a pro-active approach now to protect key domain names as widely as possible, the use of domain names for a charity on the internet will be less susceptible to confusion and thereby will enhance the process of the charity on the internet.

In addition to obtaining multiple internet domain names, if a charity is using a domain name in a prominent manner, ie., on promotional or fundraising materials or in a prominent position on letter head or on advertising, (ie., like "microsoft.com", "abc-charity.net" registered after abc-charity.org), such domain names should be registered as trade-marks in both Canada and the United States. Not only does trade-mark registration assist in protecting the domain names from challenges under the new ICANN Uniform Domain Name Dispute Resolution Policy, but it would also permit recovery of damages based upon trade-mark infringement where a new domain name is registered by another party that is confusingly similar to the domain name of the charity in use.

The identity of a charity on the internet through its domain name is one of the most important assets of a charity and will become more so in the future. As such, it is important that charities, its executive directors and its board of directors become pro-active in identifying the importance of internet domain names as key intellectual property and take active steps to protect those assets on a timely basis.

B. ESTABLISHING AN INTERNET USER POLICY TO LIMIT EMPLOYER LIABILITY

BY: MERVYN F. WHITE

The Internet offers obvious advantages to charities, including easy access to

information, government resources and business websites, simple document transfer, and economical communication with donors.

The Internet, also poses serious risks for charities, not the least of which, is employee misuse. Charities need to address how employees are using the Internet at work to ensure that they are not exposed to vicarious liability.

Employers can face vicarious liability for the actions of their employees where the inappropriate conduct of the employees arises out of the employment relationship. The Supreme Court of Canada recently addressed the issue of vicarious liability for charities in the Curry and Griffiths decisions. What is clear from those decisions is that a charitable employer will not be provided with a special exemption from vicarious liability for the conduct of it's employees.

Employee misuse of the Internet can involve a wide range of activities, some of which may appear at first blush to be relatively harmless, and some of which are more clearly damaging. At the least, employee misuse of the Internet can seriously affect productivity in employees using the Internet to "surf" for personal pleasure. The Internet allows employees access to a wide range of websites offering content which will be viewed by many as harmful and degrading. Pornography and hate literature on the Internet are prominent and easily accessed. If left on a computer terminal such material may be viewed by others who object to it, providing them with sexual harassment claims, or claims of human rights violations against the employer.

Often a website offering software, or movie and music content allow employees to download material onto their employer's computers which breaches copyright. Equally damaging, employees can access bulletin boards and chat rooms, and engage in disparaging or libellous conduct. Again, the employer may be vicariously liable for such action, depending on the circumstances surrounding the employee's conduct.

Charities should become pro-active in ensuring that employees do not misuse their Internet access. A variety of steps can be taken to limit such risk:

(a) A charity can limit the number of employees who can access the Internet at work to a select few who are highly trusted.

(b) A charity can institute a policy of random review of employee computer terminals to determine how employees are using them.

(c) A charity can develop and implement a user policy for the Internet.

While a charity may decide to implement all three steps, at the very least, a user policy should be created which clearly establishes what Internet use by employees will be tolerated, and what the punishment will be if employees misuse the Internet. A written policy will make it clear to employees that their employer takes the use of the Internet seriously, and should act as a deterrent for future misconduct.

In order to be effective, a user policy should be reduced to writing, and should be provided to all employees for their review. Employees should be asked to sign a copy of the user policy, or an acknowledgement that they have reviewed and understood it. Any user policy should clearly delineate what is and isn't considered appropriate use of the Internet. For example, a charity might consider restricting access to certain times of the day in order to limit employee "surfing". A user policy should outline the sanctions which employees will be subject to if they

violate it's terms. Sanctions may range from a loss of access to the Internet for a period of time, or permanently, to termination, depending on the severity of the violation. For example, an employee's use of the Internet at work to disseminate hate literature may constitute sufficient grounds for termination without notice.

Before establishing a user policy or implementing one of the other steps noted above, a charity should review their situation with legal counsel. A poorly drafted user policy may only confuse or exacerbate the situation, while measures which appear too draconian in nature may stifle employee creativity and sour employee and employer relations. A proper balance needs to be arrived at, whereby employees are allowed reasonable access to the Internet in order to assist their employer, while limiting their own personal use of the Internet at work. If such a balance is reached, the risk of vicarious liability should be reduced or eliminated, and charities should be able to reap the benefits the Internet offers without excessive fear of employee misuse.

1. 1 See the recent decision Woolner v. R, (1999) CarswellNat 1948 (Fed. C.A.).

2. 2 See Beaudry v. R [1998] 1 C.T.C 2042 (T.C.C.).

3. 3 See (1997) 1:1 Charity & the Law Update (Sept. 26th), for a summary of the letter. (Found also at www.charitylaw.ca).

4. 4 See (1999) 1:3 Charity & the Law Update (April 30th) . (Found also at www.charitylaw.ca).

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