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CHURCH & THE LAW UPDATE

Terrance S. Carter, B.A., LL.B. - Editor

Updating churches and religious charities on recent legal Developments and risk management considerations

IN THIS ISSUE

This issue of *Church & the Law Update* contains the following articles:

EDITORS NOTE

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

1. IS THE SKY REALLY FALLING? REVENUE CANADA'S POSITION ON DONOR BENEFITS AND ***RELIGIOUS CHARITIES***

BY: CARL JUNEAU, ASSISTANT DIRECTOR, CHARITIES DIVISION, REVENUE CANADA

The following is the full text of a speech given by Carl Juneau, Assistant Director, Charities Division, Revenue Canada, at the Annual 1999 Church & the Law Seminar in Bramalea, Ontario on February 3rd, 1999 for approximately 500 ministers and religious leaders on the topic of what are permissible benefits to donors, with particular emphasis concerning religious charities. The comments in the speech, though, also have general application to charities in understanding what are reasonable limits to donor benefits with regard to gifts and receiving donations.

A. INTRODUCTION

"My topic today deals with gifts to charities and any benefits that go back to the donor as a result of the gift. As an introduction, I'd like to say two words: Alexei Yashin.

Obviously, I can't talk about Alexei Yashin because of the confidentiality provisions in the Income Tax Act. There are probably some aspects to the Yashin incident that the media might not know, and I'm not implying that Mr. Yashin was right or wrong in the case, or that there is an absolute comparison between Mr. Yashin and any other donor. But what's useful here is that I know you've been reading the papers or watching the news on TV, and I know that you have a sense of the range of the public reaction to the incident. And it is this public reaction that I want you to think about.

The public reaction gives us an idea of the problems that can arise with gifts and tax-receipting, and shows that the problems may not be – contrary to what some people believe - entirely Revenue Canada's doing. There is at least a generally accepted notion of fairness present here, in terms of how and why people should give.

The notion of a gift for tax purposes is defined at law. Generally speaking, a gift is a voluntary transfer of property without consideration. It is perhaps clichéed to say that law is a blunt instrument – but it's fairly true, and a law has to be applied to the facts of particular cases.

But the problem is also with some people who see the law, less as a normative guide to human behaviour, and more as an obstacle to be circumvented. Make your legal trail convoluted enough, they think, and chances are the law will not find you – maybe.

As Sir Thomas More once said, some people will suggest: "We're different. We're good. Don't apply the law to us." But we need to apply the law evenly, to get at the Devil. If we cast the law aside, what will we do, ladies and gentlemen, when the Devil turns on us? Behind which law will we hide? We will say to the Devil, "Yes, but there's the law." And the Devil will say "What law?"

I am here to assist people who have a genuine desire to help their neighbours by giving, and who need to deal with the bluntness of the law. In so doing, I'd like to try and answer a few questions.

Over the course of the past year especially, the Canadian Council of Christian Charities has publicly expressed the concern that Revenue Canada was "out to get Christian charities". It raised a number of issues, some of which I propose to address here, and, reacting to what it felt was a legitimate perception, it sought to raise public awareness about the issues through the media - notably through its own newsletter and through *Christian Week.* I also received a couple of calls from more mainstream publications – notably from the *Victoria Times Colonist*, who had apparently received a package of selected information from *Christian Week.*

I am not trying to impugn the intentions of the CCCC or of those people who worry about Revenue Canada - I think most of us do at one time or another. But it is certainly appropriate to try and get more perspective on the issue of gifting and donor benefits.

B. IS REVENUE CANADA SINGLING OUT RELIGIOUS CHARITIES?

One general message that seemed to pervade the debate is that Revenue Canada had singled out Christian charities for particular grief.

I would be foolish to deny that we were indeed auditing several religious organizations. But here are a few statistics: In September of 1998, there were in Canada 76,426 registered charities. Of those, 31,366 organizations, or approximately 41% were religious charities. In the circumstances, it is only fair and logical that a substantial portion of our audits should be directed toward religious charities.

As well, certain types of charities have ways of operating that are different from other charities - and it is understandable that when we choose a particular charity for audit, we are most interested in those aspects of the charity's operations where experience tells us we have found significant abuse in the past. This is a matter of efficiency. If we did audits purely at random, without any audit leads whatsoever, this would significantly reduce the effectiveness of our audit program and result in a proportionate increase in non-compliance.

We know for instance that certain charities are more likely to participate in art donation scams. These are scams where for example the donor purchases a painting at a bargain price, and gives it to a registered charity, usually in exchange for a tax receipt that reflects a highly inflated market value. As it happens, organizations involved in art donation scams aren't usually religious charities. Just so I don't get quoted out of context by some reporter, art donation scams are not rampant but they do occur; they can involve significant amounts of money; in the aggregate, they do involve a lot of money; and they have a significant impact on the affected charity, on the donor's taxes and on resulting state revenues. So for the sake of a sound tax administration, we need to track them down. Are we singling out charities that are likely to issue inflated receipts for donations of art? You bet we are. But is it because we hold a grudge against the type of charity they happen to be, or the art they happen to like? Certainly not.

So it is not because charities are Christian, or because they deal with the environment, or because they send funds abroad that we audit. It is because our role is to see that people comply with the tax law.

C. IS THERE A MOVE AFOOT WITHIN GOVERNMENT TO WITHDRAW THE TAX PRIVILEGES AVAILABLE TO RELIGIOUS CHARITIES?

No, absolutely not. I should add that if a move comes to remove religious organizations from the charitable sector, the impetus will not come from Revenue Canada, it will come from elsewhere.

You should know for instance that the whole legal definition of charity and the tax incentives that go with it are up for discussion at the moment, in the context of reports submitted to government by the Broadbent Panel and by the Kahanoff Foundation in particular.

But as late as last Fall, I broached the question of hiving off religious charities from the rest of the charitable sector, with Department of Finance officials, wanting to find out where the ugly rumour concerning religious organizations got started. And the Finance position at the time was that hiving off religious organizations from the rest of the sector was completely out of the question. The particular Finance official was as perplexed as I was as to the origins of this rumour. I since suspect that the suggestion is coming from other areas of the sector – and Terry Carter can corroborate this.

D. DIRECTED DONATIONS, DONOR BENEFIT, AND DETACHED AND DISINTERESTED GENEROSITY

I would like to talk about the notion of directing donations through charities to particular individuals, and the whole idea that a charitable gift has to be made out of detached and disinterested generosity.

Revenue Canada has an Interpretation Bulletin – IT-110R – that talks about charitable gifts[1]. In particular, paragraph 15(f) of the Bulletin formerly read:

"Gifts directed to a person designated by a donor: A charity may not issue an official receipt for income tax purposes if the donor has directed the charity to give the funds to a specified person or family as opposed to a program. In reality, such a gift is made to the person or family and not to the charity. Donations made to charities can be subject to a general direction but decisions regarding specific beneficiaries of one of its established programs must be the exclusive responsibility of the charity".

Since June 1997, paragraph 15(f) of the Bulletin now reads:

"A charity may not issue an official receipt for income tax purposes if the donor has directed the charity to give the funds to a specified person or family. In reality, such a gift is made to the person or family and not to the charity. However, donation subject to a general direction from the donor that the gift be used in a particular program operated by the charity are acceptable, provided that no benefit accrues to the donor, the directed gift does not benefit any person not dealing at arms' length with the donor, and decisions regarding utilisation of the donation within a program rest with the charity".

The wording has changed, not because Revenue Canada claims the law has changed, but because we felt we had to be more careful: some people were taking the wording of paragraph 15(f) – especially that part that deals with the organization's decisions about beneficiaries, and pushing it beyond its intended limits.

Revenue Canada's intention was to get at tax abusers. We are the first to recognise that the proper characterisation of a gift will often turn on the facts of a given case, and that there are circumstances in which charitable gifts can ultimately benefit certain individuals. However these are gifts that ought to be made for the organization, within the organization's purposes, with the organization's approval and control, and for the organization's own purposes rather than for personal and private advantage.

I will return to the wording of the IT Bulletin in a moment.

E. DETACHED AND DISINTERESTED GENEROSITY

Closely related to this wording is the use of the phrase "detached and disinterested generosity" when explaining how a valid gift should be made. The concern expressed by some arises from the use of the phrase in recent and more or less routine Revenue Canada correspondence dealing with gifts, and stating that a gift has to be made from "detached and disinterested generosity".

This expression has been used by Revenue Canada for quite some time, but it has been used more and more frequently in past years, mainly because we are increasingly concerned that certain charities and donors are using ingenious interpretations of the legal concept of gifting to defeat the intent and the letter of the law, and obtain tax benefits where none should be had. This problem is not unique to a single organization or group of organizations. It shows up in different areas of the sector under different guises. With private foundations, it used to show up in the form of loan-backs, until last year's legislation on non-qualifying securities. With athletic associations, it shows up in the form of coaching sessions for little Johnny.

It is suggested, mostly by the Canadian Council of Christian Charities, that the concept of detached and disinterested generosity is new, that it is a concept imported wholesale from Australian law, that it has been arbitrarily imported by Revenue Canada, and that it is not an accurate statement of Canadian law.

In point of fact, the concept originally comes from British common law, of which both Canadian and Australian common law are direct descendants. Notably, in 1896, Lord MacNaghten – the very same one who gave us the now-famous four categories of charitable purposes - dealt with the case of an art union, which gave its subscribers an engraving of a work of art and a chance to win an artwork in the form of a prize [2]. Lord MacNaghten did not view the subscribers' contributions in that case as gifts, and in deciding so, he commented on the concept of an "annual voluntary contribution". He wrote:

"Apart from authority, the meaning of the provision would seem to be tolerably obvious. The first observation that must, I think, occur to any one who may be called upon to construe it is that the phrase which the Legislature has adopted is an old and familiar acquaintance. In the public streets it meets the eye not unfrequently *(sic)* on the walls of schools and hospitals; it is to be found in the forefront of many charitable appeals. So used, [the concept of annual voluntary contribution] carries with it a meaning which nobody can mistake. It means that the institution on whose behalf the statement is put forward depends for its support on freewill offerings - *on the generosity of persons acting from disinterested motives*, and not looking for

any return in the shape of direct personal advantage[3] ".

What is detached and disinterested generosity? The concept is intertwined with, and overlaps the policy on directed donations that is set out in the Interpretation Bulletin mentioned above. This is so, because it has to be interpreted in the proper context, not out of context.

The concept of detached and disinterested generosity was indeed referred to in some recent Australian cases, *Commissioner of Taxation v. McPhail*, and *Leary v. Federal Commissioner of Taxation*. And Canadian courts who viewed the notion as applying equally in Canadian common law, liked the reasoning set out in the Australian cases, and they referred to the cases. To constitute a gift,

"...it must appear that the property transferred was transferred voluntarily and not as the result of a contractual obligation to transfer it and that no advantage of a material character was received by the transferor by way of return[4] ".

The Court of Appeal in the *Leary*[5] case went on to qualify the above statement by saying that a contractually binding promise to make a gift does not deprive it of its character. Similarly, the fact that a donor receives some return from a charity does not prove conclusively that there was no gift. Nevertheless, and in anticipation of those who would want to take this latter proposition to the limit, this does not mean that a charity can provide a valuable return to the donor in any and all circumstances. The Court went on to say:

"(T)he above-mentioned considerations indicate usual attributes of a gift, namely, that a gift will ordinarily be by way of benefaction, that a gift will usually be not made in pursuance of a contractual obligation and that a gift will ordinarily be without any advantage of a material character being received in return. I would add to those usual attributes of a gift, the attribute that a gift ordinarily proceeds from *a detached and disinterested generosity*, out of affection, respect, admiration, charity or like impulses".

The notion of detached and disinterested generosity has been cited more and more frequently with approval by Canadian court[6]. Because it is cited by the courts, it is without question part of Canadian law – common law (like the definition of a gift), not statute law.

Some people are concerned that if a gift has to be made out of detached and disinterested generosity, it will effectively shut down every conceivable form of giving, since in a pure psychological sense, no one can be absolutely "detached or disinterested" about giving.

The use of the concept of detached and disinterested generosity by the courts, and accordingly by Revenue Canada, is perhaps infelicitous, but it was intended to foil those people who would use charitable giving and the ensuing tax benefits to suit private and personal purposes, and who would interpret the usual, more terse definition of a "gift" narrowly or broadly, as the circumstances and their private purposes dictated.

Not to be thwarted by the courts' attempts, Wim Posthumus writes in an opinion piece in the November 98 issue of the *Christian Courier,* some organizations have gone on to give the words "detached and disinterested generosity" a wider emancipation than intended in the context. "This wider meaning they have attributed to

Revenue Canada as its new definition of charitable giving. The result has been to frighten and inflame the Christian community sufficiently to encourage it to contribute to a legal trust fund".[7] With all due respect to the organizations involved, to quote the phrase "detached and disinterested generosity" out of the context of the cases in which it is being applied is a gross misinterpretation. And what I'd like to do is provide you with some guidelines.

Again, a gift at law is a voluntary transfer of property without consideration. The consideration, if any, is the advantage that a "donor" derives.

This consideration or this advantage are much more than something which is measurable in economic terms A "material" advantage - which is a term often used synonymously for "consideration" - is much more than an economic advantage. Material here is used in the sense of the existence of a direct and significant benefit accruing specifically back to the donor or to a person designated by the donor, (that designation being made purely because of private and personal reasons not related to the charitable purpose at hand).

Designating funds to a specific project of a charity is acceptable. The donor here may be interested in the project, but it is an interest in the sense of a curiosity, a concern, a personal identification with the goals of the project. But contrary to what some people may suggest, a donation to a specific project is still *dis*-interested insofar as the donor's support is not primarily or substantially motivated by private and personal advantage. "Interest" - in this latter, unacceptable sense - is more akin to the right to have an advantage accruing from the donation. The advantage to the donor would logically be something he or she would like to get for himself or herself, or for another person for purely personal and private reasons.

The tax advantage which is received from gifts is not normally considered a 'benefit' within this definition. Again, like the notion of detached and disinterested generosity, if we considered the tax incentive to be a benefit, the law would turn it into an absurdity[8].

If an individual is afflicted with a particular disease, can that individual donate to a charity dedicated to eradicating that disease? Usually. But if the payment is made on the understanding that the "donor" will receive admission to a particular treatment centre, no.

Can an alumnus of a college or university make a donation to his or her alma mater? - Usually. But if the payment gives the alumnus' children the right to use the physical recreation facilities at the university, no.

Can members of cultural charities such as a symphony, a theatre or a museum, donate to such a charity when they attend the performances or exhibitions of that charity? Yes, they can, notably within the parameters set out in Interpretation Bulletin IT-110R3, *Gifts and Official Donation Receipts.* Can they get a discount at the gallery gift shop, a parking pass during the year, a dinner with the curator, as well as a tax receipt? No.

According to the courts, a Christian education of one's children is a material benefit and one which carries economic and material consequences[9]. This is an altogether different situation than making a general contribution to the Sunday School program or other church program. Note however Revenue Canada's policy regarding

the partial receipting of tuition fees. This is an administrative policy which goes well beyond the law[10]

Does an expectation that each member pay according to his or her means automatically make that payment a gift? Not necessarily. The fact that a payment is voluntary and not made pursuant to a specific contractual or legal obligation is irrelevant in determining whether it is a gift[11].

Will an employee of a charity be unable to make gifts to the charity that employs them? If it is a genuine, altruistic gift, there should be no problem. On the other hand, if it is - for instance - a condition of employment, or if it is given to flow money given to staff in Christmas bonuses back to the company, thereby allowing staff to at least claim a tax credit while keeping the company in the black, then the donors are not acting out of disinterest. In the first instance, they want a job, and in the second one, they are interested possibly in keeping their jobs, in getting a promotion, in keeping the company in the black, or in only getting a tax credit[12].

How about travel and living expenses?[13] Does this not contravene the concept of detached and disinterested generosity? No. It is not the fact that you contribute at the same time as you volunteer that is damning. It is whether, for instance, you contribute to cover the cost of personal and discretionary expenses, as opposed to contributing to the organization to cover necessary costs related to the charitable project at hand.

In tax law, form matters. If it were not so, Revenue Canada and the courts would be engaged in endless exercises to determine the true intentions behind certain transactions. This is why Revenue Canada reacts to certain signs that tend to indicate whether we are in presence of a gift or not. These signs are not always absolute. They tend to establish a presumption which becomes stronger as the facts accumulate. On the donor's part, evidence of intention may be used on occasion to clarify dealings, but as the court suggested in the *Friedberg* case, this is not always determinative. While intention plays an important role – notably the donor's intention to grow poorer overall, as a result of giving - after-the-fact evidence of a charitable intention is rarely successful in altering documentary evidence which clearly point in another direction[14].

Whether a payment is a gift would notably depend on a reasonable person, taking all the facts and circumstances of a particular case into account, could conclude

- whether or not the payment was made pursuant to an express or implied plan to convert inadmissible personal costs or advantages into tax-assisted gifts, or

- whether or not the receipt of a benefit was dependent on the payment being made.

In deciding whether a payment is a gift, a single factor may not be determinative, but the growing presence of a combination of factors like the following[15] will create a presumption that a payment is a gift or not.

Here are some indicia that would suggest a payment is <u>not</u> a gift:

- The donor specifies the beneficiary of gift, and the beneficiary is non-arm's length to the donor.
- Most donors in a program specify a beneficiary, and in most cases the beneficiary is non-arms' length to the donor.
- The beneficiary is non-arm's length to the donor and is being preferred as a result of the payment, to others equally eligible

for assistance.

- The donor gives, or donated amounts increase only when a non-arm's length beneficiary is benefiting from the program and end or drop off substantially when the beneficiary leaves the program.
- Fund-raising solicitations or other documents stipulate that benefits to donor or to a person connected to the donor are conditional on the making of a gift.
- A gift is ear-marked for the direct benefit of a particular individual.
- There is a contract under which a person agrees to make a gift, but which contains provisions ensuring that the gift or some other benefit will flow to a relative.
- The donation is part of a broader agreement with the charity, involving payments for goods or services.

- There is a plan allowing participants to either make gifts, or pay (*e.g.*, tuition)
- Donated amounts are high and identical from one donor to the next[16].
- There is an otherwise unexplained denial of admission or re-admission of people who are financially able, but who do not contribute.
- In those cases where people are normally charged for services, there is a substantial gifting program but very little in the way of a significant charge.
- Donors receive substantial or unusual pressure to contribute.
- Other factors suggesting that a gifting policy has been created as a means of avoiding the characterisation of payments as fees in return for services and materials.

If a combination of such factors is not present, a payment could be a valid gift. Here are some indicia that suggest the payment is a gift. Again, they are not necessarily conclusive, but must be looked at in context:

- The funds are given to the organization, for the organization's purposes and projects only.
- The funds are given at the donor's own initiative, without any solicitation by the organization or other express or implied request.
- The organization has full discretion and control over the funds, and applies the funds for qualified expenses only[17]. The particular use of the funds is not under the control of, say, the recipient missionaries. The key test is that the charity has full control over the funds so that it, and it only, can determine how it will carry out its charitable purposes. By itself alone, the fact that a missionary receives money from a fund to which a parent has contributed is not sufficient to disqualify the parent's payment as a gift[18].
- The donor does not stipulate in any way to whom the funds should be directed.
- Beneficiaries are selected by the charity according to objective criteria, and completely independently from the donor.
- The donors have had a pattern of constant and significant giving to a particular program over the years, regardless of their involvement or that of close relatives.
- Money goes into a common pool, from which all beneficiaries receive equal support.
- The organization has objective rules governing the selection of beneficiaries and limiting the expenses that will be paid out of the common pool.

F. CONCLUSION

Do not think for an instant that Revenue Canada is not sympathetic to the work of religious charities. At almost half the sector, religious charities do an incredible amount of work, not only in terms of inculcating sound moral principles, but by ministering to the sick and the homeless, and those stricken by disaster.

What is Revenue Canada's agenda? It is not to change the law; the law is still the same. It is to get at the tax abusers.

I hoped today to have provided you with some answers, or at least with a clearer insight. Unfortunately, clear answers will depend on where the facts point. The answers cannot always be categorical because the facts vary so much from one case to the other. Paying the charity for your travel costs and getting a tax receipt when you are out doing missionary work, is not the same as paying the charity for your travel costs for a European trip with a substantial amount of free time that essentially amounts to a vacation.

There is a dearth of regulation in Canada on this subject, but to the extent that abuse proliferates, we may eventually find ourselves in unfortunate circumstances similar to American charities, where - for instance - payments covering religious travel tours are tax-receiptable only if the tour includes for instance a reading list, attendance of a qualified instructor, a maximum specified amount of free time per day and a minimum amount of hours of prayer, or work, or study - all of which the charity is required to fully account for.

We need clearer policy on gifting, that will foster genuine charitable activity without giving the Devil free rein. In this respect, I want to thank the Ontario Chapter of the Canadian Bar Association and the Evangelical Fellowship of Canada for having the foresight and the concern to try and address the policy problems constructively with Revenue Canada.

A number of us will be meeting in the near future to put a finer point on the policy as expressed in the Interpretation Bulletin that addresses the needs for guidance expressed by religious charities.

In the meantime, and in closing, if you ever have any questions, you can call our 1-800-267-2384. You don't even have to identify yourself. Talk to us. If you want a written reply, if you think you are receiving contradictory advice or if you think the problem is too complicated to explain over the phone, write to us".

FOOTNOTES FOR "IS THE SKY REALLY FALLING?"

1. IT-110R3, "Gifts and Official Donation Receipts", modified June 20, 1997
2. *The Overseers of the Poor and Chapelwarden of the Royal Precinct of the Savoy in the County of London v. The Art Union of London,* 1896 A.C. 296.
3. *Ibid* at p. 312.
4. *Commissioner of Taxation of the Commonwealth v. McPhail*, (1967-68) A.L.J.R. 346 at p. 347.
5. *Leary v. Federal Commissioner of Taxation*, (1980) 32 A.L.R. 221.
6. *The Queen v. McBurney,* 85 D.T.C. 5433, at p. 5436 (payments by the taxpayer to three religious schools attended by his children); *Tite v. M.N.R.*, 86 D.T.C. 1788 (goods and services received in return); *Campbell v. The Queen,* 92 D.T.C. 1855 (payments to a Minister for teaching

sessions); *Dupriez v. The Queen*, 1998 CanRepNat 997 (adoption services); see also *The Queen v. Zandstra,* 74 D.T.C. 6416 (payment of tuition fee at a Christian school claimed as a donation) *Burns v. The Queen*, 90 D.T.C. 6335 (payments to the Canadian Ski Association in recognition for coaching given to donor's daughter)

7. Wietse Posthumus, "Beware of Taxing Tactics by Corban and CCCC", in *Christian Courier*, November 13, 1998, pp. 12-13.

8. *The Queen v. Friedberg*, F.C.A. docket A-65-89, judgement dated December 5, 1991, page 3.

9. *The Queen v.* Zandstra, 74 D.T.C. 6416; *The Queen v. McBurney*, 85 D.T.C. 5433 at 5436.

10. "Tuition Fees and Charitable Donations Paid to Privately Supported Secular and Religious Schools", Information Circular 75-23 published September 29, 1975. See also Information Letter "Treatment of Tuition Fees as Charitable Donations Under Information Circular 75-23" sent to all newly-registered religious schools.

11. *Ibid.*

12. Note the difference in context between this, and the general rule regarding tax credits referred to in the *Friedberg* case, *supra*. See in particular *Dutil v. The Queen*, 95 D.T.C. 281.

13. Note that in the United States, a tax receipt for unreimbursed expenses is not allowed where a person other than the actual taxpayer performs the charitable service: *Davis v. U.S.*, U.S.T.C. 88-2, 9594.

14. *The Queen v. Friedberg*, F.C.A. docket A-65-89, judgement dated December 5, 1991, page 3.

15. These suggested factors were gleaned from case law and various Revenue Canada files. I also relied on US Internal Revenue Service rulings. Factors such as these, especially when taken in combination, would logically bring Revenue Canada or a court to conclude that a payment was or was not a gift.

16. See *Dupriez v. The Queen*, 1998 CanRepNat 997.

17. *Davis v. U.S.,* 88-2 U.S.T.C. 85,874 (funds sent by the taxpayers to their sons for personal expenses incurred while acting as missionaries for an organised church).

18. *White v. U.S.*, 84-1 U.S.T.C. 83,234 (fee paid by the parents of a missionary to a travel agent, in accordance with church policy and whose primary purpose was to further the aims of the Church).

2. WHO DO YOU SAY THAT YOU ARE? COURTS, CREEDS AND CHRISTIAN IDENTITY

BY: M. H. OGILVIE, PROFESSOR OF LAW, CARLETON UNIVERSITY, OTTAWA, AND OF THE BAR OF ONTARIO ©

The following is the full text of a speech given by M. H. Ogilvie, Professor of Law at Carleton University, Ottawa, and of the Bar of Ontario, at the Annual 1999 Church & the Law Seminar in Bramalea, Ontario on February 3rd, 1999 on the topic of the increasing demands being placed upon Christian churches by the courts to justify their beliefs and practices in order to continue to enjoy civil law protection.

A. INTRODUCTION

Peter's certainty in identifying Jesus distinguished him from his contemporaries.[1] Peter's faith was defined by his knowledge. Peter knew who Jesus was. Peter knew who he was. Peter knew what he believed and any crisis he may have felt about how to spend his life was resolved when, according to Matthew's Gospel, he was rewarded with the task of building the church.

Two millenia later, that church in all its parts is engulfed in a crisis which, I believe, it has yet to identify. Whether the essential crisis is one of identity or whether confusion about identity is a symptom or outcome of the crisis is unclear. But that the crisis involves identity is reflected both in the Church's forgetfulness about and denial of its historic identity as the Body of Christ throughout the ages, as well as of its distinctive beliefs and practices in its various parts. While the challenges to historic standards and beliefs have been internal and external, the particular external challenge I want to consider, are the accelerating demands placed on the Christian churches by Canadian lawmakers, both legislators and judges, to justify their beliefs and practices if they are to enjoy continuing civil law protection and space within the Canadian civil polity to practise and to preach those beliefs.

Make no mistake about it: the incidence of administrative and judicial inquiry into and assessment of Christian beliefs has increased because of the confluence of several related factors in the past generation: the expansion of the regulatory state, especially by legislation which takes no account of religion in the enactment of universally applicable legal norms; the divestment of constitutional sovereignty from the legislature to the judiciary with an unaccountable and re-configured authority under the Charter to determine whether religious claims are worthy of protection or of exemption from otherwise universally applicable legal norms; and, the infection of the churches by the litigious spirit of the age, resulting in the concession to state sovereignty over ecclesiastical matters implicit in engagement in civil litigation. That the moving spirits of the age have motivated and cheered on these developments can hardly be doubted. That such developments are matched by sinister implications for the recognition by the civil law of the integrity of belief and practice for the identity of the Christian churches is equally evident.

This is not to suggest that past courts have not inquired into and assessed distinctive beliefs and practices of the Christian churches. They have. They have had such jurisdiction in Anglo-Canadian constitutional theory and practice since the early 1530's when the English Reformation produced the sovereignty of the Crown-in-Parliament over the then universal church, including over doctrine, polity, discipline and governance. However, in previous eras, churches appeared less frequently in the courts and were subject to less state regulation; the social paradigm was one in which the courts and legislatures understood the limits of propriety in dealing with ecclesiastical matters, and understanding the churches, themselves, frequently protected them from themselves and from others.

In the older cases, the courts said they would not consider matters of doctrine except where they were relevant to matters of property and civil rights.[2] But the distinction was artificial, although few cases demonstrated that artificiality. One notable exception was Archer v. The Society of the

Sacred Heart of Jesus,[3] which involved an attempt by an expelled member of a Roman Catholic religious order to claim compensatory damages for wrongful dismissal and for services on an employment contract basis for 17 years spent in the order. By concluding that no damages were available, the Ontario Court of Appeal effectively rejected the idea that the relationship between a religious and an order was contractual, a finding favourable to the church's own understanding of its evangelical vows. But to reach this conclusion, the court found that if there was a contract, it was unenforceable for illegality because the vow of obedience amounted to an illegal contract for slavery while the vow of celibacy was an illegal restraint of marriage at common law. In effect, the court reached its decision by denying one aspect of the church's own understanding of the nature of ministry when measuring the evangelical vows against common law norms.

The anti-Catholic undertones of Archer may reflect the prevailing social paradigm of turn-of-the-century Protestant Ontario, but also point to the fact that courts and legislatures make laws in accordance with the dominant norms of their age, and to the new social paradigm at this turn-of-the-century: secularism and its myth of state neutrality toward religion. Accordingly, churches are required to prove the worthiness of their identifying beliefs and practices for civil legal protection by courts confident in their powers to assess objectively and neutrally what is essential to a church's self-understanding.

Permission to the courts to inquire into doctrine as an inherent element in any church's identity was first granted by the Supreme Court of Canada in two early Charter cases: Jones v. The Queen[4] and Edwards Books v. The Queen.[5] Although only a few courts have done so since, the top court's release of lower courts from earlier self-imposed constraints combined with the actual decisions in which matters of doctrine have been considered, suggests that this trend should be watched closely by the churches.

The discussion of some of these cases which follows will be divided into three parts: (i) analysis of S.C.C. dicta on inquiries into religious identity; (ii) examination of four cases chosen to exemplify three ways in which such matters have come before the courts; and, (iii) consideration of their significance for Christian churches. The three ways in which religious identity issues have come before the courts are as follows: (i) where legislation of general application is so expressly framed that Christian churches are caught by it without legislative exemption; (ii) where legislation of general application is ambiguously framed so that a church may be able to argue that it is exempt from it; and, (iii) where an internal dispute comes before the civil courts, not because of some state-initiated legislation, but because a dissatisfied party has voluntarily initiated civil litigation to overturn an internal dispute resolution outcome. Paul's admonition to the Corinthians[6] not to take disputes before unbelievers applies only to the third situation; in the first two, the unbelievers have called Christian churches to account for themselves if they are to enjoy civil law exemptions or protections.

B. LAYING THE FOUNDATION

In the early s. 2(a) case, Jones v. The Queen, a Baptist pastor found in breach of Alberta legislation requiring that his church basement school be certified, argued that to apply for certification amounted to infringement of his freedom of religion

insofar as his authority over the education and upbringing of his children was God-given not state-given. Speaking for the majority in the S.C.C., La Forest J. briefly addressed the question of whether or not a court should inquire into the validity of a religious belief to determine whether it was worthy of protection under s. 2(a). He found that no court was in a position to question the validity of a belief but could examine the sincerity with which a belief is held if that belief is the basis of a claim to exemption from a valid law of general application. On the facts, the court assumed the sincerity of Jones' belief because although it was no longer widely held in Canadian society, in the court's view, it was once a widely-held view that parents and churches had responsibility for the education of children, as instanced by publicly-funded denominational schools, before the state took over this responsibility. However, the court went on to find that the state's interest in the education of its citizens placed a reasonable limit on parental religious educational rights under s. 1, so that the legislative requirement that Jones seek certification was reasonable.[7]

Several features of this analysis are troubling. First, the onus is placed on the religious litigant to prove the sincerity with which a belief is held. How is sincerity proven? Merely stating subjective belief appears insufficient. But, if the test is objective, that is, would a reasonable person hold such a belief, then the religious litigant may experience considerable difficulty proving sincerity in an age of scepticism or widespread disbelief. Jones was fortunate because a social memory remains of an earlier age in which parents and churches had responsibility for education. Secondly, although the court disconnected sincerity and validity in relation to a belief, from an objective standpoint, they are intimately connected: if a belief is one in which a court finds it difficult to imagine anyone might seriously or sincerely believe, then it may also question implicitly the validity of the belief. If the validity of the belief is doubted, then the identity of the belief and the belief system of which it is a part may also be doubted as a bona fide system of belief and worthy of civil law protection. Thus, thirdly, sincerity and validity are more easily doubted when some other reasonable objective is balanced under s. 1 against the religious belief. In Jones, the court found the state's objective in educating its citizens more reasonable than Jones' belief, and privileged it over Jones' belief. And, who can seriously doubt that a state's interest in an educated citizenry is not worthy of constitutional protection? The onus on a religious litigant to prove the greater reasonableness of a belief is heavy indeed.

In Edwards Books v. The Queen, the issue of judicial inquiry into beliefs was again briefly addressed because three of the four Jewish retailers arguing for the unconstitutionality of the then Ontario Sunday closing legislation also kept their shops open on Saturdays, thereby undermining their argument that the legislation infringed their freedom of religion. Speaking for the majority, Dickson C.J.C. opined that state-sponsored inquiries into religious belief should be avoided "whenever reasonably possible,"[8] because this would expose private beliefs to a public airing and would be particularly difficult when required only of members of "non-majoritarian faiths,"[9] who may have good reason for reluctance to expose and articulate non-conformity. On the other hand, in the view of the top court, it is perfectly constitutional to inquire judicially into the sincerity of belief because otherwise courts might not find good reasons to grant exemption from legislation infringing on

freedom of religion under s. 2(a). Inquiry is to be avoided where protection of religious freedom can be otherwise achieved; nor, need anyone submit to such inquiry, other than voluntarily, in the opinion of the court.[10]

While Dickson C.J.C. evidently regarded judicial inquiry into religious belief as benign, friendly and positive, for the purpose of finding reasons to protect such beliefs, nevertheless, he acknowledged that such inquiries may be conducted by self-authorized courts and that failure to assist may result in a finding against granting constitutional protection. Dickson C.J.C. gave no explicit consideration to the fact that such inquiries will not be voluntary where legislation of general application forces religious litigants into the courts to argue for exemption. Nor did he acknowledge that such legislation would require "majoritarian" as well as "non-majoritarian" religious litigants to submit to the same inquiry for exemption. As if the distinction is demographically meaningful, when all religious groups are minorities! In short, Dickson C.J.C. appeared not to have considered the sinister ramifications of his well-intentioned views at all, although they are cited as authority by subsequent courts for judicial inquiries into and valuations of religious beliefs.

C. THREE CASE STUDIES

1. Express Legislation of General Application

One such case was Salvation Army (Canada East) v. Ontario.[11] The narrow issue of whether or not the applicant's pension plan fell to be regulated pursuant to the Ontario Pension Benefits Act[12] was expressly answered by the definition sections of the Act. These extended the operation of the Act to all relationships in which a member of a pension plan receives remuneration to which the pension plan is related.[13] This clever and all-encompassing definition avoided the legal difficulties associated with defining clergy as employees,[14] and rendered ineffective for the purposes of the Act, the provisions in the Orders and Regulations of the Salvation Army expressly providing that officers are not employees, which had been upheld in previous cases.[15] Effectively, if any organization has a pension plan, it must be registered and regulated pursuant to the Act.

The Salvation Army resisted compliance with the Act on the basis that it deemed officers to be employees and therefore constituted an infringement of those officers' freedom of religion pursuant to s. 2(a) because their relationship was voluntary rather than contractual, by virtue of the Army's doctrine of ministry. Officers are said to undertake voluntarily to devote their lives to the service of God and are equally voluntarily provided with an allowance, not as a reward for services or on any commercial or legal basis, but rather to relieve the officer from the need to engage in secular employment to earn a livelihood. The effect of the Act was said to be to transform that relationship into one of legal necessity and contract so as to infringe s. 2(a).

Relying on Jones and Edwards Books, Henry J. in the Ontario General Division, justified judicial inquiry into the sincerity of belief in the Army's doctrine of ministry if exemption from legislation on the ground of religious conviction was to be granted. "Sincerity" required the applicant to satisfy the burden of proving to the court whether its doctrine of ministry was an essential belief or of fundamental importance to it. The court's role was to decide, and further,

as required by the S.C.C. in R. v. Morgentaler,[16] the court was also obliged to distinguish between a tenet of belief, on the one hand, which may be protected, from "a policy position on a secular issue,"[17] on the other hand, which was not subject to protection under s. 2(a). Even if a belief is essential, Henry J. further opined, to enjoy protection under s. 2(a), there must be a state threat to the belief that was not trivial or insubstantial as determined by the court.[18]

To determine the Army's understanding of its doctrine of ministry, Henry J. consulted three sources: (i) various authoritative documents including the Handbook of Doctrine and the Orders and Regulations; (ii) affidavits from two then current senior officers; and, (iii) affidavits from a number of ex-officers. The court concluded that the Salvation Army had not discharged the onus of proof by satisfying the court that the provision of a compulsorily regulated pension plan pursuant to the legislation was contrary to its essential beliefs and practices in relation to the voluntary aspect of its doctrine of ministry. Rather, following the Morgentaler decision, the court characterized it as a part of the secular aspect of the denomination's beliefs. Throughout this analysis, the learned judge said on several occasions,[19] that he was assessing the Salvation Army's authoritative documents against "Scripture"! Every judge, his own theologian!

Among the many reasons given by the court to support this conclusion, several relate to issues of belief and identity. First, the court expressed a preference for the views of the ex-officers to those of the serving officers, which it characterized as "an apologetic for the views of the hierarchy," "formalistic and technical," not "rooted in the fundamental doctrines of the faith" and "lacking scriptural authority."[20] Secondly, it doubted that voluntariness was essential to the Army's understanding of ministry because, inter alia, the decision to become an officer was not made on the basis that the retirement allowance was discretionary rather than contractually guaranteed; the structure of the Army was hierarchical in relation to discipline and job placements; and, both allowances and retirement allowances were paid and expected as a matter of course. Thirdly, the required conformity of the pension plan to the legislation was not inherently immoral or contrary to a Christian code of conduct or likely to cause a crisis of conscience or any other moral dilemma. Finally, and in any case, in the view of the court, even if the purpose and effect of the Act were to entrench on freedom of religion, the infringement was trivial and insubstantial. Whether or not there was any merit in these observations is irrelevant, the fact remained that the applicant truly subscribed to and sincerely believed that its understanding of the nature of ministry is of essential importance to its unique Christian identity.[21] As indeed do all Christian churches with regard to their respective doctrines of ministry. Yet, the court dismissed this position as unworthy of consideration.

Several features of this decision are instructive. First, it was the court which decided whether or not the Salvation Army's understanding of ministry conformed to Scripture, albeit without support by explicit references to Scripture. Secondly, the onus of proof on the Salvation Army was exceptionally burdensome. Evidence from its own doctrinal statements as well as from its senior officers was rejected. Yet, what more can a church offer a court to prove what it believes? Thirdly, the court not only suggested that the views of the serving officers lacked scriptural authority but also preferred the evidence of ex-officers. And,

what church does not have ex-clergy who left because they became disenchanted or distracted, or were simply dismissed? Fourthly, the court did not address the question of whether the legislation was a threat to belief, as precedent required; nor, fifthly, did it state why compliance with the legislation was a trivial or insubstantial infringement of the freedom of religion of the officers.

In the end, it would, at the very least, have been more gracious for the court to have found legislative compliance to be an infringement of religious freedom under s. 2(a) but justifiable under s. 1 because the other interest to be balanced was the legislative policy of removing gender discrimination in pensions in Ontario. The insult to the beliefs of the Salvation Army might have been lessened although not eliminated.

2. Ambiguous Legislation of General Application

Ambiguously drafted legislation of general application has also resulted in court challenges to religious litigants to prove what they say they believe, that is, to prove that they are who they tell the court they are. A doctrine of ministry was also at issue in Zylstra, et al. v. The Queen,[22] where the question was whether four taxpayers were clergy for the purposes of claiming the clergy residence deduction under the Income Tax Act.[23] To qualify, a taxpayer had to prove possession of both a status and function. The statutorily stipulated categories of status were: a member of the clergy; a member of a religious order; or a regular minister of a religious denomination. The required functions were ministering to a diocese, parish or congregation or full-time administrative service by appointment of a religious denomination or a religious order. The Act did not define any of these. Four senior officers, divided between two private evangelical colleges, argued that they were members of a religious order, i.e. their respective colleges, and as such qualified for the deduction. One of these men was not ordained in any commonly accepted meaning of the word, rather was a "commended worker" in a denomination that did not ordain or have clergy; thus, if not a member of a religious order, he would have to prove that he fitted one of the other categories for the purposes of the Act. All four also had to prove the functional requirement of ministering to a congregation or full-time administrative service by appointment of a religious order or denomination.

MacKay J., in the Federal Court-Trial Division, found neither college to be a religious order for two reasons: (i) neither college met the unique indicium for a religious order, as expressed by both dictionary definitions and expert witnesses called for both sides, that is, that an order is characterized by some distinctive purpose or quality setting it apart from the other institutions within the denomination of which it is a part; and (ii) the primary purpose of both colleges was education in contrast to the primary purpose of a religious order to serve God through worship, prayer and devotion. While the taxpayer who was a "commended worker" was found not to be a member of the clergy, again because both dictionary definitions and expert evidence pointed to the conclusion that the key indicium of being set apart for a specific religious function from the laity was absent, he was found to be a "regular minister" because his commended worker status permitted him to "minister" full-time to a congregation.[24] However, this was of no avail because the colleges were not congregations by any definition, nor

were any of the four taxpayers appointed to a full-time administrative position by a religious denomination or order; the inter-denominational character of the colleges predicated against any such conclusion.

Whether or not these taxpayers ought to have enjoyed the clergy residence deduction is not of present concern. Rather, the way in which the claim was argued and decided by the court is of considerable relevance to how issues of Christian identity can be mishandled in litigation. If Salvation Army showed how courts dismiss Christian claims to statutory exemption on grounds of infringing an aspect of Christian identity when those claims are honestly presented as such, Zylstra shows how doubtful identity claims will be unmasked as such. Whether the claim that the colleges were religious orders was a ruse devised by legal counsel or a claim dreamed up by the taxpayers themselves is unknown to me. That it constituted a significant betrayal of Reformed understandings of ministry, the priesthood of Christ and the priesthood of all believers as well as Reformed renunciation of religious orders as a Christian life-style is patent, and its presentation for personal financial advantage all the more distressing. Special tax exemptions for clergy are financed indirectly by other taxpayers, the vast majority of whom in Canada today enjoy lower incomes, fewer benefits and even less job security or prestige than most Christian clergy.

Nevertheless, the case is salutary in several respects. First, it demonstrated how the courts have always gone about the task of defining words for which no legislative definition is given, by recourse to standard dictionaries such as Oxford and Webster as well as evidence from authorities in the field. When a Christian institution attempts to persuade a court of a novel meaning for words, supporting its view of a litigated matter, and without any authoritative texts of its own to substantiate its claim, it should expect to be rebuffed as the four taxpayers were in Zylstra. Submission to the sovereign jurisdiction of the state sometimes does produce predictable results, no matter how unwanted.

Secondly, no court and no opposing party in litigation is going to accept an argument made by a Christian litigant just because he is a Christian or a member of the clergy, even about a matter such as the nature of ministry. There may still be corners of the Christian churches where a minister's word is, ipso facto, authoritative, but in civil courts everything must be proven to judges who are usually very clever people, whether or not their decisions are popular. The argument that evangelical colleges were religious orders, at least for a particular legislative purpose, was bound to be met by expert evidence to the contrary from expert witnesses drawn from polities with religious orders. No matter how scholarly, objective, fair-minded and non-sectarian such expert witnesses might be, their own polity's self-interest in protecting their understanding of religious life from dilution in the civil law and possible loss of legislative protection will never be far from their minds.

Thirdly, when faced with legislation that appears to discriminate unfairly against certain religious institutions (and it is not self-evident that the Tax Act does), Zylstra shows that attempting to change doctrinal identity to conform to the legislation is an inappropriate response. The legislation under consideration was, prima facie, originally drafted to encompass those involved in pastoral ministry and in administering pastoral ministry in the various religious institutions and structures at the time it was first drafted. It excluded

faculty in those institutions' own theological colleges at the time, as MacKay J. noted.[25] The underlying legal problem in Zylstra was not legislative discrimination against evangelical colleges or clergy but rather the real issue was the fact that rapid evangelical growth over the past half-century and movement into the Canadian mainstream rendered the legislation less comprehensive than it may originally have been. Whether faculty at evangelical colleges should enjoy tax benefits not enjoyed by other university professors, or even other taxpayers, in Canada may be a worthy issue for consideration, but the appropriate forum for that discussion is the legislative process not the civil courts. And if the argument that evangelical colleges are religious orders was made because of some real or perceived advantage enjoyed by other polities, I would suggest that late 20th century civil courts are equally inappropriate as fora in which to re-fight the Reformation. Laws that are no longer suitable or comprehensive can be changed when the appropriate processes, both public and private, are used. Since a legislative failure to be comprehensive and inclusive today can be challenged as discriminatory or unconstitutional, counsel for the taxpayers in Zylstra may have adopted the wrong legal strategy in arguing the case. Assuming other Christian identities than one's own, as a legal strategy, will be quickly unmasked by the courts.

If Salvation Army was a case in which a civil court wrongly dismissed a valid doctrinal claim inherent to the Christian identity of the applicant, Zylstra was a case in which a civil court rightly dismissed an invalid claim of identity. In both cases, however, decisions about identity were made by civil courts which assessed the evidence independently of assertions of identity by Christian litigants.

3. Internal Ecclesiastical Disputes

Civil courts have also recently made decisions about Christian beliefs by silence, that is, by implicitly adopting the doctrinal position advanced by one party rather than another in an internal church dispute which has been appealed to the civil courts, through the choice of the civil legal principle used to resolve the dispute. Two cases may be briefly contrasted in this regard: United Church of Canada v. Anderson[26] (also known as the Dover Centre Case) and Wesleyan Methodist Trustees v. Lightbourne.[27]

The narrow facts were very similar. U.C.C. pastoral charges in Ontario and Bermuda, respectively, wished to take congregational property with them after deciding to leave because they disagreed with the 1988 General Council decision to ordain active homosexuals. In Ontario, the disputed property was vested in the national church and in Bermuda, in the local congregation. In the common law, this distinction should not matter since every English, Scottish, American and Canadian case before Dover Centre dealing with property disputes where schism has occurred was decided on the principle that the property should go to the faction which remained faithful to the original trust, express or implied, for which the property was given, rather than to the faction which happened to have legal title at the time of the action, no matter how large.[28]

Nevertheless, in Dover Centre, the Ontario General Division decided that the property belonged to the U.C.C. because it had legal title to it. But in Lightbourne, it belonged to the departing congregation because it continued to subscribe to the original confessional standards of the U.C.C. in

relation to human sexuality. In Dover Centre, the trust issue was not addressed, so that doctrinal issues were not addressed. In Lightbourne, the requirement of establishing the terms of the original trust necessitated judicial discussion of the underlying doctrinal issue, and although the court did not devote much time or detail, it adopted the expert views presented on behalf of the congregation in a detailed and extensive theological expert report. Yet, whether or not the respective courts considered doctrinal standards, both made decisions about doctrine, expressly or by silence, in particular, about what the U.C.C. believed or ought to believe in relation to homosexuality.

Comparison of these two cases yields several observations relevant to judicial considerations of identity. First, and self-evidently, when internal disputes around matters of doctrine and belief boil over into the civil courts, those courts must either decline jurisdiction or decide about doctrine, at least implicitly. Although no civil court has been asked to adjudicate a doctrinal dispute, simpliciter, such a decision becomes unavoidable when doctrine is tied to property as it is in the common law, even if the decision is the least interventionist possible in the civil law. The traditional position of the courts that they deal only with property and civil rights but not doctrine is artificial because doctrinal schism inevitably leads to property disputes. Courts simply can never decline jurisdiction.

Secondly, even judgments on the narrowest and most neutral legal grounds are decisions on matters of belief by silence. A positive reading of Dover Centre would say that Gautreau J. looked to the legal title issue only to avoid dealing with the underlying issue, that is, he considered this to be the least intrusive approach available to a civil court. Let the church resolve these internal matters itself. Yet, the net effect was to lend civil law authority to one side in the debate over homosexuality, to the same extent as in Lightbourne, where the court addressed the doctrinal matter squarely and in accordance with the proper legal approach, by applying the implied trust principle to the issue. However, since the net effect of the decision of the Supreme Court of Bermuda was to dispense with the position taken by the highest judicatory of the church,[29] whatever one's views on the underlying doctrinal issue, it remains the fact that by different legal routes, a civil court in both cases determined a matter of belief normally thought to reside within the jurisdiction of a church.

A third, and final observation, drawn from Lightbourne, is to express the hope that this is not the start of a trend whereby extensive and detailed expert reports on theology will be submitted for adjudication by civil courts. Admittedly, although the implied trust principle may require such, the precedent seems ominous in light of the voracious appetite displayed by the civil courts in other areas for determining policy matters traditionally thought more suited to the legislative or executive branches of government, or simply left in private hands.

D. CONCLUDING OBSERVATIONS

Whether the source of the litigation is legislation or a disgruntled member, civil courts assess belief and, ipso facto, identity to determine worthiness for civil legal protection, even to being self-appointed arbiters of conflicting doctrinal assertions. Indeed, if Charter protection is sought, this assessment is constitutionally mandated.

The standards applied are the normal evidentiary standards of the common law: the onus of proof is on the religious litigant; conflicting evidence, especially expert evidence, will be seriously considered; and in the end, a non-believing judge will decide. While no civil court would require a church to change formally its statements of belief, doctrines or codes of practice, decisions which shape the contours of the border between church and state will inevitably shrink in various places the jurisdiction of the church and cause subtle changes in practice, which may, in time, impact on belief and identity. When pension plans must comply with civil employment law standards, clergy may come to be thought of as employees and historic understandings of ministry will be re-formulated in ways not necessarily scriptural. When property is awarded to the faction which supports the ordination of homosexuals, implicit approval is concurrently bestowed on conduct contrary to scriptural standards about the proper uses of human sexuality, which will then within the church be increasingly questioned according to secular criteria. Thus, judicial decisions threaten integrity of belief and practice, and, in the end, identity as the Body of Christ faithful to divine revelation and tradition.

But civil judicial decisions based on belief have the potential not only to impact on the belief system of the church which is the litigant but also on the relationships among the various Christian churches--a matter, historically, for them to determine among themselves. Every branch of the Body of Christ is characterized by its particular understandings of scripture and tradition on many, but by no means all, doctrinal matters. Doctrine divides the churches and by division defines each, giving each its unique identity and role within the Body of Christ. When a civil court is asked to adjudicate on a belief distinctive to one church, it may also implicitly be adjudicating among the churches themselves. Conceivably, for example, a successful claim to a s. 2(a) exemption from pension regulation could be made by a church with a more complex doctrine of ministry tied more explicitly to a core Christian doctrine such as the nature of the priesthood of Christ and supported by 2,000 years of theological texts; such overwhelming evidence is simply more likely to satisfy the evidentiary burdens of proof in civil actions, which are neutral in conception but may be discriminatory in application to some churches but not others. Yet, each church subscribes fully and honestly to its own doctrine of ministry. Again, an award of property to one faction rather than to another on the apparently neutral ground of present ownership of legal title could tip the theological balance in one church in one direction and leave it more or less able to compete in the marketplace of religions in relation to other churches which avoided litigation on the matter. In short, where civil courts adjudicate matters of belief, in hindsight, they may also be adjudicating among churches, affecting their ability to determine for themselves how to compete in the marketplace of religion. The net impact may be to reduce religious diversity, toleration of religious diversity and religious tolerance for Christians in the country.

Dickens' advice in Bleak House to prospective Chancery petitioners may not be overstated: "Suffer any wrong that can be done you, rather than come here!" Instead, if legislation or proposed legislation is problematical, lobby to ensure your views are reflected in the final version--everyone else does. Reclaim your right to be heard in the public square. If compliance is

doctrinally offensive, then adopt creative legal means to circumvent it, short of compromise. Instead of funding a pension plan, increase clergy stipends and ensure that clergy establish personal and spousal R.R.S.P.'s; this is what the majority of Canadians are required to do to fund retirement. Indeed, your doctrine of ministry may be more faithfully reflected in an R.R.S.P. than a pension plan. Structure college appointment processes to comply with legislation and this might result in greater multi-denominational support and acceptance of your graduates than is presently the case for evangelical colleges. Or, lobby for more inclusive legislation or challenge existing legislation with a more thoughtful legal strategy. But do not pretend to be who you are not; the next time, who will take you seriously? When litigation is your last, faint hope, fight on the real and narrowest legal issue; present your beliefs honestly and clearly. But remember civil courts are not seminaries and Athens really had little to do with Jerusalem. Integrity often entails failure. But civil disobedience is not dishonourable. Refusal to sacrifice to the gods of the state rendered the blood which nourished the seeds of the church. Fortunately, you live in Canada not Rome.

When Christian beliefs and identity become the intellectual playthings to amuse a secular judiciary, two institutions have gone seriously awry: the state and the church. While the church cannot re-mold the state, it can re-think its recent commitment to statism. Big states mean small church; small states mean big church. But the church can do something about the church, directly and immediately, to restore bulwarks impregnable against the secular forces encircling and invading it from without, and infesting it from within. It can recover its meaning and reclaim its identity as the Body of Christ in all its various parts; expel from its midst those who insidiously undermine the moral and intellectual health of that body; and, present a renewed and self-knowing identity to the secular world. When Peter knew who Jesus was, he knew who he was and what he was called to be and to do.

FOOTNOTES FOR "WHO DO YOU SAY THAT YOU ARE?"

1. Matt. 16: 13-20; Mark 8: 27-30; Luke 9: 18-22.
2. See for example: McPherson v. McKay (1880) 4 O.A.R. 501 (Ont. C.A.) per Patterson J.A. at 512. This passage has been frequently quoted since.
3. (1905) 9 O.L.R. 474 (Ont. C.A.). See also: Jordan Hite, "The Status of Vows of Poverty and Obedience in the Civil Law," Studia Canonica 10 (1976) 131-193 and "The Discipline and Dismissal of Religious as Seen by the Secular Courts of Canada," Studia Canonica 11 (1977) 115-144.
4. (1986) 31 D.L.R. (4th) 569 (S.C.C.).
5. (1986) 35 D.L.R. (4th) 1 (S.C.C.).
6. 1 Cor. 6: 1-11. See also: Joseph Allegretti, "'In All this Love Will Be the First Guide': John Calvin on the Christian's Resort to the Secular Legal System," Journal of Law and Religion 9 (1991) 1-16.
7. Supra, n. 4 at 591-594.
8. Supra, n. 5 at 49.
9. Ibid.
10. Ibid., at 49-50. See also: Peel v. A. & P. (1991) 78 D.L.R. (4th) 333 (Ont. C.A.) per Dubin C.J.O. at 345-346 for a similar sentiment.
11. (1992) 88 D.L.R. (4th) 238 (Ont. Gen. Div.).
12. R.S.O. 1990, c. P. 8.
13. Ibid., s. 1 "employee"; "employer"; s. 3.
14. See for a current analysis of the cases: M.H. Ogilvie, "Christian Clergy and the Law of Employment: Office-Holders,

Employees or Outlaws" (1999) 3 Journal of the Church Law Association.

15. Rogers v. Booth [1937] 2 All E.R. 751 (C.A.); Lewery v. Salvation Army in Canada (1993) 104 D.L.R. (4th) 449 (N.B.C.A.); leave to appeal to S.C.C. refused (1994) 107 D.L.R. (4th) vii (note) (S.C.C.).

16. (1985) 22 D.L.R. (4th) 641 (S.C.C.) per Wilson J. at 679, quoting from the trial decision (1984) 12 D.L.R. (4th) 502 (Ont. H.C.) per Parker A.C.J.H.C. at 561.

17. Ibid.

18. Supra, n. 11 at 255-256.

19. Ibid., at 281; 282; 285; 288.

20. Ibid., at 282.

21. The court also wrongly thought the s. 2(a) protection to be available only to individuals and not to corporate bodies. Cf. R. v. Big M Drug Mart Ltd. (1985) 18 D.L.R. (4th) 321 (S.C.C.).

22. (1994) 94 D.T.C. 6687 (F.C.-T.D.). See also the earlier decisions of the Tax Court: Zylstra v. M.N.R. (1989) 89 D.T.C. 657 and Small v. M.N.R. (1989) 89 D.T.C. 663.

23. S.C. 1970-71-72, c. 63 as am.

24. This conclusion was doubted on appeal: McRae v. The Queen (1997) 97 D.T.C. 5124 (Fed. C.A.).

25. Supra, n. 22 at 6690.

26. (1991) 2 O.R. (3d) 304 (Gen. Div.).

27. Unreported decision of the Supreme Court of Bermuda (No. 280/1996 and No. 282/1996) (June 10, 1998).

28. See generally: M.H. Ogilvie, "Church Property Disputes: Some Organizing Principles" (1992) 42 University of Toronto Law Journal 377. Reprinted in (1995) 1 Journal of the Church Law Association 413.

29. It could also be argued that the U.C.C. did not complete the necessary constitutional steps required within its polity to change its teaching on human sexuality and its doctrine of ministry since this would have required a request to Parliament to make the necessary amendments to its Act: United Church of Canada Act, S.C. 1924, c. 100.

3. THE Y2K PROBLEM: AVOIDING LEGAL LIABILITY

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A. WHAT ARE THE BASIC Y2K ISSUES?

1. ADOPT A CAUTIOUS APPROACH

- Like it or not, the Year 2000 ("Y2K") Problem or the "Millennium Bug" is difficult to ignore
- Considerable litigation is speculated to result, but no one knows for sure whether Y2K is more "hype" than "crisis"
- Due diligence requires that charities become aware of the issues and take appropriate precautions as necessary
- Charities and churches cannot afford to simply do nothing
- Do not panic but be aware and be prepared

2. WHAT IS THE Y2K PROBLEM OR "MILLENNIUM BUG"?

- The Y2K Problem refers to the inability of computers, software and micro-processors to process date related information beyond December 31st, 1999
- The Y2K Problem originates from using abbreviated date codes and allowing for only the last two digits of the year instead of all four
- When the year changes from 1999 to 2000, technology using two digits will see a change from 99 to 00 and programs may misinterpret 00 as 1900 instead of 2000
- The Y2K is also a leap year which many computer applications may fail to consider
- If systems are not rendered capable of dealing with Y2K, they may crash or fail to correctly compute information

- The U.S. Government estimates that its Y2K costs alone to be thirty billion ($30,000,000,000.00) (U.S.) to achieve compliance

3. WHAT DOES Y2K COMPLIANCE MEAN?

- A single definition of Y2K Compliance does not exist
- Compliance should include accurate and timely processing of date data using both single century and multi century formulas
- Compliance should include years 1999, 2000 and leap year calculations and recognition
- Compliance should include date and data communication and transfer capability
- Compliance should include the absence of malfunctions, logical or mathematical inconsistencies, or operational interruptions due to any data

B. HOW THE Y2K PROBLEM MAY IMPACT CHARITIES

1. COMPLIANCE DEFICIENCIES

- Failure to maintain records for Revenue Canada under the *Income Tax Act*
- Failure to maintain accounting records for the Public Guardian and Trustee of Ontario under the *Charities Accounting Act* (Ontario)
- Failure to maintain donor lists
- Inability to produce charitable receipts to donors
- Inability to maintain financial statements for audit purposes
- Failure to maintain records of charitable trust funds
- Failure to maintain investment records for surplus monies and charitable trust funds
- Failure to maintain records involving international charitable activities through third parties, ie, agents, co-joint venture participants, partners or international projects

2. HARDWARE DEFICIENCIES

- Computers have internal clocks that record the time and date
- Both older models and some newer model computers still record the years with two digits
- Some computers can be corrected by a change to the basic input/output system (BIOS)
- Some computers may be too old to be fixed and will need to be replaced

3. SOFTWARE DEFICIENCIES

- Many computer software may not work properly after the Year 2000

- Vendors should be contacted to see if the software program can be updated to correct Y2K deficiencies before the Year 2000
- "Detonation method" of testing for Y2K compliance by setting the computers clock to January 1st, 2000 might result in software programs shutting down, software licenses expiring, and date reminders disappearing
- Accounts payable/receivable and payroll software may not properly work
- Records retention and retrieval system software may not properly work

4. DATA STORAGE DEFICIENCIES

- Data storage using a two digit format will not work properly after the Year 2000
- Software is generally available to update data handling programs but is not fool proof

5. TELECOMMUNICATION DEFICIENCIES

- Telephone switching equipment and voice mail may not work properly after the Year 2000
- Need to check with manufacturer about the Y2K compliance of equipment

6. ENVIRONMENTAL SYSTEM DEFICIENCIES

- Vaults, security and safety systems, sprinkler systems, HVAC, lighting and elevators may not properly function after the Year 2000

C. THE BROADER IMPLICATIONS OF THE Y2K PROBLEM FOR CHARITIES

1. OPERATIONAL ISSUES FOR CHARITIES

- Y2K compliance by third parties
  - consider what steps should be taken to determine the Y2K compliance status of third parties, such as suppliers or other charities involved in joint projects
- Y2K representations and commitment to third parties
  - consider what Y2K representations and commitments, if any, should be provided to third parties or to donors about charitable activities
- Disclosure obligations and financial statements
  - consider what disclosure of Y2K compliance, if any, should be made in the financial statements of the charity
- Insurance coverage
  - consider the extent to which Y2K risks can be insured under an existing policy, if at all, and what steps should be taken to protect against or extend coverage
- Risk management
  - consider whether steps should be taken to appoint an appropriate Y2K project management team to address the risks
- Staffing and personal
  - consider the implications of the Y2K Problem on staffing and labour relations
- Expert assistance
  - consider whether to seek advice from outside consultants and advisors

- Delegation of the Y2K duties
  - consider to what extent the board of director's responsibility to deal with Y2K Problems can be delegated to a committee of the board or to outside advisors
- Protection of privilege and confidentiality

- consider what steps should be taken to ensure that the confidentiality and privilege of Y2K information is preserved
- it may be advisable to use legal counsel to protect Y2K reports with a solicitor client privilege

2. CONTRACTUAL RIGHTS AND OBLIGATIONS

● Who owns the affected software?
- consider whether the charity owns the software it uses or has licences for
● Access to software source codes

- consider who can modify a source code for customized software
● Is software warranted to be Y2K compliant?
- consider whether existing software licence agreement, maintenance support agreements and outsource agreements contain a warranty stating that the software is Y2K compliant or, if not, will be modified as necessary
● Does the charity have contractual rights to modify software itself?
- for licensed software, consider whether the software license precludes modifications without the prior consent of the software vendor
● Is software vendor offering assistance?
- consider whether the software vendor is offering assistance to make the software Y2K compliant and what warranties are being offered in this regard
 Insurance contracts
- consider whether a charities insurance may cover the cost of determining a major Y2K Problem under an existing insurance policy
 Protection of outstanding loans
- if the charity has loaned money then consider how it can protect its rights and security if the borrower is likely to face significant risks associated with Y2K

3. MAINTENANCE OF RELIABLE RECORDS FOR EVIDENTIARY PURPOSES

● Will a Y2K Problem compromise the integrity of the records of a charity to an extent that it will render those records inadmissable in evidence in future litigation?
● Charities should consider the extent to which an organization's inability to defend against or prosecute civil claims may occur because of a lack of a reliable evidentiary source

D. WHAT IS THE EXPOSURE TO LEGAL LIABILITY FROM Y2K?

1. STATUTORY SOURCE OF LIABILITY

● Consider the statutory requirements that may be breached by lack of Y2K compliance
● *Income Tax Act* and electronic record keeping requirements
● *Income Tax Act* and requirements in issuance of charitable donation receipts and records
● *Charities Accounting Act* (Ontario) and maintenance of accounting records for charities in Ontario

2. PRIVATE ORGANIZATIONAL LIABILITY

● Consider whether charities are subject to organizational obligations and duties as members of a national or international association that may be impacted by Y2K non-compliance
● ie, failure to produce regular financial statements and reporting

requirements to a national or international association

3. CONTRACTUAL LIABILITY

● Consider what contractual obligations may be affected by Y2K Problems
-- i.e., direct or implied contracts to provide goods or services, technology, or equipment
● Charities should identify the specific contracts and issues that may result in liability

4. INTELLECTUAL PROPERTY LIABILITY

● Consider whether remedial action undertaken to achieve Y2K compliance may infringe, breach, contravene or misappropriate intellectual property rights of others
- ie, the *Copyright Act* will generally require the consent of software owners

5. CONFIDENTIALITY LIABILITY

● Consider whether technology and software data that is subject to confidentiality obligations will be impacted by Y2K Problems or Y2K Corrections
● Consider whether the disclosure of, or failure to adequately protect information constitutes a breach of privacy rights, ie, failure to protect donor lists

6. DIRECTOR AND OFFICER'S LIABILITY

● Directors and officers may be exposed to personal liability for failure to exercise due diligence in undertaking remedial steps to avoid Y2K Problems
● Directors and officers may be accountable to their corporate members, Revenue Canada, and to the Public Guardian and Trustee of Ontario for breach of fiduciary duties of directors in their roles as "quasi trustees"
● Directors and officers may be exposed to breach of trust for improper investment of charitable funds if the income or the investment is lost through Y2K Problems

7. TORT LIABILITY (ie, Civil Wrongs)

● Negligence claims may result from damages caused by Y2K problems, ie, damages that were foreseeable
● Claims based on negligent misrepresentation may be brought against manufacturers of hardware and software as well as service providers for misstatements about Y2K compliance
● Umbrella organizations may be liable for failure to warm member charities about potential Y2K Problems based on detrimental relevance

8. PUBLIC POLICY AND GOVERNMENT LIABILITY

● Municipal, provincial and federal governments may face liability as a result of their public duty to promote and protect the public interest arising from Y2K Problems
- infrastructure systems such as transportation, telecommunications, utilities, etc.
- government services to individual clients, such as income distribution, licensing, etc.
- regulatory obligations, such as audits, inspections, commission, etc.

E. LIMITATIONS ON LEGAL REMEDIES AVAILABLE FOR Y2K PROBLEMS

1. ARE LEGAL REMEDIES PRACTICAL?

- Determine if a legal action claim will be sufficient to protect an injured party
- Serious consideration must be given to whether defendants to an action will be capable of paying damages and whether the defendants will even exist in the future

- Legal remedies may not always be practical

2. RESTRICTION ON DAMAGES

- Do existing contracts contain restrictions on the amount of damages that can be received for losses caused by Y2K Problems?

3. REMEDIES OTHER THAN DAMAGES

- If damages are not an appropriate remedy, what other options are available to an injured party?
- A party may require immediate relief rather than waiting for prolonged litigation
- Does the injured party have the right to compel a potential defendant to fix Y2K Problems, ie, through an injunction

4. MITIGATION OF DAMAGES

- Does an injured party have an obligation to mitigate against damages from Y2K Problems?

5. DISCLOSURE OF Y2K PROBLEM

- Must a charity discloses its knowledge of a Y2K Problem to an opposite party when the Y2K problem may impact the other party?

6. APPLICABLE LIMITATION PERIOD

- Do limitation periods and/or other considerations restrict how or by when a legal action can be commenced?

7. ARE THERE LIMITATIONS ON LEGAL LIABILITY

- Contracts may contain specific provisions limiting liability and establishing conditions that must be met before liability can be found
- Contracts may also contain certain time limitations in its representations or warranties
- Contracts may also contain waivers and estoppel that preclude any liability claims

F. REDUCING EXPOSURE TO LEGAL LIABILITIES

1. MINIMUM STEPS THAT SHOULD BE TAKEN

- Appoint someone on the staff or the board of the charity to take charge of Y2K compliance
- List all hardware, software and automated/electronic equipment used in operations
- Assess compliance of equipment and systems and get help from a consultant
- Retain qualified consultants or advisors as necessary
- Identify most critical functions in order to prioritize and budget for action
- Repair, upgrade and change systems and procedures according to priorities

- Require information from third party providers about their system compliance through written confirmation Y2K compliance letters and checklists as necessary
- Test thoroughly for compliance with respect to all Y2K issues
- Maintain separate electronic or paper backup of records, data basis and key dates

- Develop a continency plan for the most critical functions of a charity
- Review insurance contracts, particularly liability coverage, to see if there is any protection available under insurance coverage
- Review the fine print in all contracts to determine exposure to Y2K liability and possible renegotiate contracts if necessary
- Maintain documentation that demonstrate that "reasonable care" and "due diligence" was taken by the charity to protect its assets and to continue to provide required services
- Avoid potentially incriminating correspondence about Y2K Problems, including e-mail
- Ensure that employees are informed of both Y2K Problems and what remedial steps are being taken to deal with the problem
- Ensure a consistent approach is taken to deal with the Y2K Problem and do not panic

2. WHAT DIRECTORS AND OFFICERS CAN DO TO PROTECT THEMSELVES

- Exercise due diligence, which involves discharging duties and responsibilities with the requisite degree of care, diligence and skill required by statute and at common law in recognition of the director's fiduciary obligations akin to that of a trustee
- Obtain indemnification from the charity or associated charities for the directors and officers with respect to potential Y2K liability
- Obtaining liability insurance for directors and officers, if available, for Y2K liability

3. SPECIAL PROBLEMS INVOLVING AMALGAMATIONS AND MERGERS

- Due diligence involving mergers and/or amalgamation with other charities requires that careful consideration be given to Y2K compliance by each of the amalgamating charities
- Liabilities associated with the Y2K Problem by an amalgamated charity will become the liability problem of the amalgamating charity

4. DUE DILIGENCE REQUIRED WITH JOINT PROJECTS WITH OTHER CHARITIES

- Y2K liability exposure of agents, co-joint venture participants, or partners of a charity will potentially impact the liability of the charity
- Potential for liability exposure will often occur in relation to international charitable activities
- Need to conduct due diligence compliance of Y2K Problems of other charities

5. CONTRACTING TO CORRECT Y2K PROBLEM

- Define Y2K services and the service provider's obligations

- clearly describe the scope of the work and the resulting services to be provided

● Define Y2K Compliance

- clearly define what is meant by Y2K Compliance

● Define project management

- clearly describe the manner in which the Y2K project is to managed

● Define alternative dispute resolution mechanics

- the contract should provide for the use of alternative dispute resolution mechanism

● Consents to modify intellectual property rights

- consider what consents are required for the service provider to modify the software

● Ownership of modifications

- the contract should specify the ownership of the modifications and provide for appropriate waivers of "moral" rights

● Protecting confidentiality

- the contract should provide appropriate protection for confidential information

● Representations and warranties

- representations and warranties should be used to identify risk associated with the performance of the contract

● Limitation of liability

- limitations of liability should reflect the economics of allocating risks

● Indemnification of charities

- when should each party have an obligation to defend and indemnify the other party?

G. WEB RESOURCE MATERIALS ON Y2K ISSUES

Year 2000: Sharing CEO Perspectives and Executive Summary
http://strategis.ic.gc.ca/sos2000

Viewpoint
http://www.conferenceboard.ca

Guidance for Directors-The Millennium Bug
http://www.cica.ca

Year 2000: Risk Management and Contingency Planning
http://strategis.ic.gc.ca/sos2000

Guidance material from ITAC
http://www.itac.ca

Year 2000: Technology Checklist for Small Business
http://www.cfib.ca

January 1, 2000: Crisis or Opportunity
http://www.conferenceboard.ca

Year 2000 legal issues
http://www.cba.org/abc

4. REVENUE CANADA'S REVERSAL ON GIFTING OF VACATION PROPERTY

BY TERRANCE S. CARTER

Church & the Law Update, Volume 2, Number 1, dated September 1st, 1998 included a copy of an opinion that had been received from Revenue Canada explaining the circumstances under which charitable receipts could be issued for the fair market

value of vacation property loaned to a charity, normally to be auctioned at a charity fundraising event.

That opinion, written by Carl Juneau, Assistant Director of the Charities Division, was a reasonable and fair interpretation of existing departmental policy at that time. The Rulings Directorate which is responsible for the policy, has recently reversed its position, and is notifying taxpayers of the change in Bulletin ITTN-17. As a result, it would appear that no charitable receipts can be issued for the fair market value of the loan of property, including vacation property, to a charity. This change in position is apparently to be effective as of April 1999, and will mean that of vacation property offered for a charity auction is not a receiptable gift. As a result, charities should either not solicit a gift of vacation property from donors, or if they do, they should advise the donor in advance that no receipt can be issued by the charity for the value of the loan of the vacation property and that the donor should seek the advice of their professional advisors concerning the tax treatment of such gifts.

5. JULY 1st, 1999 PROCLAMATION DATE SET FOR NEW **TRUSTEE ACT** *INVESTMENT POWERS IN ONTARIO*

BY TERRANCE S. CARTER

Church & the Law Update, Volume 2, Number 2, dated January 21st, 1999 included a summary of Bill 25 that amends the investment power provision of the *Trustee Act* in Ontario. Although the Act was given Royal Assent on November 30th, 1998, it was not to come into force until a date to be proclaimed. By an Order in Council

published in the Ontario Gazette in April of 1999, the new investment powers under Bill 25 was proclaimed in force effective as of **July 1st, 1999.** For more information concerning the impact of Bill 25, reference should be made to the *Church & the Law Update*, Volume 2, Number 2 that can be found at our Web Site at **www.charitylaw.ca .**

One of the more problematic aspects of Bill 25 is that it does not authorize trustees to delegate investment decision making, except in the limited situation involving mutual funds. Since most large charities rely upon investment dealers to not only advise on an appropriate investment policy, but also to make day to day decisions within the parameters of such investment policy, the omission by the Ontario government to deal with the matter of delegation, other than to allow investment in mutual funds, leaves many charities in an uncertain position. For charities that, for practical reasons, delegate investment decision making to investment dealers, the more terms of reference and directions that can be built into an investment policy, the more that the board will be able to argue that their reliance upon investment dealers for day to day decision making in investments was done in accordance with the reasonable expectations of a "prudent investor" as opposed to being an unauthorized delegation of their investment decision making power.

However, it is not clear at what point the utilization of an investment dealer to make day to day investment decisions will constitute an unauthorized delegation of investment power by the board of trustees or directors of a charity. As such, charities

should either avoid delegating decision making on investment matters, or if they do, then they should work closely with their investment dealer and their legal counsel in developing an investment policy that will evidence due diligence in establishing and maintaining a reasonable and prudent investment portfolio. Until this matter is dealt with by the courts, the issue of delegation of investment decision making by boards of charities will remain an unsettled area and may leave some charities in a vulnerable position.

6. WEB SITE RESOURCE MATERIALS

Seminar materials, back issues of *Church & the Law Update* and *Charity & the Law Update*, as well as full texts of selected articles and commentaries are available at our law firm web site at **www.charitylaw.ca**

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