

CHURCH & THE LAW UPDATE - No. 8

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Updating Churches on recent legal developments and risk management considerations.

1. INTRODUCTION

This is the eighth issue of Church & the Law Update. It is intended to provide an update for churches and charities on current legal developments as well as recommendations on matters of legal risk management where appropriate. The Church & the Law Update is prepared as a service to churches and charities and is published approximately three to four times a year as legal developments occur.

This issue of the Church & the Law Update provides:

- (i) information on investments of charitable monies in mutual funds;
- (ii) a synopsis of a recent case concerning the status of a minister within a denomination;
- (iii) an update on human rights - sexual orientation issues;
- (iv) the effect of the recent changes to Substitute Decision making legislation in Ontario;
- (v) proposed changes to the *Ontario Charities Accounting Act* (Bill 61 and Bill 79); and
- (vi) a summary of Legal Risk Management Tips for churches.

2. UPCOMING CHURCH & THE LAW SEMINAR - 1997

The 1997 Annual "Church & the Law" Seminar will be held on **Wednesday, February 5th, 1997 in Toronto at Queensway Cathedral in Etobicoke, Ontario**. Full details of the program and how to register for the seminars will be set out in future issues of the Church & The Law Update.

3. HUMAN RIGHTS – SEXUAL ORIENTATION

The Federal Government has passed Bill (C-33) enacting amendments to the *Canadian Human Rights Act* to incorporate "sexual orientation" as a protected ground from discrimination. The Senate must still, as of the date of writing, approve the proposed amendments for most organizations. This amendment will have minimal direct impact for churches and Christian organizations, since the Canadian Bill of Rights applies only to Federal Institutions. However, the legislation will have significant indirect consequences as a result of changes to other federal legislation that will likely follow.

On another front, the Alberta Court of Appeal in March of 1996 handed down its decision in the *Vriend and Kings College* case and allowed the appeal by refusing to read into the Alberta *Human Rights Act* "sexual orientation". The court determined that the role of the courts was not to rectify legislation or to usurp legislative assemblies jurisdiction. The decision was not unanimous and appears to be headed to the Supreme Court of Canada. The Province of Alberta is one of only three provinces that have not yet included "sexual orientation" as a prohibited ground of discrimination.

The real issue that churches and christian organizations will have to deal with is whether there exists any basis to discriminate based upon sexual orientation using the "reasonable and bonafide requirement" exemption contained within most human rights codes. Given the breadth of human rights legislation in existence in Canada, it is recommended that churches and Christian organizations very carefully review any policy, especially in the employment area, which might be alleged to violate human rights legislation. Inclusion of a Statements of Faith and Lifestyle Statements in corporate or organizational documentation for a church or Christian charity will be critical to an organization's ability to avoid imposition of world "standards" on Christian organizations.

4. MUTUAL FUNDS ARE NOT AUTHORIZED INVESTMENTS FOR CHARITIES

By: Terrance S. Carter, B.A., LL.B.

Most charities and/or churches do not have incorporating documents and/or constitutions that contain power clauses permitting investments beyond those authorized for trustees at law. As a result, churches and charities that operate in Ontario are restricted to investing surplus funds in investments that are authorized under the *Trustee Act* of Ontario. A similar situation would apply in most other provinces across Canada.

The difficulty with the *Trustee Act* of Ontario and similar legislation in other provinces is that the investments that are permitted in those statutes are very conservative, such as first mortgages on real estate, guaranteed investment certificates by banks, and so forth. With the proliferation of investment opportunities, particularly with regard to mutual funds, many administrators of christian charities and churches have either invested or have considered investing surplus charitable funds in mutual funds.

However, a relatively recent case in Ontario, *Re: Haslem and Haslem, (1994), 114 D.L.R. (4th) 562 (Ont. G.D.)*, has clarified that, at least in Ontario, investments in mutual funds are not permitted investments under the *Trustee Act*. This is because most mutual funds place monies in investments that are not investments authorized by the *Trustee Act*. Even if the investments of a mutual fund consisted of only authorized investments under the *Trustee Act*, since the investment decisions involving charitable monies are being delegated to mutual fund managers in contravention of the prohibition on delegating the decision making authority of a trustee, the placement of charitable monies in a mutual fund would constitute an unauthorized investment and as such would constitute a breach of trust of charitable funds.

As a result, churches and Christian charities that have placed monies in mutual funds should speak with their legal counsel to determine if there is authority to do so and if not, what steps should be taken to rectify the unauthorized investment.

5. ANNUAL CORPORATE FILINGS NO LONGER REQUIRED IN ONTARIO

Charities incorporated in Ontario under either the Ontario *Corporations Act* or under special legislation in Ontario have been required in recent years to file an annual returns called Special Form 1 together with an annual filing fee. This requirement has now been eliminated as a result of a recent amendment to the *Corporation Information Act* which suspends the requirements for annual filings effective as of June 30th, 1995. This will no doubt come as a relief to incorporated charities in Ontario.

6. ANNUAL FINANCIAL STATEMENTS NO LONGER REQUIRED BY THE PUBLIC GUARDIAN AND TRUSTEE IN ONTARIO

Notwithstanding that the *Charities Accounting Act* of Ontario empowers the Public Guardian and Trustee to require all charities operating in Ontario to produce annual financial statements, the practice of the Office of the Public Guardian and Trustee has been amended over the last year to no longer require charities to file annual financial statements on their own. Instead, only those charities that are specifically requested by the Office of the Public Guardian and Trustee to do so are required to file annual financial statements. This again will be of relief to charities that are either incorporated in Ontario or incorporated elsewhere but operate in Ontario.

7. FORMATION OF CANADIAN BAR ASSOCIATION CHARITIES COMMITTEE

The Charities Committee of the Canadian Bar Association of Ontario has recently been reactivated. The Committee will deal with issues such as submissions to the Public Guardian and Trustee of Ontario on various issues, including directors and officers liability insurance, as well as recommendations on amendments to the Ontario *Corporations Act* and the *Canada Corporations Act*.

For lawyers in Ontario who would like to be a part of the CBAO Charity Committee, they can contact the Canadian Bar Association of Ontario at Toronto 416-869-1047 to the attention of John Hamilton or Terrance Carter, Co-Chairs of the Committee. The first meeting of the Charity Committee is scheduled for Friday September 20th 1996 at the C.B.A.O. office in Toronto at Suite 200, 20 Toronto Street, from 3:00 p.m. to 5:00 p.m.

8. AMENDMENTS TO SUBSTITUTE DECISION MAKING IN ONTARIO

By: Terrance S. Carter, B.A., LL.B.

The Province of Ontario had enacted legislation in 1992 to establish a new requirement of substitute decision making authority under the

Substitute Decision Act, the *Consent to Treatment Act*, and the *Advocacy Act*. In 1994, public concern developed about aspects of the legislation which provided that the appointment of the Public Guardian and Trustee as Statutory Guardian terminated any continuing power of attorney for properly given by an incapable person while he or she was capable. As a result, in 1995 government prepared legislation to correct

the deficiencies in the Substitute Decision Making Legislation and make it more respectful of private arrangement. The legislation, known as Bill 19 was proclaimed in forces on March 28th, 1996 which Act accomplished the following:

- (a) it repeals the *Advocacy Act* in Ontario;
- (b) it repeals the *Consent to Treatment Act* in Ontario and replaces it with the *Health Care Consent Act*,
- (c) a continuing power of attorney is no longer terminated by the appointment of a statutory guardian, and instead takes precedent over it; and
- (d) under a power of attorney for personal care, the possibility that an incapable person could object to the attorney's decision, resulting in the power of attorney having to be validated process, is repealed by Bill 19.

These amendments are welcomed by charities, lawyers, and the public at large in overcoming some notable deficiencies in the earlier litigation concern.

9. PROPOSED CHANGES TO ONTARIO CHARITIES ACCOUNTING ACT (Bill 61&79)

By: Terrance S. Carter, B.A., LL.B.

The Province of Ontario has introduced two Bills that would significantly simplify court procedures involving charities under the *Charities Accounting Act* by providing for consent orders and judgements in charitable matters without the necessity of a formal court application. Bill 61, being an "*Act to Simplify Government Processes and to Improve Efficiency in the Ministry of the Attorney General*" was given first reading on June 5th, 1996 and is expected to receive royal ascent in the fall of 1996. The Act provides, amongst amendments to other legislation, that a draft order or judgement that could have been made by the Ontario Court (General Division) under the *Charities Accounting Act*, any other provincial Act dealing with charitable matters, or in the exercise of the inherent jurisdiction of the court in charitable matters, shall be deemed to be an order or judgement of that court if the Public Guardian and Trustee and any other person who would have been required to be served in the proceedings to obtain the order or judgement gives written consent to the draft order or judgement.

Bill 79, entitled "*Courts Improvement Act*", was given first reading on June 27, 1996 and is also expected to receive royal assent by the fall of 1996. Although a copy of the Bill was not available at the time of publication of this Church & the Law Update, Bill 79 compliments Bill 61 by providing a process of keeping technical matters involving charities out of the courts and clarifying the records required to be kept for charitable property, including funds given to a charity for special purposes.

These amendments to the *Charities Accounting Act* reflected in these two Bills in effect means that the Public Guardian and Trustee will be delegated the power and authority of the Ontario Court (General Division) on charitable matters. While this will no doubt considerably strengthen the position of the Public Guardian and Trustee in Ontario into a quasi-judicial role akin to the Commissioners of Charities in England, it will have a significant benefit in making it easier and less expensive to obtain court approval on charitable issues in Ontario. For instance, pre-approval for remuneration of directors will be available directly through the Public Guardian and Trustee without the expense, aggravation, and possible negative publicity involved in a formal court application. In addition, the recent issue concerning whether payment of directors and officers liability insurance requires court approval will be dealt with as an administrative matter as opposed to a court application.

This simplified procedure was first contemplated in the 1987 case of *Re Toronto Humane Society* (1987) 60 O.R.(2d) 236 where the court suggested that the requisite court approval could be obtained by "*fiat*" from the Public Guardian and Trustee. At that time, there was no statutory authority to do so. Now there will be. As a result, charities either incorporated in Ontario or operating in Ontario will now be able to deal with both substantive and technical applications in an expeditious and efficient manner that otherwise would have to be submitted through a formal court process. From a practical standpoint, it is expected that there will be numerous administrative applications to the Public Guardian and Trustee by charities that wish to have one or more directors receive remuneration or to obtain authorization to pay for directors and officers liability insurance. In this regard, the proposed amendment to the *Charities Accounting Act* will be a welcome method of dealing with what have become for many charities difficult issues.

10. LEGAL RISKS MANAGEMENT TIPS FOR CHURCHES

By: Terrance S. Carter, B.A., LL.B.

The following is a brief summary of some key legal risk management tips for churches. The highlighted commentaries that are referred to

after each of the tips are available through the Canadian Council of Christian Charities through the order form that is attached to the back of this Church & The Law Update. For more details see the Legal Risk Management Checklist in the Church and the Law Update No. 7. The tips are as follows:

1. Develop a written procedure for biblical discipline and include it as part of the church constitution.



(See CCCC Bulletin on Discipline No. 2 - 1992 and No. 2 - 1993)

2. Review the possibility of church incorporation to obtain liability protection for members and develop a complete and user friendly constitution.



(See CCCC Book on Incorporation of Churches)

3. Develop church policy statements on potentially litigious issues, such as avoiding child abuse and establishing lifestyle expectations for members, and then incorporate them into the church constitution.



(See Church and The Law Update No. 2, 5 & 6 and CCCC Book on Incorporation of Churches)

4. Contain liability of high risk ministries, such as a christian day care, school, or camp ministry, within a separate corporation and away from the assets of the church, its lenders, and possibly its members.



(See CCCC tape and handout on associated corporations from the 1995 CCCC annual conference and at the 1996 Church and the Law Seminar, a tape on Using Multiple Corporations to protect church assets)

5. Structure the church constitution to allow ministers to have input on the church board while avoiding conflict of interest of having to be a member of the board.



(See Remuneration of Directors in CCCC Bulletin No. 3 - June 1991, CCCC Bulletin No. 4 - August 1993, and Church and The Law Update No. 3)

6. Include an indemnification provision for church leaders in the church constitution.



(See CCCC Book on Incorporation of churches)

7. Review and upgrade both property and comprehensive liability insurance coverage and obtain director and officer coverage as appropriate.



(See Church and The Law Update No. 7 on "Legal Risk Management Checklist" on insurance matters)

8. Develop a property use policy for use of church facilities and obtain indemnity and insurance coverage from third party users of facilities.



(See Church and the Law Update No. 7 on "Legal Risk Management Checklist" on Property use issues, and the 1996 Church and the Law seminar tape on Legal Risk Management Considerations)

9. Re-register church deed within forty years to maintain priority under the *Registry Act* (Ontario).



(See Church and The Law Update No. 7)

10. Document lifestyle expectations for ministers and employees in employment contracts.



(See CCCC tape and handout on Employment in 1994 and 1996 Annual Church and The Law Seminar and 1995 CCCC Annual Conference)

11. Ensure that donor designated trust funds are segregated from operating funds and are not borrowed against or expended in contravention of terms of trust.



(See CCCC tape and handout on directors liability from the 1994 Annual Church and The Law Seminar, the CCCC Bulletin No. 3. - 1995, and the tape on Legal Risk Management Considerations for the 1996 Church and the Law Seminar)

12. Establish a church legal risk management committee to indemnify and reduce legal liability in the operations of the church in conjunction with a Legal Risk Management Checklist.



(See "Legal Risk Management Checklist" in Church and The Law Update No. 7 and the tape from the 1996 Church and the Law Seminar)

11. TOPICS IN UPCOMING ISSUES OF THE CHURCH & THE LAW UPDATE

In upcoming issues of the Church & the Law Update, some of the topics that will be addressed will include the following:

- (i) Can a charity pay for Directors and Offices Insurance in Ontario in light of the recent position of the Office of the Public Guardian and Trustee?
- (ii) An updated Policy Statement or Children's Ministry to reduce the incident of sexual abuse.
- (iii) Avoiding errors in dealing with Restricted Trust Funds.
- (iv) A further commenting on the revised Substitute Decision Making legislation in Ontario.
- (v) A commentary on a recent case involving church discipline.
- (vi) Trade-mark issues for Christian charities.

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

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