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CHURCH & THE LAW UPDATE - No. 12

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

1. OVERVIEW

This is the twelfth 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) information on the upcoming 1998 Annual *Church & the Law* Seminar;
(ii) an explanation of the proposed New "Prudent Investor" standard for investments under the *Trustee Act*, as amended by Bill 122 and its impact upon charities;
(iii) an executive summary of the revised IT-110R3 Bulletin issued by Revenue Canada dealing with gifts and official donation receipts;
(iv) a commentary on a recent decision involving a Canadian court ordering that a U.S. charity return money to its Canadian counterpart;
(v) information on revised Precedent Materials on Church Incorporation; and

2. 1998 ANNUAL *CHURCH & THE LAW* SEMINAR

The 1998 Annual *Church & the Law* Seminar will be held on **Wednesday, February 4th, 1998** at Queensway Cathedral in Toronto. One of the confirmed speakers is Carl Juneau, Director of Charities for Revenue Canada, who will be addressing a number of issues relevant to churches and ministries, including information on completing the revised annual T3010 return that has raised concerns for many charities.

Some of the other topics that will be presented include:

1. Christians in the "Lion's Den" - What To Do in the Face of Discrimination
2. The Do's and Don'ts of Church Incorporation - How to Avoid Disasters
3. What Church Leaders Can Learn From Cannon Law - Legal Perspective
4. Troublesome New Investment Powers for Charities - And Other Legislative Changes in Ontario
5. Looking a Gift horse in the Mouth - Legal Issues in Fundraising For Churches and Charities
6. How to Stay on the right Side with Revenue Canada - Including New Annual Reporting Requirements
7. A Review of Recent Decisions and Legal Developments That Affect Churches and Charities
8. Sexual Abuse and Insurance Protection for Churches and Charities
9. Update on Federal Legislative Changes Affecting Charities

10. Copyright Crunch - What the New Copyright Act Means for Churches and Charities

3. THE APPLICATION OF THE NEW "PRUDENT INVESTOR" STANDARD FOR CHARITIES IN ONTARIO

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

A. Overview

On February 3rd, 1997, the Province of Ontario introduced Bill 122, which proposes amendments to the authorized investment provisions contained in the *Trustee Act* of Ontario. The legislation has yet to receive second or third reading but is expected to be adopted into law in the near future. The thrust of the proposed amendments to the *Trustee Act* is to replace the statutory list of permitted investments by establishing a statutory "prudent investor" standard to determine what investments trustees can invest in. This new statutory standard would generally apply to the investment of charitable funds by directors and other members of controlling boards of charities.

While there are many positive aspects to the new legislation, such as providing authorization for investments in mutual funds, there are also troublesome aspects of the new legislation that will increase the liability exposure for directors of charities, particularly as it relates to liability for inadequate investments. Since the matter of investment powers for trustees is a technical area of the law that requires a careful analysis of statutory provisions and the application of case law, what follows is intended to be only a brief summary of the new legislation. A more detailed and comprehensive analysis is expected from other commentators in the near future.

B. Review Of Current Trustee Investment Powers In Ontario

All charities that operate in Ontario are considered to have trust obligations with respect to their charitable funds. As such, the members of the controlling boards of those charities, whether they be boards of directors, boards of trustees or boards of management, are considered to have trustee-like duties as fiduciaries in the administration of charitable funds. Historically, trustees were expected to make investment decisions in accordance with what was expected of a "prudent person". In Ontario, this common law rule was supplanted by a statutory list of permitted investments under the *Trustee Act*, which list dates back to the turn of the century when it was more important to preserve property instead of maximizing investment returns.

The current provisions of the *Trustee Act* have been updated a number of times since the early 1900's but continue to remain limited to conservative investments such as:

- government and municipal securities;
- first mortgages on real estate in Canada;
- secured bonds;
- loan corporation debentures;
- trust corporation guaranteed investments;
- preferred and common shares in "blue chip" companies.

Although the current statutory list of investments under the *Trustee Act* applies only if the investment is in other respects "reasonable and proper", directors of charities are seldom challenged for making an investment that produces a poor rate of return, provided that the investment was included in the statutory list of investments under the *Trustee Act*. As such, although directors presently will be liable if a loss occurs from an investment made outside of the statutory list, such as a mutual fund, they are less likely to be held to account for a poor rate of return if it involves an investment from the statutory list of investments. As will be seen later, this result will change under the proposed amendments to the *Trustee Act* contained in Bill 122.

Also currently under the *Trustee Act*, section 35 allows a court to grant relief for technical breaches of trust if the trustees otherwise were acting honestly and reasonably. This means that if a board of directors was making investments outside of the statutory list of investments, such as in a mutual fund, then depending upon the circumstances, i.e, whether a loss had resulted, it might be possible to obtain court sanctioned relief for an improper investment by relying upon the relieving provisions of section 35 of the *Trustee Act*.

Generally, the current statutory list of investments under the *Trustee Act* applies only if the charity is either (a) a corporation or a trust created in Ontario, or (b) a charity incorporated federally or in another province with its head office or principal place of business in Ontario; has constating documents in either situation that:

1. are silent about investment powers; or
2. describes its investment powers as being "those authorized by law for trustees to invest in" or such similar terminology.

Conversely, this generally means that the current statutory list of investments under the *Trustee Act* does not have application if the charity is either:

1. a corporation or a trust created in Ontario and already has a broad form of prudent investor power in its constating documents; or
2. is incorporated federally or in another province and refers to a specific investment power, such as that contained in the *Federal Insurance Companies Act*.

As a result, the current statutory list of investment power under the *Trustee Act* does not have broad universal application for charities in Ontario. This is to be contrasted with the new "prudent investor" rule under the proposed amendments to the *Trustee Act* that would generally apply to most charities located or operating in Ontario.

C. Specifics Of Proposed New "Prudent Investor" Rule Under Bill 122

The current statutory list of permitted investments under the *Trustee Act* has for some time been recognized as not reflecting economic reality or the effect of inflation. In 1984, the Ontario Law Reform Commission responded to this dilemma by recommending that the statutory list of investments be discarded for a "prudent investor" rule. In 1996, the Uniform Law Conference of Canada adopted the model "*Trustee Investment Act*" that if adopted would have removed the legal list of permitted investments, established a "prudent investor rule", permitted investments in mutual funds, and permitted delegation of investment decisions to professional investment advisors.

Unfortunately, Bill 122 does not include all of the recommendations of the Uniform Law Conference of Canada under its draft "*Trustee Investment Act*". The failure to adopt all of those recommendations will result in serious practical problems involving investments for charities in Ontario. As such, the Government would do well to reconsider adopting the model "*Trustee Investment Act*". At present, though, it does not appear that the Government is intending to make any changes to the proposed legislation under Bill 122. As a result, it is important for charities to understand the new investments powers proposed under Bill 122. The principal changes are summarized below as follows:

1. The statutory list of investments is to be deleted and replaced with the statutory standard that a trustee "must exercise the care, skill, diligence and judgement that a prudent investor would exercise in making investments". This establishes a new mandatory standard of care for investments for a trustee and is generally considered to be an objective standard, although it may be applied by the courts in a subjective context. This means that a lawyer or banker on the board of directors of a charity would generally be expected to exercise a more sophisticated sense of investment acumen than that of an individual who did not have the benefit of a higher education or business experience.

2. A trustee will be able to "invest trust property in any form of property in which a prudent investor might invest". In addition, notwithstanding any rule of law that otherwise prohibits the delegation of investment powers, a trustee will be able to invest in mutual funds or in common trust funds where there are two trustees, one of the trustees is a trust company and the common trust fund is maintained by that trust company. This amendment permitting investments in mutual funds is of significant benefit to many charities that are currently investing in mutual funds in Ontario without legal authority. However, since there is no definition of what a "mutual fund" is in Bill 122, it is likely that the courts will be called upon to interpret what is meant by this investment term.

3. The proposed amendments establish the following list of seven mandatory criteria that a trustee must consider in making an investment in addition to any other criteria that are relevant under the circumstances:
   - general economic conditions;
   - the possible effect of inflation or deflation;
   - the expected tax consequences of investment decisions or strategies;
   - the role that each investment or course of action plays within the overall trust portfolio;
   - the expected total return from income and the appreciation of capital;
   - needs for liquidity, regularity of income and preservation or appreciation of capital;
   - an asset's special relationship or special value, if any, to the purposes of the trust or to one or more of the

beneficiaries.

If a trustee does not consider each criterion to the same degree, then the trustee will likely have to demonstrate that it was prudent to prefer one criteria over another. Generally speaking, this list of mandatory criteria consists of an attempt to codify the common law concerning what a "prudent investor" is expected to consider before making an investment decision. However, the fact that this list is set out in legislation will increase the responsibility placed upon directors to carefully consider each criterion and therefore increase their exposure to liability if they fail to do so.

4. The amendments also state that a trustee must diversify the investments of trust property to an extent that is appropriate to;

   - the requirements of the trust; and
   - the general economic and investment market condition.

   This means that simply placing monies into one investment, whether it be a G.I.C. or even a "balanced" mutual fund, may not satisfy the requirement that trustees "diversify" the investments. This in turn raises the question of how far trustees must go in diversifying investments. Are issues of morality in investment decisions justification not to make an investment notwithstanding the mandatory diversification requirement in the legislation? In this regard, if the incorporating documents of a charity have charitable objects that include a religious statement of faith or some other value statement, then Bill 122 states that the new statutory investment requirements will be considered secondary to the terms of the trust. However, if the charity does not have clearly stated charitable objects to reflect the moral position of the charity, then it may become debatable concerning how far the directors of the charity must go in diversifying investments, i.e, where there are profitable opportunities to invest in tobacco companies and/or casino related businesses that religious charities might understandably find offensive.

5. Although the amendments will permit trustees to obtain investment advice and to rely upon that advice, the trustees are still not permitted to delegate investment decisions to an investment advisor or manager. While trustees will not be liable for the investment advice that has been relied upon, the relief from liability only exists if a prudent investor would rely on such advice. As a result, the decision to retain an investment advisor may result in the same liability for directors as if they were making the investment decision themselves, since a poor decision in deciding which investment advisor to retain will expose the directors to the full liability resulting from the recommendations made by the investment advisor.

6. Relief from liability available for trustees will be relieved from liability only if the loss resulted from following an investment plan that comprised reasonable assessments of risk and that a prudent investor would adopt in comparable circumstances. As such, there will be very little practical protection for trustees under the amendments. More importantly, the relief that is currently available for technical breaches of trust under Section 35 of the *Trustee Act* will no longer be available for breaches of trust relating to investments. This is an unfortunate restriction and means that directors who are found in breach of trust will not be able to look to the court for relief, even if the directors acted in good faith.

7. Although the amendments state that if a trustee is liable, the court can look at the overall performance of investments in assessing damages against the trustee, each separate investment decision will still result in a separate finding of breach of trust and resulting damages on a personal basis, with the remedial provisions applying only to the assessment of damages, not to a finding of breach of trust.

The new trustee investment powers under Bill 122 are not yet in effect. As a result, investments in mutual funds are not yet permitted in Ontario and where the *Trustee Act* does apply to a charity, investments must be limited to the prescribed statutory list of investments provided for in the Act, provided that there are in all other respects "reasonable and proper".

When Bill 122 does become law, then the new "prudent investor" power will generally apply, in a charitable context, to:

1. all Ontario charitable trusts or charities incorporated by letters patent or by Special Acts, except for Special Act corporations with an existing investment power; and
2. all federal or other provincial incorporated charities that have their head offices or principal places of business in Ontario and do not have specific statutory investment powers, such as the investment authority under the *Federal*

Insurance Companies Act.

As a result, the new trustee investment power proposed under Bill 122 will have much broader application than the current investment provisions under the existing *Trustee Act*.

D. Practical Consequences Of The Proposed "Prudent Investor" Rule

When the Ontario Government introduced Bill 122 to amend the *Trustee Act*, it was generally perceived as providing remedial relief from the overly restrictive investment provisions of the *Trustee Act*. Although the investment power that is proposed will provide more flexibility for professional trustees and those who act under testamentary and inter vivos trusts, its application to directors of charities will have serious consequences which may not have been fully understood by the Government when Bill 122 was given first reading.

Most of the problems with the new legislation could be remedied if the government adopted the provisions of the model "*Trustee Investment Act*" proposed by the Uniform Law Conference of Canada. However, as amendments to Bill 122 are not expected, some of the more important consequences which charities operating in Ontario affected by the new legislation will need to deal with are summarized below as follows:

1. Since the remedial provisions of section 35 of the *Trustee Act* will no longer apply to investments, it would be prudent for charities to review both their current and past investments to determine if investment decisions have resulted in violations of the *Trustee Act* and if so whether consideration should be given to applying for relief from technical breach of trust now under the current Section 35 of the *Trustee Act* before its application to investment is repealed. This is a complicated issue and therefore should be carefully reviewed with legal counsel for the charity before a decision is made in this regard.

2. As a result of the mandatory criteria that will need to be considered by boards of charities, such as taking into account the effect of inflation and the requirement to diversify investments, directors of charities will now be called upon to account not only for potential losses that occur from investment decisions but for income that might have been earned through more creative and aggressive investment choices. As such, directors will be found liable for income that is not earned as well as for losses that are sustained from imprudent investment decisions, whether from risk taking or from over caution. This is not a responsibility that most directors are either aware of or are prepared to assume.

3. The board of directors will need to become familiar with the new investment provisions of the *Trustee Act* and consider each of the mandatory investment criteria before making any investment decisions. The board members may need to record each investment decision with reference to the mandatory investment criteria having being considered and why some criteria may have been given greater consideration than others.

4. The board of a charity, even a small charity, will need to consider retaining an investment advisor with a proven reputation to provide carefully documented investment recommendations to the board. The investment advisor should provide a written report, which in turn should be attached to the board minutes. The board of a charity will need to carefully monitor the performance of its investment advisor and be prepared to change advisors if a "prudent investor" would do so in similar circumstances. To simply rely upon a relative of a board member or a "friend" of a charity to provide investment advice will no longer be sufficient evidence of due diligence.

5. Investment decisions should be made by the full board of directors instead of only an executive committee or finance committee, since the decisions that are made will have a direct impact upon every board member, whether they were part of the investment decision or not.

6. The board of directors for a charity will need to meet as frequently as investment decisions are required to be made, which in turns means that board members will need to attend every board meeting, unless absolutely necessary, since absence from board meetings will not necessarily relieve them from liability for investment decisions that are made in their absence.

7. In the event that a board member disagrees with an investment decision, it is essential that the board minutes reflect the objection by a board members. If a board member did not attend a board meeting and subsequently learns of an investment that they do not agree with, then that board member should voice his or her opposition at the next board meeting and preferably in writing to all other board members before the board meeting takes place.

8. Board members of a charity need to be thoroughly informed about the responsibilities that they face in making investment decisions as a "prudent investor" would. This would also require board members to become generally well informed on investment matters. Just as ignorance of the law is no defence, ignorance or naivety in investment issues will be no explanation in the face of an allegation of breach of trust involving investments.

9. In recognition of the increased responsibility and liability placed upon directors of charities concerning investment decisions, unless a board member is prepared to fulfil the fiduciary obligations placed upon them under the proposed amendments to the *Trustee Act*, they should either not become board members in the first place or if the are already on the board, they should consider tendering their resignation.

10. For those charities impacted by the *Trustee Act* that are incorporated federally or in other provinces, consideration may be given, after seeking legal advice, to amending their letters patent to secure broader investment powers to authorize their board of directors to invest in what a prudent person would without being restricted to investment criteria mandated by statute.

E. Concluding Comments On New Investment Powers

In consideration of the practical difficulties that will be faced by directors of charities concerning investment decisions, it is hoped that the Provincial Government will reconsider the provisions of Bill 122 and adopt the "*Trustee Investment Act*" proposed by the Uniform Law Conference of Canada, including the restoration of the ability to obtain relief from technical breaches of trust arising from investment decisions. However, unless present efforts in this regard that are being made by various charitable groups and the Charity and Not-For-Profit Law Section of the Canadian Bar Association of Ontario are successful, then directors of charities in Ontario will need to be become better informed about the investment obligations placed upon them and ensure that they are dealing with investment decisions in a careful and prudent manner as a "prudent investor" would. Being a director of a charity has never been for the faint of heart, and these proposed amendments make that statement even more true than ever.

4. REVENUE CANADA ISSUES REVISED IT-110R3 BULLETIN ON GIFTS AND OFFICIAL DONATION RECEIPTS

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

Revenue Canada issued a revised Interpretation Bulletin IT-110R3 on June 20th, 1997, dealing with gifts and official donation receipts that replaces the previous Interpretation Bulletin IT-110R2 dated May 14th, 1986, as amended earlier by a Special Release dated January 27th, 1989.

The revised Interpretation Bulletin reflects recent changes to the *Income Tax Act* resulting from both the 1996 and 1997 Federal Budgets. The Interpretation Bulletin also deals with a number of recent policy positions by Revenue Canada on the issuance of gifts and official donation receipts, as well as a reorganization and rewording of various of provisions from the previous versions of IT-110R2. Copies of Interpretation Bulletin IT-110R3 and other Interpretation Bulletins can be found at the Revenue Canada Internet site at *http://www.rc.gc.ca*.

The more important changes reflected in Interpretation Bulletin IT-110R3 are summarized below as follows:

1. The Bulletin explains which institutions, other than registered charities, can issue charitable receipts, such as Canadian Amateur Athlete Associations, Canadian Municipalities, the United Nations, and prescribed Universities under Schedule VIII of the *Income Tax Act*, all of which fall within the definition of a "qualified donee" under the Act.

2. The Bulletin includes a helpful summary of the provision in the 1996 and 1997 Federal Budget dealing with deduction limits for charitable donations. The amendments have resulted in a significant increase in the limit for charitable donations as a percentage of net income, the details of which have been explained at length in other articles.

3. The Bulletin explains the amendments contained in the 1997 Federal Budget concerning the new rules for the determination of the fair market value of a gift of an easement, covenant or servitude included in the total ecological gift of a taxpayer.

4. The Bulletin also explains Revenue Canada's recent position that an auction is not a "like event" to a "dinner, ball, concert or show" and as a result, if a charity sells tickets to a dinner auction, the charity cannot issue a donation receipt for any portion of the amount paid for the ticket, even if the price of the ticket clearly exceeds the cost of the dinner. The only exception to this prohibition is where the public are allowed to bid at the auction without being required to pay the admission fee for the dinner. As a result, charities that are intending to sell tickets for an auction dinner and issue charitable receipts for the value of the ticket in excess of the fair market value of the cost of the dinner should clearly indicate in its advertising, on its tickets and on appropriate signs displayed at the dinner that members of the public are invited to attend the auction and participate in the auction without paying the admission fee for the dinner. It is important that copies of such advertising, etc., be preserved to provide evidence of compliance with Revenue Canada's recent position concerning auction dinners.

5. The Bulletin clarifies that while an obligation to make a donation will generally cause the donation to lose its status as a gift, there are exceptions where the obligation is entered into voluntarily and without consideration, such as where a taxpayer honours a personal guarantee concerning a loan to a charity or honours a pledge, provided that the obligation was entered into voluntarily and without consideration.

6. An important change introduced in the Bulletin is the introduction of an objective test in determining whether the benefit provided by a charity in return for a donation is considered to have a "nominal value". In the previous version of IT-110R2, inducements could have no more than nominal value, otherwise the gift could not be receipted. Interpretation Bulletin IT-110R3 now states that a gift will still be considered to be voluntary and made without consideration provided that the item, privilege or other benefit given by the charity in return for the donation does not exceed the lesser of:

   (a) $50.00; or

   (b) 10% of the amount of the gift.

   This test will be of significant benefit to many charities that have been giving nominal inducements to donors but had not been sure how to determine whether or not those inducements were of "nominal value". The test that has been set out by Revenue Canada will clarify this previously "grey area". However, it is still necessary that there be a determination of the fair market value of the "item, privilege or other benefit" given by the charity in return for the donation.

7. The Bulletin also contains an important clarification of Revenue Canada's position on donations that are subject to a general direction. The previous IT-110R2 stated that a donation that was subject to a general direction from the donor would still be considered to be a gift provided that the gift was used in a particular program operated by the charity and the decisions regarding utilization of the donation were the exclusive responsibility of the charity. These rules have remained but have been augmented by an additional requirement that a direction does not result in any benefit occurring to the donor and that the directed gift does not benefit any person not dealing at arms length with the donor. This is consistent with the earlier position of Revenue Canada set out in its 1996 Registered Charities Newsletter No. 6 on tuition fees.

8. The Bulletin also contains a summary of the proposed 50% special tax on charities in respect of acquisitions after February 18th, 1997 of debt obligations and shares of private corporations set out in Resolution No. 21 in the February 1997 Budget. The summary will likely be amended as a result of proposed revisions to Resolution No. 21 introduced by Revenue Canada at the end of July, 1997.

9. Finally, the Bulletin includes a new provision that states that computer generated official donation receipts are acceptable provided that they are legible and the integrity of the computer data entries is sufficiently guaranteed. This explains that guarantees will need to include the circumstances under which the data is entered, stored and protected against alteration. Protection against unauthorized access will be a key security precaution required by Revenue Canada.

The number of changes and the substance of the matters dealt with in Interpretation Bulletin IT-110R3 reflects a major clarification of Revenue Canada's position on gifts and official donation receipts and as such, the Bulletin should be read carefully by those who deal with these issues on a regular basis.

5. 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 v. 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.

6. REVISED PRECEDENT MATERIALS ON CHURCH INCORPORATION

The precedent materials for Letters Patent and General Operating By-law No. 1 that are contained in the book "To Be Or Not To Be - Incorporation of Churches in Ontario", have been updated a number of times since they were last published in January 1996. Given the complexities of the issues involving the incorporation of churches, it is not practical nor advisable to provide ongoing updated precedent materials. For churches and/or their legal counsel who are interested in more current precedent materials for either a double and/or single board structure, contact should be made to the author, Terrance S. Carter at Carter & Associates, Barristers, Solicitors & Trade-mark Agents, 211 Broadway, Orangeville, Ontario, L9W 1K4, Telephone (519) 942-0001, FAX (519) 942-0300, E-Mail tcarter@carterslawfirm.com

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