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CHURCH & THE LAW **UPDATE** - No. 10

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Updating Churches and Church related Charities on recent legal developments and risk management considerations.

1.INTRODUCTION

This is the tenth issue of *Church & the Law* Update. It is intended to provide an update for churches and charities on current legal developments, as well as providing 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) A Report on the 1997 *Church & the Law* Seminar;
(ii) The Paper by Professor M.H. Ogilvie on *The Seven Deadly Myths: What Every Church Administrator Should Know About the Law in Canada Today* presented at the 1997 Annual *Church & the Law* Seminar;
(iii) U.S. Legal Omens on the Horizon: Recent Legal Developments in the United States;
(iv) Revenue Canada's Recent Position on Agency and Joint Ministry Agreements;
(vi) Proposed Changes to Investment Powers in the *Trustee Act* of Ontario; and
(vii) Court Orders U.S. Charity to Return Money to its Canadian Counterpart.

2. REPORT ON THE 1997 *CHURCH & THE LAW* SEMINAR

The 1997 Annual *Church & the Law* Seminar was held in Toronto on Tuesday, February 4th, 1997. More than 575 ministers, administrators, stewardship representatives, lawyers and accountants were present to hear presentations on 10 different topics ranging from a description of the myths about the law and the Church in Canada all the way to an explanation of U.S. legal developments and how they affect Canada. Tapes of all the topics (including handouts where applicable) are available by contacting The Canadian Council of Christian Charities at (519) 669-5137.

Over the next few issues of *Church & the Law* Update, excerpts and summaries of some of the materials presented at the *Church & the Law* Seminar on February 4th, 1997 will be included. In this issue of the *Church & the Law* Update, the highly acclaimed paper presented by Professor M.H. Ogilvie, D.Phil.,F.R.S.C., of Carleton University on *The Seven Deadly Myths: What Every Church Administrator Should Know About the Law in Canada Today* has been included, together with an overview of recent legal developments in the United States by George (Chip) Grange of Gammon & Grange, in Washington.

3. UPCOMING *CHURCH & THE LAW* SEMINARY 1998

The 1998 Annual *Church & the Law* Seminar is tentatively scheduled for Tuesday February 3rd, 1998 in Toronto. Full details of the program and how to register for the Seminar will be set out in future issues of the *Church & the Law* Update.

4. THE SEVEN DEADLY MYTHS: WHAT EVERY CHURCH ADMINISTRATOR SHOULD KNOW ABOUT THE LAW IN CANADA TODAY

By: Professor M.H. Ogilvie, D.Phil.,F.R.S.C., Professor of Law, Carleton University, Ottawa©

Christ's admonition to render to Caesar[1] and Paul's instruction to submit to all governing authorities[2] sound increasingly like counsels of perfection to Christians in postmodern Canada. Surely submission to a Leviathon, seemingly intent on devouring Christians is not what they meant. Yet, faced with a Leviathon, a large and overweening state, partly of their own making, Canadian Christians are today challenged to explore again their founding principles of political theology and to question their recent addiction to a state they no longer control, or even influence, and which menacingly promotes policies and laws profoundly at variance with the historic teachings of Christianity. When American Christian political thinkers and theologians now openly debate civil disobedience, can we afford not to do likewise?

Before proceeding to such a debate, the groundwork must be laid by slaying some deadly myths many Christians continue to entertain about the relationship in law of the Christian churches to the Canadian state. These myths are outdated and dangerous. Yet, they are frequently repeated within church circles by the same perplexed people who concurrently lash out blindly and impotently at each new affront of the law to Christianity in Canada today. It may now be time to accept the obvious.

There are at least seven deadly myths which I continue to hear repeated in church circles. As a Presbyterian, I cannot claim an intimate knowledge of or of the theology of the seven deadly sins, but I understand that they are thought of as dispositions toward sinning rather than sins themselves. They are tendencies in the (non-Calvinist) human character which threaten moral goodness by predisposing humans to engage in sin. By analogy, I would like to suggest that there are seven deadly myths widely current among Canadian Christians today which might be characterized as self-deceptions of self-importance which predispose Canadian Christians toward a serious misunderstanding of their true legal status in Canada today.

The first myth is that Canada is not only a Christian country but is so recognized by the civil law: His dominion from sea to sea, as the Psalmist[3] and the fathers of Confederation would have it. Now, there is some legal authority for this view; in Pringle v. The Town of Napanee,[4] in which the Ontario Court of Appeal refused to enforce a contract for the rental of a hall for the purpose of a public lecture series attacking Christianity, Harrison C.J.O. stated:

> An examination of the English law will be found to establish that Christianity in general, and not simply the tenets of particular sects, is a part of the Common Law of England...and as such, in effect, became a part of the Common Law of this Province... .
>
> The Empire to which we belong owes much of its greatness and influence among the nations of the earth to the profession, practice, and propagation of the religion of Jesus Christ. The many colonies of the Empire are growing into importance and power by reason of the love which they bear for Christ, and the high morality which He taught, and the blameless life which He led. It will require something more than mere general words in an Act of Parliament to compel a Court of Justice in any portion of the Empire to hold that the glory of the Empire is to be tarnished by the removal from its exalted position of Christianity as an integral part of the common law of the country.[5]

This is a late 19th century case which has never been overruled, and so remains a part of the law of Ontario today. But thinking in centuries is an indulgence in post-Charter Canada and no court would ever rely on such a statement today, not even in relation to the preamble to the Charter, which resulted from Evangelical lobbying, that "Canada is founded on principles that recognize the supremacy of God and the rule of law." Added at the last minute, with a view to entrenching the Christian foundations of the nation, the preamble has been both ignored and neutered by the courts since. Few Charter cases have even considered it as a tool of statutory interpretation, and those few which have considered it, have undermined its original Christian intention.

In O'Sullivan v. Minister of National Revenue,[6] in which a taxpayer was prohibited from withholding a portion of taxes in relation to the public funding of abortion, Muldoon J. of the Federal Court, Trial Division, characterized the preamble this:

> What then is meant by this preamble? Obviously it is meant to accord security to all believers in God, no matter what their particular faith and no matter in what beastly manner they behave to others. In assuring that security to believers, this recognition of the supremacy of God means that, unless or until the Constitution be amended - the best of the alternatives imagined - Canada cannot become an officially atheistic state... .

> The preamble to the Charter provides an important element in defining Canada, but recognition of the supremacy of God, emplaced in the supreme law of Canada, goes no further than this: it prevents the Canadian state from becoming officially atheistic. It does not make Canada a theocracy because of the enormous variety of beliefs of how God (apparently the very same deity for Jews, Christians and Moslems) wants people to behave generally and to worship in particular. The preamble's recognition of the supremacy of God, then, does not prevent Canada from being a secular state.[7]

Again, in Zylberburg v. Sudbury Board of Education,[8] in which the Ontario Court of Appeal found that school religious exercises constituted a breach of s. 2(a) of the Charter, Lacourciere J.A. (dissenting) stated:

> The preamble to the Charter is probably no more than an interpretive tool and it is clear that it cannot be relied upon to derogate from the substantive rights guaranteed in the Charter. But it does lend credence to the view that a strict separation of church and state is not contemplated by the Charter, and that the advancement of religion is permissible as long as it does not infringe anyone's religious freedom.[9]

So it appears the preamble is a prophylactic device to prevent Canada from becoming, officially, an atheistic society, or a steamroller to level down the religious playing field in Canada today. Thus, the steady removal of all traces of Christianity from education, health, employment and public moral regulation over the past decade by the courts and the legislatures suggests that it is as much a myth in law as in fact that Canada is legally a Christian country.

The second myth is that although Christianity is not, in some sense, the officially recognized religion of Canada today, it continues to enjoy some greater measure of privilege and legal protection than other religious and secular ideologies. Certainly, some branches of the Christian church enjoy constitutionally entrenched privileged positions, such as the Roman Catholic school system in Ontario or the religious schools in Newfoundland. However, in the absence of such constitutional entrenchment, the steady judicially enforced retreat of Christianity is consistent with the understanding of s. 2(a) of the Charter in relation to the fundamental right of "freedom of conscience and religion", of the Supreme Court of Canada, as set out in the two companion cases of R. v. Big M Drug Mart Ltd.[10] and Edwards Books v. The Queen,[11] in which the court, speaking on both instances through Dickson C.J.C., assimilated freedom of religion to freedom of conscience. In Edwards Books, Dickson C.J.C. defined the meaning of s. 2(a) thus:

> The purpose of 2(a) is to ensure that society does not interfere with profoundly personal beliefs that govern one's perception of oneself, humankind, nature, and in some cases, a higher or different order of being. These beliefs, in turn, govern one's conduct and practices. The Constitution shelters individuals and groups only to the extent that religious beliefs or conduct might reasonably or actually be threatened[12]

Thus, not only is Christianity not favoured or privileged above other religions in Canada today, but religious faiths and beliefs, generally, are not granted any special protection over other secular beliefs or systems of belief. For the Supreme Court of Canada, religious belief is simply one reflection of the exercise of freedom of conscience and assimilated by the top court with all other systems or individual beliefs regarded by their believer as giving meaning to life. This legal attitude demotes religious belief, by denying its unique claim to divine authority, in contrast to humanly-devised belief systems, and renders less likely special protection by a court, greater impressed by some other set of beliefs or a greater degree of fervour by those advocating an
antagonistic set of beliefs. Thus, courts are encouraged to chose among belief systems for enforcement, a process which may prove detrimental to religious belief generally, and Christianity especially.

It is as mythical in law as it is in fact that Christianity is accorded greater protection than other religious or secular ideologies today.

The third myth is that Christian churches are entirely free to determine their own affairs within their own kingdoms without state or judicial intervention. Ironically, variants of a two kingdoms political theology proliferate luxuriously and are amazingly popular today - now that Christian churches no longer influence the state as was once the case. Yet, it should be recalled that the fundamental norm of the system of government known as parliamentary government, by a sovereign and supreme legislature, posits the authority of the state, through its legislative, executive and judicial branches, over all institutions and individuals of faith within the geopolitical area called Canada. Subject only as the division of sovereignty called federalism and judicial Charter review, the constitutional structure in Canada knows of no two kingdoms, nor voluntarily foregoes the assertion of absolute and universal authority over the visible City of God within its midst.

Judicial intervention in ecclesiastical affairs has historically been a legal fact of life in Canada. Its apparently greater resentment by religious institutions today may reflect the greater vulnerability felt by those institutions in a secular society where a secular, and quite frankly, scoffing judiciary, is determining ecclesiastical disputes, in contrast to the past where the general culture and the judiciary were, at least, officially Christian, and the judiciary exercised self-restraint.

To date, while examples of judicial or legislative intervention abound, their significance is still salutary rather than sinister, for example, the recent judicial requirement that ecclesiastical judicatories comply with the procedural rules of natural justice in the various U.C.C. cases[13] and in Lakeside Colony of Hutterian Brethren v. Hofer.[14] Moreover, legislation relating to such matters as property use, property taxation, incorporation and charitable status, is still largely neutrally applied to religious and non-religious institutions alike. Nevertheless, procedural intervention today may become substantive intervention tomorrow once the principle of intervention is accepted. Thus, it is a myth in law as in fact that there are in Canada from a legal perspective two kingdoms: there is only one - the sovereign state called Canada.

The fourth myth follows closely from the third: Christian churches are free to disobey the secular laws with impunity as long as they follow to the letter their own practices and procedures. The reply follows equally closely: this too is a myth and for the same reasons. No special exceptions are made for religious institutions from the law of the land. Whether crafted especially for them as private legislation or as laws of general application, the law of the land applies equally to and within religious institutions as well as non-religious institutions. By all means follow your own practices and procedures but be aware that they may, from the perspective of the civil law, be found wanting.

The fifth myth is that the law in Canada is particularly concerned with ensuring the integrity and longevity of Christian churches and institutions qua institution, as corporate entities. That is, the law recognizes that Christian institutions serve some unique and irreplaceable social functions in Canadian society. Is Canada conceivable without the U.C.C., the Hutterite colonies doting the West or the Conference of Catholic Bishops? Well, from a legal perspective, it is entirely so conceivable, and as a number of Christian institutions which have been less than Christian in their personnel affairs in the recent past have learned, it would take only a handful of moderate damages awards to wipe out the national assets of the offending institution. Indeed, the interpretation placed on s. 2(a) by the Supreme Court of Canada privileges the protection of the individual rather than the institution. In R. v. Big M Drug Mart, Dickson C.J.C. stated:

> Freedom must surely be founded in respect for the inherent dignity and the inviolable rights of the human person....an emphasis on individual conscience and individual judgement also lies at the heart of our democratic political tradition. The ability of each citizen to make free and informed decisions is the absolute prerequisite for the legitimacy, acceptability, and efficacy of our system of self government....
> whatever else freedom of conscience and religion may mean, it must at the very least mean this: government may not coerce individuals to affirm a specific belief or to manifest a specific practice for a sectarian purpose.[15]

The judicial desire to protect the individual from coercion by the state is commendable - an enforced faith is no faith at all, as post-Constantinian Christianity occasionally appreciates. Yet, the understanding of s. 2(a) as exclusively concerned with the individual and not at all with the institution, which nurtures and sustains the individual believer, suggests that when courts have to choose between the two, the direction from the Supreme Court of Canada is to protect the individual rather than the institution (presuming, of course, that the institution has not acted wrongfully). One occasionally suspects that some courts see religious institutions through modern, secular, liberal spectacles, as authoritarian, hierarchical and oppressive institutions from whose grasp individual believers require release. A recent example may be the view expressed by McLachlin J. in Adler v. Ontario,[16] that the public secular school system is more likely to promote a tolerant harmonious multicultural society than religious schools which promote intolerance, and therefore, should be denied public funding.

The myth that the state prizes religious institutions as socially useful is just that. DeTocqueville's observation that religious institutions are the first political institution through which individuals are schooled in morality, self-restraint, the rule of law and the habits of public duty has yet to penetrate the consciousness of the Canadian elite.

The sixth myth is that Christian churches enjoy complete or almost complete freedom to shape and determine their present role in Canadian society and their outreach into that society. After all, did not Dickson C.J.C. define freedom of religion in Big M in these grand words:

> The essence of the concept of freedom of religion is the right to entertain such religious beliefs as a person chooses, the right to declare religious beliefs openly and without fear of hinderance or reprisal, and the right to manifest belief by worship and practice or by teaching and dissemination.[17]

But he also went on to say:

> Freedom can primarily be characterized by the absence of coercion or constraint. If a person is compelled by the state or

> the will of another to a course of action or inaction which he would not otherwise have chosen, he is not acting of his own volition and he cannot be said to be truly free. One of the major purposes of the Charter is to protect, within reason, from compulsion or restraint. Coercion includes not only such blatant forms of compulsion as direct commands to act or refrain from acting on pain of sanction, coercion also includes indirect forms of control which determine and limit alternative courses of conduct available to others. Freedom in a broad sense embraces both the absence of coercion and constraint, and the right to manifest beliefs and practices. Freedom means that, subject to such limitations as are necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others, no one is forced to act in a way contrary to his beliefs or his conscience.[18]

In fact, the application of the liberal idea that freedom of religion is restricted by the rights of others[19] in subsequent cases, has resulted in four distinct limitations being placed on the practice of religious freedom in Canada today: (i) the rights of others to public safety, order, health, or their own morals and fundamentals rights and freedoms; (ii) the right of the state to impose burdens on religion which are "trivial or insubstantial";[20] (iii) the right of the state and the courts to impose unequal treatment on different religious groups in the promotion of freedom and equality;[21] and (iv) the overriding s. 1 right of the courts to inquire whether there are other "reasonable limits demonstrably justifiable in a free and democratic society", so as to justify restricting or limiting freedom of religion. Preach the gospel in its fullness on the street-corner or in the media or even from the pulpit and learn how limited your religious freedom may be, once the special interest groups hear of your activities!

Arguably, the net effect of the first 15 years of s. 2(a) litigation is to create a legal environment more restrictive of religious freedom than the previous common law in which no explicit restrictions existed at all. Too often, it seems, the balance is weighed in favour of those who would restrict the exercise of religion, and especially Christianity, as shown by judicial decisions eliminating religious education and exercises in schools,[22] denying funding to religious schools on an equality basis with the secular and denominational schools,[23] or denying minority religious group parents the right to bring up their children in their faith,[24] or make medical decisions for them in accordance with their religious beliefs.[25]

It should be recalled that, historically, while Christianity has necessarily made judgments about conduct which does not conform to divinely ordained norms of behaviour, that it has always been the state and not the church which has had the temporal power to oppress others through legislative fiat, judicial order or military force. In Western history, it has always been the state which has been the greater threat to religious freedom than the church, for reasons of its own, that is, secular reasons, and historically, as today a favoured device of the state has been neutral laws of general application, thereby justifying "trivial and insubstantial infringements" of individual religious freedoms. The American First Amendment was designed by their founding fathers to keep the state away from religion. Our Charter endows the state with control over religion.

Freedom of religious expression belongs to the realm of deadly myth in Canada today.

The seventh deadly myth is that in addition to shaping their present, Christian churches and individuals of faith also enjoy the right in law to shape their future, that is, their children. One sometimes suspects that no one is more conscious of the dictum that the end of Christianity is never more than one generation away than contemporary anti-Christian social activists. Would that all Christians were as perceptive. As the examples given earlier indicate, myth though religion might seem to the secular society, in which we live, myth it is that Christians retain control of their futures in their own children.

Recently, historians of ideas in Canada have argued that the secularization of Canadian society since the late 19th century owed its origins in large part to the loss of faith first apparent among leading Protestant clergy and professors, who once constituted the intellectual elite of Canadian society. It subsequently spread to the political and economic elites in the early 20th century and downward throughout Canadian society since. Whatever the Bibby polls might indicate, true conformity of life and faith to Christ is characteristic of a minority of Canadians today, including church members, and the secularization of the law since the Charter simply confirms the evolving secularization of Canadian society over the past two or three generations. Canada is now a nation of religious minorities, bobbing in a largely secular ocean. Since 1982, two aspects of this secularization have become particularly menacing: first, secularization is now enforced by the sanctioning powers of the state at the instance of the judicial and executive branches of government; and secondly, secularization is justified by the judiciary on the basis that it is neutral, necessarily rational and individual liberty-enhancing. These too are myths and profoundly dangerous and deadly to all institutions and individuals of faith.

While the response of Christian churches and individuals to these challenges must be multi-faceted, I want to suggest the importance of one facet, that is, the strengthening of Christian institutions qua institutions. At a time when real Christians are aliens in relation to the dominant cultural and moral norms of Canadian society, especially those of the political elite, Christian institutions acquire significance as centres of meaning, reinforcement, refuge and empowerment for ordinary believers - as bulwarks against the world, against the state. Thus,

it is especially important to the present and to the future to ensure the institutional integrity and financial solvency of these institutions by efficient stewardship of their personnel and temporal property, which remains extensive, if not always well-managed. Church administration, whether at the national or the congregational level, is no longer a marginal or glamourless vocation but vital to the institutional and social future of the Christian churches.

While I may here today be preaching "only to the choir", unfortunately too many laity and clergy involved in church administration entertain such prejudices about the importance of temporal property, the law, and lawyers especially, that they are thereby rendered less likely to appreciate and exploit these resources to ensure the maximum temporal integrity and financial solvency of their institutions. However threatening the public law of the land increasingly is, the private law, the common law, relating to contract, property and corporate organizations, remains a source of doctrines, concepts, techniques and vehicles to protect property and ensure its growth. The use of contract to define employment relationships; the use of not-for-profit corporations and charitable status to preserve institutional status and assets; and the use of administrative law rules of procedure, such as the rules of natural justice, to ensure fair ecclesiastical procedures, are just three examples of the resources available through the private law. Moreover, the effective use of the resources of the private law should ensure that internal disputes are minimized and that public scrutiny and resulting public opprobrium are avoided, thereby maintaining public credibility for the Christian churches, of which much has been lost in recent years. Disdain for and suspicion of law and lawyers is congruent with the anti-capitalist and pro-socialist stance of the Christian churches for most of this century, so the psychological hurdle church administrators must overcome remains high. Swallow hand and jump-the alternative may be oblivion.

Concern for the institutional integrity of the Christian churches today is not just one response to the political threats posed to them by post modern Canada. It is also theologically mandated of the church in all times and all places. The church is the Body of Christ, both invisible and visible, and the repository of the Scriptures and the inheritance of the faith for the faithful of all generations. Its calling is to preach the Gospel from generation to generation and to invite into its midst all whom God has chosen. Without the visible Church, the Gospel may no longer be heard in the land. Effective stewardship of the good gifts - the temporal
gifts - God has bestowed on His visible Kingdom is required of all to whom they are entrusted for the advancement of His Dominion from sea to sea.

As well as having a number of lawyers participate, Professor M.H. Ogilvie, Professor of Law at Carleton University in Ottawa and a member of the Bar of Ontario will be providing an overview on the topic of "The Seven Deadly Myths - What Every Church Administrator Should Know about the Law". Professor Ogilvie is a well respected legal scholar and is the author of an upcoming book on *Religious Institutions and the Law in Canada*.

5. U.S. LEGAL OMENS ON THE HORIZON: RECENT LEGAL DEVELOPMENTS IN THE UNITED STATES

George (Chip) Grange, a founding partner of the law firm of Gammon & Grange in Washington, D.C., a firm which specializes in charities and non-profits, gave a key-note address on *U.S. Legal Omens on the Horizon: Recent Legal Developments in the United States.* In his presentation, Mr. Grange dealt with various issues including:

1. The Effect of Fraudulent Transfer Laws in the United States on Fundraising;
2. Is Donor-Designated Giving Really Donor-Controlled Giving?
3. The Hazards of Planned Giving (Charitable Gift Annuities);
4. Our Churches Should Not Be The Last Remaining Haven for Child Abusers and The Need To Implement A Comprehensive Screening Of Applicants And Criminal Record Checks For Volunteers And Employees;
5. Sexual Harassment: An Expanding Area of Liability for Churches;
6. The Importance of Christian Conciliation Policy "A Gentle Answer Turns Away Wrath"; and
7. The Importance of Conducting a "Legal Audit" To Avoid Problems Before They Occur.

Tapes of his presentation and handout are available by contacting the Canadian Council of Christian Charities at (519) 669-5137. Excerpts from the "Non-Profit Alert" published by Gammon & Grange will be appearing in future issues of *Church & the Law* Update.

For churches or Christian charities that are considering expanding into the United States or need more information about U.S. law, information or an initial consultation can be obtained by contacting George (Chip) Grange at Gammon & Grange, 8280 Greensboro Drive, 7th Floor, McLean, Virginia, 22102-3807, U.S., Telephone number (703) 761-5000, Facsimile number (703) 761-5023. George (Chip) Grange and the firm of Gammon & Grange.

6. REVENUE CANADA'S RECENT POSITION ON AGENCY AND JOINT MINISTRY AGREEMENTS

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

As outlined in the CCCC Bulletin No. 2 (July 15th, 1996) on Joint Ministry Agreements, Revenue Canada is taking a closer look at charitable organizations carrying on activities outside of Canada through joint ministry or partnership arrangements. What is problematic for charities is the increased scrutiny by Revenue Canada in this area, while at the same time the limited amount of written direction from Revenue Canada concerning what will be considered by them in determining whether or not arrangements for carrying on activities outside of Canada will meet with their approval. Recently, the writer communicated with Carl Juneau, the Director of Charities for Revenue Canada, concerning a number of issues and requesting clarification concerning their position on agency agreements and joint venture agreements. As the response received was very helpful in explaining the position of Revenue Canada, it has been included in this Update.

What follows is a compilation of six related points each starting with a summary constituting the writers *summation* of a telephone conversation with Carl Juneau of Revenue Canada followed by his written response:

1. Summation - Although joint ministry agreements are often useful tools in situations involving the transfer of monies to non-qualified donees, they are not necessarily "a panacea" for all such transfers of money. There might be situations where an Agency Agreement would be the appropriate document to use.

   Response from Revenue Canada - As an initial remark, I would emphasize that while it is true that joint ministry agreements are useful tools in many situations, they should never be seen as a simple method for transferring money to non-qualified donees. Section 149.1(1) of Income Tax Act clearly stipulates that charitable organizations must carry on their own activities. Therefore, Canadian charities are required to control, direct and supervise any activities undertaken and expenditures made under a joint ministry agreement.

   You are correct in noting that there are situations where an agency agreement may be more appropriate than a joint ministry agreement. Not all joint venture/joint ministry agreements satisfy the statutory requirement for control, direction and supervision, due to the Canadian charity's lack of involvement in the planning and execution of the joint undertaking. Indicia of whether a charitable joint venture/joint ministry arrangement is acceptable for departmental purposes include:

   - *a presence of bona fide members of the Canadian charity on the board of directors of the coordinating body carrying on the joint projects;*
   - *a presence in the field of bona fide members of the Canadian charity and control by the charity over the hiring and firing of labour involved in the projects;*
   - *joint ownership by the Canadian charity of assets and property involved in the projects;*
   - *input by the Canadian charity into project initiation and follow through, including the charity's ability to direct or modify the projects and to establish deadlines or other performance bench marks;*
   - *the Canadian charity is a signatory to loans, contracts and other agreements arising from the projects;*
   - *the Canadian charity receives vouchers, cancelled cheques, etc., and acts as a bookkeeper for the projects;*
   - *the Canadian charity's review and approval of the project's budgets, the availability to the charity of an independent audit of the projects and the charity's option to discontinue funding;*
   - *the Canadian charity's authorship of procedures manuals, training guides, standards of conduct, etc.; and*
   - *the on-site identification of the projects as being one the Canadian charity.*

   If it appears that a joint venture/joint ministry does not fit within these parameters - with suitable regard to the particular nature of the undertaking - then it may be preferable for the Canadian charity to meet the statutory requirement of carrying on its own activities by means of an agency agreement.

2. Summation - The key issue that Revenue Canada is concerned about in the transfer of monies to “non-qualified donees” is whether or

not there is sufficient control being exercised by the Board of Directors of the Canadian charity over the expenditure of monies being transferred to the agent acting on behalf of the charity.

Response from Revenue Canada - The Department has developed some recommendations to assist Canadian charities in establishing that they are truly acting as the principal in the agency relationship. At the very least, every agency agreement should include the following elements:

- *the names and addresses of both parties;*
- *a comprehensive description of the specific activities (actual and proposed) for which funds will be transferred, in sufficient detail to clearly outline the limits of the authority given to the agent to act on behalf of the Canadian registered charity on its behalf;*
- *provision to update the agreement as new projects are initiated by the Canadian charity in order to provide descriptions of the specific activities as per above;*
- *provision for written progress reports (or other documentation from the agent such as minutes of meetings);*
- *provision for instalment payments by the Canadian charity based on confirmation of reasonable progress (for example, board meetings, letters and visits) reflecting the fact that the resources provided to date have to be applied for the specific activities outlined in the agreement;*
- *provision for the Canadian charity to have discretion in withholding or withdrawing the funds or other resources;*
- *provision for the maintenance of adequate books and records in Canada;*
- *provision for the Canadian charity's funds to be kept separate from those of the agent and for the agent to keep separate books and records; and*
- *the date and signatures of both parties.*

3. Summation - In this regard, one of the key indicators that Revenue Canada will look for is whether or not the agent has placed the monies received by the charity into a segregated account.

   Response from Revenue Canada - The segregation of funds is important to any agency relationship. However, as indicated above, it is only one aspect of an adequate arrangement under the Act.

4. Summation - When monies are expended by the agent out of the segregated account, there will need to be documentary evidence showing how the monies have been expended, such as the production of an invoice or a receipt.

   Response from Revenue Canada - We would agree that, whenever possible, an agent must account for expenditures through the production of documentary evidence.

5. Summation - The fact that monies held by the agent in a segregated account are co-mingled with monies of the agent in relation to a project that both the agent and the charity are involved with does not necessarily violate the viability of an agency agreement. The fact that monies from the segregated account are combined with monies of the agent, though, does impose a greater duty upon the agent to evidence compliance with the contractual obligations of the Agency Agreement.

   In such situations, evidence will be needed to show how the monies that have been co-mingled together with the monies of the agent have retained the identity of the Canadian charity. For instance, if monies held by the agent are transferred into the general account of the agent so that monies of the agent and the segregated monies can be combined together for payment of a single invoice, then the invoice will need to be marked to show that a portion of it was paid with by monies from the segregated account of the agent, with a copy of the invoice being included in the regular reporting requirement of the agent to the charity.

   Response from Revenue Canada - In general, the segregation of principal and agent funds should be respected. Where commingling takes place, we would require a complete and detailed accounting for every expenditure out of the mixed fund. The invoicing procedure you describe, if applied to all expenditures involving the Canadian charity's funds, would seem to satisfy this requirement.

6. Summation - What is not permissible in relation to co-mingling of funds in an agency relationship is where the agent co-mingles money of the charity with monies from another source that are not monies of the agent itself. In such situation, the agent would be simply acting as a broker of monies on behalf of two or more parties instead of an agent of the Canadian charity. In such a situation, a Joint Ministry Agreement would be the appropriate document to reflect the joint venture nature of the arrangement.

   Response from Revenue Canada - We would point out that where the funds of several organizations are commingled, this will not necessarily be legitimized by the adoption of a joint ministry agreement.

   Although a joint ministry agreement is likely the appropriate instrument in these circumstances, it will be measured against the criteria listed above in order to determine whether the Canadian charity is exercising a sufficient degree of control, direction and supervision in the framework of the shared endeavour.

7. PROPOSED CHANGES TO INVESTMENT POWERS IN THE *TRUSTEE ACT* OF ONTARIO

The Province of Ontario introduced Bill 122 on February 3rd, 1997 [known as the "*Red Tape Reduction Act (Ministry of the Attorney General), 1997*"] which includes substantive amendments to the investment powers as set out in the *Trustee Act* of Ontario. The thrust of the proposed amendments is to replace the detailed list of authorized investments for trustees with a general power to invest in any property that a prudent person might invest in, including mutual funds and in certain situations common trust funds maintained by Loan and Trust Corporations. A trustee will be required to exercise the care, skill, diligence and judgement that a prudent investor would exercise in investing trust property. The Attorney Generals Office has advised that the proposed amendments to the *Trustee Act* are based on principles approved by the Uniform Law Conference of Canada.

The amendments set out the criteria that a trustee must consider in planning the investment of trust property. In addition, the amendments impose an obligation upon a trustee to diversify the investment of trust property to the extent that is appropriate.

Although the proposed amendments to the *Trustee Act* in eliminating the restrictive list of investments is a positive step, it will also mean additional liability exposure for trustees, including directors of charities. The "prudent investor" standard of care places greater responsibility and expectations upon directors of charities concerning what investments charitable money can be invested in, particularly since the amendment includes a list of criteria that must be considered in making investment decisions. A more detailed analyses of the proposed amendments to the *Trustee Act* will be included in future issues of the *Church & the Law* Update.

8. COURT ORDERS U.S. CHARITY TO RETURN MONEY TO ITS CANADIAN COUNTERPART

In a recent unreported decision of *Humane Society of Canada for the Protection of Animals and the Environment vs. Humane Society in the United States* (Judgement given on January 7th, 1997) the Ontario Court of Justice (General Division) ordered that the Humane Society in the United States to return in excess of $1,000,000.00 to the Humane Society in Canada.

The case involved a take over by the U.S. Charity of the Board of Directors of the Canadian Charity resulting in a majority of U.S. Directors on the Board of the Canadian Charity. When the U.S. Charity produced a large bill for alleged expenses in excess of $1,000,000.00 incurred on behalf of fundraising campaigns for the Canadian Charity, the Board of Directors of the Canadian Charity (made up of a majority of U.S. residents) authorized the removal of over $1,000,000.00 from the bank account of the Canadian Charity to pay the alleged debt owed to the U.S. Charity.

The Court found that U.S. Directors were acting as agents for the U.S. Charity and were in a breach of their fiduciary duty when they authorized the transfer of $1,000,000.00 from the Canadian Charity to the U.S. Charity. The Court characterized the conflict of interest as follows: "I cannot imagine a more glaring conflict of interest or a more egregious breach of fiduciary duties. It demonstrated a overweening arrogance of a type seldom seen".

This decision emphasizes the importance of having an independent Board of Directors made up of a majority of Canadian residents who are acting in the best interests of the Canadian Charity and not simply as agents for a foreign charity. In addition, where one member of the Board of Directors is a representative of a Board of a foreign charity, he or she must declare a conflict of interest in relation to any decisions made by the Canadian Board of Directors that involves payment to the related foreign charity.

FOOTNOTES (for Paper by Professor M.H. Ogilvie)

1. Matt. 22:15-22; Mark 12:13-17; Luke 20: 19-26.

1. Rom. 13:1-7.

1. Ps. 72:8.

1. (1879) 43 U.C.Q.B. 285 (C.A.).

1. Ibid., per Harrison C.J.O. at 293, 299, 304.

1. [1991] 91 D.T.C. 5491 (F.C.T.D.).

1. Ibid., per Muldoon J. at 5497.

1. (1988) 65 O.R. (2d) 641 (Ont. C.A.).

1. Ibid., per Lacourcière J. at 674.

1. (1985) 18 D.L.R. (4th) 321 (S.C.C.).

1. (1986) 35 D.L.R. (4th) 1 (S.C.C.).

1. Ibid., per Dickson C.J.C. at 34-35.

1. Lindenberger v. U.C.C. (1987) 20 O.A.C. 381 (C.A.); McCaw v. U.C.C. (1991) 82 D.L.R. (4th) 289 (Ont. C.A.); Davis v. U.C.C. (1991) 92 D.L.R. (4th) 678 (Ont. Gen. Div.).

1. (1992) 97 D.L.R. (4th) 17 (S.C.C.).

1. Supra, n. 10 at 353-354; 361-362.

1. Unreported decision of 21 November 1996.

1. Supra, n. 10 at 353.

1. Ibid., at 354.

1. P. v. S. (1993) 108 D.L.R. (4th) 287 (S.C.C.) per L'Heureux-Dubé J. at 317; B. v. Children's Aid Society of Metropolitan Toronto (1995) 122 D.L.R. (4th) 1 (S.C.C.) per Iacobucci and Major JJ. at 88.

1. Supra, n. 11 per Dickson C.J.C. at 34-35.

1. Ontario Education Act Reference (1987) 40 D.L.R. (4th) 18 (S.C.C.).

1. Zylberberg, supra, n. 8; Canadian Civil Liberties Association v. Ontario (Minister of Education) (1990) 71 O.R. (2d) 341 (C.A.).

1. Adler, supra, n. 16.

1. Young v. Young (1993) 108 D.L.R. (4th) 193 (S.C.C.).

1. B., supra, n. 19.

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