

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*

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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. FEDERAL LEGAL UPDATE

BY: TERRANCE S. CARTER

A. NEW NAME AND PUBLICATIONS BY CANADA CUSTOMS AND REVENUE AGENCY (REVENUE CANADA)

The name of Revenue Canada was changed on November 1st, 1999 to *Canada Customs and Revenue Agency*. The website address has also been changed from www.rc.gc.ca to www.ccra-adrc.gc.ca.

Canada Customs and Revenue Agency has recently released a number of helpful publications, all of which are available at its website at www.ccra-adrc.gc.ca;

- A booklet entitled *Tax Advantages of Donating to Charities - RC4142 (c) 1507*, released on October 3rd, 1999,

that provides a succinct summary of the tax advantages of donating to charities, as well as describing a number of situations where charitable receipts cannot be issued.

- A pamphlet entitled *Gift and Income Tax - P113* that provides a general summary of the tax treatment of donations to charities that is a helpful resource for board members and prospective donors.
- Registered Charities Newsletter, No. 8, 1999 that provides practical interpretations by Canada Customs and Revenue Agency on various issues involving the issuance of charitable receipts.

B. NEW DRAFT INTERPRETATION BULLETIN ON ELIGIBILITY FOR CLERGY HOUSING DEDUCTION

As a result of a series of decisions released by Judge Bowman of the Tax Court of Canada on February 26th, 1999 concerning the eligibility of individuals to claim the clergy housing deduction under Section 8 (1) (c) of the *Income Tax Act*, Canada Customs and Revenue Agency announced on May 21st, 1999 that it was developing a new Interpretation Bulletin to clarify the tax treatment of the residential deduction for clergy. A proposed new Interpretation Bulletin, *IT-141R, Clergy Residence Deduction*, was released by Canada Customs and Revenue Agency on October 29th, 1999. A copy of the Draft Interpretation Bulletin is available at their website at www.ccra-adrc.gc.ca.

The contents of the Interpretation Bulletin IT-141R closely follows the parameters set out in Judge Bowman's decision of February 26th, 1999. The Interpretation Bulletin is likely to be adopted early in 2000 once it is determined what amendments, if any, need to be made. A more detailed analysis of the Interpretation Bulletin will follow in the next *Church & the Law Update*.

C. PROPOSED CEILING ON CLERGY HOUSING DEDUCTION

On October 19th, 1999, Finance Minister Paul Martin announced his intention to make legislative changes to the tax deduction allowed for clergy under Section 8 (1) (c) of the *Income Tax Act*. Although the release of the draft Interpretation Bulletin IT-141R described above and Finance Minister's Paul Martin's announcement are independent of

each other, the fact that the Government of Canada had not been successful in the clergy housing cases decided by Judge Bowman was likely the impetus for the decision by the Government to impose some reasonable limitations on the availability of the clergy housing deduction in general.

The announcement by Finance Minister Paul Martin deals with legislative changes where the clergy person provides their own residence. In those situations, it is proposed that the clergy residence deduction be limited for years after 2000 to the lesser of:

- (a) The amount of the housing allowance included in the clergy persons income, and
- (b) The greater of \$10,000.00 and 50% of the clergy persons ordinary remuneration (ie, excluding the housing allowance) from that employment.

The announcement also indicates that under the proposed legislative change, a deduction in respect of the clergy residence would only be available to the extent that a housing allowance is included in the clergy person's income. Employers who currently do not pay such an allowance will be allowed to earmark a reasonable portion of the clergy person's remuneration in respect of a housing allowance.

Further commentary concerning the proposed legislative changes on clergy housing deductions will be provided in the next issue of *Church & the Law Update*.

D. COMPETITION ACT AMENDMENTS INCLUDE CHARITABLE FUNDRAISING

On March 11th, 1999, Bill C-20, *An Act to Amend the Competition Act* received Royal Assent. On March 18th, 1999, the provisions relating to deceptive telemarketing and false or misleading representation were pro-

claimed in force. These provisions have an important application for charities in relation to telemarketing, as well as door to door and other forms of fundraising solicitation. The amendments to the *Competitions Act* contained in Bill C-20 will result in liability exposure for both fundraisers as well as charities, their directors and their officers, where fundraising activities violate the new provisions of the *Competitions Act*.

The amendments contained in Bill C-20 that have a direct impact upon fundraising practices are summarized below:

- The definition of "business" under Section 2(1) (b) of the *Competition Act* now specifically includes "*the raising of funds for charitable or other non-profit purposes*".

- More restrictive telemarketing provisions were included in response to the public perception that there is a growing problem of deceptive telephone sales and contracts that target vulnerable groups in society, like the elderly. As a result, the definition of telemarketing has been expanded under Section 52.(1) of the *Competitions Act* to now mean:

...the practice of using interactive telephone communications for the purpose of promoting, directly or indirectly, the supply or use of a product or for the purpose of promoting directly or indirectly, any business interest [Emphasis added]

- Draft Guidelines issued by the Competition Bureau of Industry Canada on the 7th day of July 1998 in anticipation of Bill C-20 defined "*interactive telephone communications*" as follows:

Interactive telephone communications will be interpreted as live voice communications between two or more persons. The Director will not consider "interactive telephone communications" to have occurred with regard to:

- fax communications,

- internet communications, or

- a customers interaction with automated prerecorded messages.

The exclusion of internet communications from the telemarketing provisions is an important and welcome concession, since more and more fundraising is expected to be conducted on the internet.

- Section 52.1(2) prohibits anyone from being involved in telemarketing unless there has been disclosure;

...in a fair and reasonable manner at the beginning of each telephone communication, of the identity of the person on behalf of whom the communication is made, the nature of the product or business interest being promoted and the purposes of that communication... [as well as] disclosure in a fair, reasonable and timely manner of the price of any product whose supply or use is being promoted and any material restrictions, terms or conditions applicable to its delivery...

- A violation of the telemarketing provisions in the *Competitions Act* constitutes a criminal offence with punishment that may include fines at the discretion of the court, and/or imprisonment for up to five years.

- Section 52.1(6) provides for a due diligence defense for corporations or individuals with respect to alleged violations of the telemarketing provision where the person is able to establish that there was appropriate due diligence taken to prevent the commission of an offence. However, under Section 52.1(7), a corporation may be convicted of the offence if it is shown that an employee or agent committed the offence, whether or not the employee or agent had been identi-

fied, unless due diligence has been established.

- Of more concern, though, is the potential for personal liability of directors and officers in relation to telemarketing. In this regard, Section 52.1(8) of Bill 20 states that:

Where a corporation commits an offence... any officer or director of the corporation who is in a position to direct or influence the policies of the corporation in respect of conduct prohibited by the Section is a party to and guilty of the offence and is liable to punishment... whether or not the corporation has been prosecuted or convicted, unless the officer or director establishes that the officer or director exercised due diligence to prevent the commission of the offence. [Emphasis added]

The possibility that directors and officers of a charity may become personally liable for criminal prosecution from deceptive telemarketing will necessitate that the board of a charity, as well its officers and senior management, become actively involved in reviewing and approving procedures involved in telemarketing and thereafter to regularly ensure that those procedures are being carefully followed through with.

- Bill C-20 also amends the description of what constitutes "false or misleading representation involving a "business interest." The new provision will now have a direct impact on charitable fundraising because of the expanded definition of "business interest". In this regard, Section 52.(1) of the *Competitions Act* now provides for the following offence:

52.(1) No person shall, for the purpose of promoting, directly or indirectly, the supply or use of a product or for the purpose of promoting, directly or indirectly, any business interest, by any means whatsoever, knowingly or recklessly make a representa-

tion to the public that is false or misleading in a material respect. [Emphasis added]

- 52.(2) states that a false or misleading representation referred to in Section 52.(1) will be deemed to have been made to the public where it is;

(a) expressed in an article offered or displayed for sale or on its wrap or containers,

(b) expressed in anything attached to, inserted in or accompanied an article offered or displayed for sale, its wrapper or container, or anything on which the article is mounted for display or sale,

(c) expressed on an in-store or other point-of purchase display, (d) made in a course of in-store, door-to-door or telephone selling to a person as ultimate user, or

(e) contained in or on anything that is sold, sent, delivered, transmitted, or made available in any other manner to a member of the public... [Emphasis added]

The false or misleading representation provisions of Section 52 (2) therefore apply not only to telemarketing but also to door-to-door solicitation, and with regard to any materials accompanying items that are offered for sale by the charity, such as candy-donation boxes that are often placed by charities on the counters of retail stores.

- A disconcerting aspect of the new provisions dealing with false or misleading representation is that Section 52.(1.1) states that to establish a false or misleading representation, it is "*not necessary to prove that any person was deceived or misled*". This means that if the solicitation complained of was made in a reckless manner that was false or misleading in a material respect, whether or not anyone was actually misled or deceived, then the charity and the fundraisers would be guilty of an offence.

- Where there has been a violation of either the new deceptive telemarketing provisions or the false or misleading representation provisions, individuals can receive penalties up to \$50,000.00 for a first offence and \$100,000.00 for each subsequent offence. A charity itself can be subject to penalties of up to \$100,000.00 for a first time offence and up to \$2,000,000.00 for subsequent offences.

In light of the increased exposure to liability for both charities and individuals under the new provisions of the *Competitions Act*, it is essential that preventative steps be implemented to reduce the exposure to liability as much as possible. In this regard, Section 74 (5) of the *Competitions Act* states that if the offending organization can demonstrate a history of compliance with the *Competitions Act* and that it has formal fundraising policies in place and follows them, penalties may be reduced or waived altogether. As a result, it is important for charities to adopt fundraising practices to guard against improper telemarketing and misrepresentation in fundraising, such as those contained in the recommendations made by the Canadian Centre for Philanthropy. A summary of those recommendations are set out below:

- Ensure that the fundraising materials (including scripts) accurately describe the charity, its activities, and the purposes for which those donations will be used.
- Consider providing written instructions to telephone solicitors, as well as door to door canvassers advising them that any misrepresentation could result in a severe penalty for them personally and for the charity that they are acting on behalf of.
- Ensure that the telephone fundraising scripts used by employees, volunteers and contract fundraisers disclose at the outset

both the identity of the organization and the purpose for the call.

- Ensure that the contract with telephone solicitors includes a provision requiring adherence to the disclosure and misrepresentation provisions of the *Competitions Act*.
- Ensure that any promotional materials concerning lotteries, etc., includes the required disclosures, ie, the number and value of the prizes, and any available information that materially affects that chances of "winning". Winners should be chosen either randomly or on the basis of their skill and then ensure that the prizes are distributed properly.
- Advise the governing board of the charity concerning the measures that have been taken and the procedures that are in place to ensure compliance with the new provisions of the Competition Act.
- Finally, have the board of a charity adopt a policy committing the organization, its directors, officers, employees, and volunteers to, at all times, avoid making "false or misleading representations" on behalf of the charity. Then ensure that such policy is provided to everyone in the charity, including volunteers as well as employees.

In consideration of the heightened public anxiety that has resulted from numerous publicized telemarketing scams, it is probable that the *Competitions Bureau* will be under pressure to be diligent in enforcing compliance with the new provisions under the *Competitions Act*. In this regard, it should be noted that the *Competition Bureau* can apply for judicial authorization to intercept private communications without consent (ie, a wire tap) to investigate more serious cases.

Bill C-20 constitutes a substantive change in the law with regard to fundraising in Canada

and will therefore need to be carefully studied by charities and their legal counsel given the substantial penalties that may result and

E. PROPOSED CIVIL PENALTIES FOR MISREPRESENTATION ON TAX

In accordance with Resolution 12 in the Federal Budget of February 1999, the Federal Government introduced subsection 163.2 to the *Income Tax Act* to provide for civil penalties for misrepresentation of tax matters by third parties. The proposed amendment is to come into force upon Royal Assent but in the meantime has become the subject of much debate amongst tax commentators.

Even though the proposed amendment to the *Income Tax Act* imposing penalties on tax advisors who make false statements or submissions in relation to tax matters has been softened somewhat by replacing a "gross negligence" standard with a more moderate "culpable conduct test", the extent of the po-

the possibility of criminal charges being laid.

ADVICE UNDER THE INCOME TAX ACT

tential liability would not be limited only to tax professionals or tax advisors. It would also encompass professional fundraisers, as well as any individuals who were involved in giving tax advice. This would include individuals who advise on the tax implications of giving a donation to a charity, whether those individuals are volunteers or professional fundraisers.

As a result, the proposed Section 163.2 of the ITA will need to be carefully studied by fundraisers, charities, and their board of directors to ensure compliance with the new provisions once they become law.

2. ONTARIO LEGAL UPDATE

BY: TERRANCE S. CARTER

A. NEW REGULATIONS AFFECTING CHARITIES EXPECTED SOON

As of the date of this Update, the expected regulations under Section 5.1 of the *Charities Accounting Act* have not yet been released by the Government of Ontario. The regulations, when enacted, are expected to determine under what circumstances directors or trustees of a charity will be exempt from the common law prohibition on directors of a charity receiving, either directly or indirectly, remuneration from the charity. In addition, the regulations are expected to establish permitted guidelines under which a charity can purchase directors and officers

liability insurance and/or adopt an indemnification by-law. The regulations are also expected to provide parameters for a charity to co-mingle restricted funds as a statutory exemption to the common law rule that prohibits the co-mingling of restricted trust funds without first obtaining court authorization.

B. UPDATE ON DELEGATION ISSUES UNDER THE TRUSTEE ACT OF ONTARIO

In earlier issues of *Church & the Law Update* (see Volume 2, Number 2, January 21st, 1999 and Volume 2, Number 3, April 30th, 1999), it was explained that there was consideration that charities would need to ad-

dress in Ontario in the event that the board of directors of those charities were continuing to delegate investment decision making to a discretionary investment fund manager.

While it is conceivable that a court might be persuaded that there is or should be authority at common law to delegate investment decision making, it is now clear that the Attorney General of Ontario has made a deliberate decision in passing Bill 25 not to provide a statutory right to delegate investment decision making, presumably upon the government's understanding of the common law. This position was evident from the comments contained in a recent letter sent by the Attorney General of Ontario to the Canadian Bankers Association dated October 15th, 1999, in which the Attorney General stated as follows:

Thank you for your letter of September 14, 1999, regarding the recent changes to the Trustee Act which came into force on July 1, 1999.

As you are aware, the government is committed to continuing its process of eliminating red tape. However, the recent amendments to the Trustee Act did not include the ability of trustees to delegate investment decisions to others, as it was our view that this step requires extensive policy review. Since the Act is a statute of general application to all trustees, it raises complex issues for accountability of trustees, the regulations of investment professionals and the impact on beneficiaries.

I have noted your comments and appreciate your concerns. I will take these into account when developing our policy agenda.

The position of the Attorney General on the delegation issue is also evident from the specific wording contained in Bill 25. In providing for the statutory right to invest in mutual funds in Section 27 subsection (3),

Bill 25 states that such statutory authority is given "*notwithstanding any rule of law to the contrary*". Such a statement is arguably a statutory recognition, rightly or wrongly, that there is a common law prohibition against delegation of investment decision making by trustees.

From a practical standpoint though, since many large charities, as well as some smaller charities regularly retain investment fund managers to operate discretionary investment accounts, the rule against delegation of investment decision making is honored more in the breach. As a result, charities that have decided to utilize discretionary investment accounts, notwithstanding the lack of statutory power to delegate investment decision making, should adopt a carefully worded investment policy to provide limits on the choice of investments that the investment fund manager can invest in, together with other reasonable terms of reference. This would assist in arguing that the investment fund manager is more an agent of the charity instead of an independent investment dealer who had received an unrestricted delegation of investment decision making from the board of directors of the charity.

The practicality of this approach was recognized by the Public Guardian and Trustee of Ontario in a letter sent to the Charity and Not-For-Profit Law Section of the Canadian Bar Association of Ontario dated September 1st, 1999, an excerpt from which is set out below:

"...Trustees of charities have an overriding duty to act prudently and reasonably. Each charity should have an investment plan in place... However, the charity must maintain authority, and responsibility, for the overall investment plan and must ensure that the investment plan is followed and revised as necessary..."

The Public Guardian and Trustee agrees that in many cases it is prudent for charities to seek the advice of an investment advisor. The charity may even choose, if appropriate, to have day to day investment decisions made by that investment advisor. For example, if the charity has planned to place a certain proportion of its investments in Canadian bank stocks, the investment manager may choose which particular stocks to buy...

Clearly it will not be enough for a charity only to have a plan in place. The way in which the advisor is chosen and plan created, carried out and monitored will also be important...

As stated in your letter, the legislature in amending the Trustee Act, did not address the power of trustees to delegate with the exception of clarifying that investment in mutual funds is not prohibited. The extent of a trustee's power to delegate investment decisions is a matter for the courts to decide. While I have provided some guidelines on the view of the Public Guardian and Trustee, I cannot state with any certainty how the courts will view this matter. If the case law changes, or new legislation affecting delegation of investment decisions comes into effect, it will be necessary to revisit the issue..."

Although the said letter does not sanction delegation of investment decision making, it does indicate that if a carefully considered investment policy is developed and implemented, it is unlikely that the Public Guardian and Trustee of Ontario would take issue with a charity retaining an investment fund manager pursuant to the terms of a prudent investment policy.

Notwithstanding the practical approach taken by the Public Guardian and Trustee, given the position taken by the Attorney General of Ontario as described earlier, it would appear that amending legislation will

still need to be sought to provide directors and trustees of charitable funds with clear statutory authority to delegate investment decision making in order to overcome the uncertainty that has resulted from Bill 25.

C. TEMPORARY LOSS OF CORPORATE INDEMNIFICATION OF DIRECTORS AND OFFICERS

When the new regulations under the *Charities Accounting Act* are released, it is expected that the regulation will set out the terms under which a charitable corporation will be able to adopt an indemnification by-law for directors and officers. However, recent amendments to the *Corporations Act* contained in Bill 25 proclaimed in force on July 1st, 1999 appear to have inadvertently precluded a charitable corporation from having the corporate authority to pass an indemnification by-law at all.

Specifically, Bill 25 amends Section 133 of the *Corporations Act* by stating that Section 80 of the *Corporations Act*, which authorizes the adoption of an indemnification by-law for directors and officers, no longer applies to a charitable corporation that is referred to under Section 1 (2) of the *Charities Accounting Act*. What was likely intended was the inclusion in Section 133.2 of an exemption to the prohibition on charitable corporations adopting an indemnification by-law in circumstances where the charity complied with regulations that authorized an indemnification by-law pursuant to Section 12 of the *Charities Accounting Act*. However, such exemption was not included in Bill 25. As a result, it would appear that a charitable corporation incorporated in Ontario does not at present have the corporate authority to adopt an indemnification by-law.

From speaking with the Office of the Public Guardian of Ontario, it would appear that an amendment will likely be passed to correct this oversight so that charitable corporations that comply with regulations under the *Charities Accounting Act* in relation to adopting an indemnification by-law will regain the corporate authority to pass such a by-law. Hopefully, the amendment will be made retroactive to July 1st, 1999 and will ensure that Bill 25 will not have created a

situation where there is a period of time in which an indemnification by-law for a charity will not be in effect. Otherwise insurance companies providing coverage for charities might be tempted to argue that the lack of an indemnification by-law may limit the exposure of an insurance company under third party liability coverage in the event that a third party claim was made against a director or officer of the charity.

3. UPDATE FROM THE COURTS

BY: ADAM PARACHIN (OSGOODE HALL 3RD YEAR LAW STUDENT)

A. SYNOPSIS OF SUPREME COURT OF CANADA DECISION IN VANCOUVER SOCIETY OF IMMIGRANT AND VISIBLE MINORITY WOMEN

1. Introduction

On June 28th, 1999, the Supreme Court of Canada in *Vancouver Society of Immigrant and Visible Minority Women v. Canada (Minister of National Revenue - M.N.R.)* (1999), S.C.J. No. 5 upheld the decision of Revenue Canada in denying charitable registration to the Vancouver Society of Immigrant and Visible Minority Women ("Society"). This was the first decision concerning the law of charities to come from the Supreme Court of Canada in a few decades. It therefore is of significant importance for organizations wanting to obtain registered charity status in Canada.

2. Factual Background

In pursuit of charitable registration, the Society had made several unsuccessful applications to Revenue Canada. All of the Society's applications were rejected. The Society made attempts, including amending its constitution, to respond to the concerns ex-

pressed by Revenue Canada. In its final application, the Society's constitution described its proposed charitable purposes as follows:

(a) *to provide educational forums, classes, workshops and seminars to immigrant women in order that they may be able to find or obtain employment or self employment;*

(b) *to carry on political activities provided that such activities are incidental and ancillary to the above purposes and provided such activities do not include direct or indirect support, or opposition to, any political party or candidate for public office;*

(c) *to raise funds in order to carry out the above purposes by means of solicitations of funds from governments, corporations and individuals; and*

(d) *detected by the Society]*

(e) *to provide services and to do all such things that are incidental or conducive to the attainment of the above stated objects, including the seeking of funds from governments and/or other sources for the implementation of the aforementioned objectives.*

The Society described its activities as including career and vocational counselling service, networking, soliciting job opportu-

nities, maintaining a job skills directory, liaising for accreditation of foreign credentials and offering referral services.

Revenue Canada rejected the Society's applications because it was not convinced that the Society was constituted *exclusively* for charitable purposes. The Federal Court of Appeal dismissed the Society's appeal of Revenue Canada's decision. On appeal to the Supreme Court of Canada, the Society argued that it was constituted for charitable purposes, namely the advancement of education and other purposes beneficial to the community. (Note: There are four "heads" of charity recognized under Canadian law: the advancement of education, the advancement of religion, the relief of poverty, and other purposes beneficial to the community.)

3. Decision of the Supreme Court

In dismissing the Society's appeal, the Supreme Court made the following determinations concerning the purposes of the society:

Purpose (a) did not qualify as charitable under the traditional head of "advancement of education". However, the purpose was found to be charitable under a broader concept of education that the court adopted, which is discussed below. The Court stated that purpose (a) did not qualify as charitable under the fourth head of charitable purposes, i.e., "other purposes beneficial to the community", because the court found that there was no trend discernable in previous decisions which would indicate that helping immigrant women find and obtain employment was charitable.

The Court found that purposes (b) and (c) complied with s. 149.1(6.2) of the *Income Tax Act*, that provides that a registered charity may devote resources to political activities, where those activities are incidental and ancillary to that organization's charitable activities. While purposes (b) and (c), were political in nature, they did not disqualify

the Society from charitable status because those purposes were considered by the Court to be incidental and ancillary to purpose (a), which was found to be a valid educational purpose.

The Court found, though, that purpose (e) disqualified the Society from charitable registration because it failed to meet the requirement in s. 149.1(1) of the *Income Tax Act*, R.S.C., 1985, c. 1, i.e., that a charitable organization be constituted exclusively to further charitable purposes. Purpose (e) was found to be problematic because it authorized the Society to do all things that were "incidental or conducive" to the attainment of its charitable purposes. The Court found that authorizing the Society to do all things "conducive" to the attainment of its charitable purposes allowed the Society to engage in activities which might constitute both a means for the attainment of its legislative charitable purposes but also independent, non-charitable ends in and of themselves. The use of the words "or conducive" in the phrase "all such things that are incidental or conducive to the attainment of the above stated objects" was determined by the Court to be non-charitable because it meant that the purpose was capable of accommodating activities that were non-charitable as well as charitable.

4. Significance of Decision

The significance of the *Vancouver Society* decision is threefold:

First, the Supreme Court broadened the advancement of education "head" of charity. Prior to the *Vancouver Society* decision, organizations seeking charitable registration under the head of education had to demonstrate that their purpose was to provide "formal training of the mind" or the "improvement of a useful branch of human knowledge". Pursuant to *Vancouver Society*, the advancement of education head merely

requires that information or training be provided in a structured manner and for a genuinely educational purpose, i.e. to advance the knowledge or abilities of the recipients. This broader interpretation of the advancement of education encompasses informal activities, such as workshops and seminars which were previously not considered to be charitable. The Supreme Court, however did delineate the outer limits of this "head" of charity by stipulating that to fall under the advancement of education, an activity must not promote a particular political orientation and must entail more than simply providing people an opportunity to educate themselves by making available educational materials.

Second, the fact that a majority of the Supreme Court found the inclusion of the word "conducive" in purpose (e) of the Society's amended constitution was capable of disqualifying the Society from charitable registration means that vagueness or ambiguity in an organization's stated purposes may be a bar to charitable registration where, as a result of that vagueness or ambiguity, an ar-

gument can be made that the organization's purpose(s) accommodate non-charitable activities. Translated into practical terms, this means that organizations seeking charitable registration must take care to ensure that their charitable purposes are stated on the one hand, wide enough to provide flexibility regarding the activities that such organizations intend to carry out, and not so as to allow criticism from Revenue Canada that those purposes accommodate non-charitable activities.

Third, the fact that the Supreme Court declined to reconsider the traditional definition of charity means that unless Parliament legislates a new definition of charity, the four traditional heads of charity articulated in *Commissioners for Special Purposes of the Income Tax v. Pemsel*, [1891] A.C. 531, i.e. the relief of poverty, the advancement of education, the advancement of religion and other purposes beneficial to the community, will continue to be the basic framework by which the courts will determine what is charitable at law.

4. INTELLECTUAL PROPERTY UPDATE

BY: TERRANCE S. CARTER - TRADE-MARK AGENT

A. THE ADVANTAGES OF TRADE-MARK REGISTRATION

In Volume 2, Number 2 of *Church & the Law Update*, dated January 21st, 1999, a brief summary was given concerning why trade-marks are important for charities. The following article provides a brief explanation of the advantages of obtaining a trade-mark registration instead of relying only on common law rights associated with a trade-mark. The advantages of trade-mark registration are set out below:

1. Trade-Mark Registration Provides A Presumption Of A Valid Trade-Mark

Obtaining a trade-mark registration establishes legal title to a trade-mark, similar to the registration of a deed for real property. This means that a court will presume that the trade-mark in question is a validly registered trade-mark owned by the registered owner. In contrast, at common law the validity of a trade-mark must be established before a court will be able to enforce a common law "passing off" action, and even at that, the "passing off" action is a lengthy, expensive and difficult remedy to pursue.

2. Trade-Mark Registration Is Effective Throughout Canada

At common law, an unregistered trade-mark can only be enforced within the local geographic area in which the trade-mark is known. This means that a charity that carries on operations in Ontario will generally not be able to pursue a common law "passing off" action to restrain unauthorized use of the trade-mark by another charity or an organization in British Columbia for example. However, registration of a trade-mark under the *Trade-marks Act* is effective throughout Canada even if the trade-mark is only used in one geographic area of the country.

3. Trade-Mark Registration Permits Enforcement Across Canada

A trade-mark infringement action for a registered trade-mark under the *Trade-marks Act* can be brought in the Federal Court of Canada and enforced in any province across Canada. However, the common law "passing off" action must be brought within the provincial Superior Court where the trade-mark has been used and cannot, as a matter of right, be enforced throughout the country.

4. Trade-Mark Registration Provides The Exclusive Right To Use The Trade-Mark With Respect To Its Goods Or Services

Trade-mark registration remains in effect for a period of fifteen years subject to renewal and gives to the owner the exclusive right to use the trade-mark throughout Canada in respect of the wares and services for which it has been registered. As such, the owner of a registered trade-mark has the exclusive rights to use the trade-mark for the goods and services for which it has been registered to the exclusion of anyone else.

5. Trade-Mark Registration Gives Public Notice Of The Trade-Mark

One of the more important advantages of a registered trade-mark is that the trade-mark

will be listed in the registered trade-marks index maintained by the Trade-marks Office in Ottawa and will appear in subsequent trade-mark searches conducted by trade-mark agents and by the Trade-marks Office itself. This helps to ensure that no confusing trade-marks are subsequently registered in Canada.

In addition, the NUANS Corporate Name Search system maintained by Industry Canada will also include the registered trade-mark in its search of similar names, thereby warning businesses that may be considering adopting a trade name or unregistered trade-mark similar to that of the trade-mark.

6. A Trade-Mark Registration Can Become Incontestable In Some Situations

A registered trade-mark cannot be contested after five years from its date of registration based upon a claim of prior usage even if there is an unregistered trade-mark with an earlier date of first usage. No such similar benefit extends to an unregistered trade-mark at common law.

7. Failure To Obtain Trade-Mark Registration May Result In A Limitation Of Trade-Mark Rights

Since a registered trade-mark becomes incontestable after a period of five years based on a claim of prior usage of a similar trade-mark, if another party obtains registration of a trade-mark that is the same or similar to the unregistered trade-mark without knowledge of the prior unregistered trade-mark, then after a period of five years from registration, the owner of the unregistered trade-mark who failed to take the initiative and register the trade-mark may be confronted by a legal challenge from the owner of the registered trade-mark to an expansion in usage of its unregistered trade-mark.

8. Trade-Mark Registration Can Assist In Protecting A Domain Name On The Internet

A trade-mark registration can greatly assist in protecting a key domain name on the Internet. Pursuant to the current Internic Domain Name Dispute Policy that came into effect on September 9th, 1996, a second level domain name on the Internet used in conjunction with a first level generic domain of .com, .org, .edu, .gov, and .net, which is supported by an identical trade-mark registration cannot be successfully challenged notwithstanding that the complainant may have an earlier unregistered or registered trade-mark, unless the complainant incurs the expense of obtaining an order in a U.S. court having competent jurisdiction over Internic Network Solutions, Inc., the body that presently regulates top level generic domain names.

Similarly, without a trade-mark registration, a domain name remains vulnerable pursuant to the provisions of the current Internic Domain Name Dispute Policy to a successful challenge by any party that has obtained a

B. EXTRA PROTECTION OF SECTION 9 OFFICIAL MARKS AVAILABLE FOR CHARITIES

There is an important opportunity that is currently available for registered charities to obtain enhanced protection for a trade-mark by applying for a Section 9 Official Mark registration. This protection, though, may not be available in the future, which should be obtained now instead of later. The following is a brief summary of what a Section 9 Official Mark is and why it is important for charities to consider obtaining the protection that it affords.

trade-mark registration for the identical second level domain name anywhere in the world. This is so even if the trade-mark registration was obtained after the domain name became activated, provided that the trade-mark registration shows a date of first usage which is prior to the activation date of the domain name in question.

9. Trade-Mark Application in Canada Permits "Convention" Filing In Other "Convention" Countries

The filing date for a trade-mark application in Canada will permit the same filing date to be used for a trade-mark application filed in another "Convention" country (i.e, another country that has entered into the "Paris Convention" of 1883), provided that the trade-mark application in the other jurisdiction is filed within six months of the filing date in Canada. This entitlement can provide a significant advantage to a charity that wishes to establish a priority claim to a trade-mark in another country based upon the earlier date of filing in Canada.

1. What Is A Section 9 Official Mark?

An Official Mark under Section 9(1)(n)(iii) of the *Trade-marks Act* prohibits anyone from using the Official Mark in association with any wares or services in Canada for which a notice has been given by the Registrar of Trade-marks. The relevant wording of Section 9(1)(n)(iii) of the *Trade-marks Act* provides as follows:

"No person shall adopt in connection with a business, as a trade-mark or otherwise, any mark consisting of, or so nearly resembling as to be likely to be mistaken for... any badge, crest, emblem or mark adopted and used by any public authority, in Canada as an official mark for wares and services in respect of which the Registrar has, at the

request of... the public authority... given public notice of its adoption and use..."

The public notice contemplated by Section 9(1)(n)(iii) of the *Trade-marks Act* is accomplished by a "public authority" making a request to the Trade-marks Office to publish notice of the Official Mark in the Trade-marks Journal. Some examples of organizations that in the last few years have had notice published of Official Marks include the following:

- (a) The Ontario Minor Hockey Association;
- (b) The Alzheimer's Society of Canada;
- (c) Canadian Baptist Ministries;
- (d) The Governing Council of The Salvation Army in Canada
- (e) The Anne of Green Gables Licensing Authority for a list of names from the Anne of Green Gable series of books, such as "Gilbert Blythe", "Anne Shirley" and "Matthew Cuthbert", to name a few;
- (f) The Heart and Stroke Foundation of Canada;
- (g) The Ontario Society for Crippled Children;
- (h) The Hutterian Bretheran Church;
- (i) The Canadian Cancer Society; and
- (j) The Canadian Canoe Museum.

as well as various governments and crown corporations.

2. The Advantages Of A Section 9 Official Mark

The advantages of a Section 9 Official Mark can be summarized as follows:

- (a) The test of confusion under Section 9 of the *Trade-marks Act* does not necessitate a

comparison of wares and services as is required with the test of confusion for regular trade-marks under Section 6 of the *Trade-marks Act*. The test under Section 9, although narrowly applied, involves only a comparison of the prohibited Official Mark with that of the mark used by another. If the mark on its face is obviously confusing with the prohibited Official Mark, even if it is being used in conjunction with different wares or services than that of the owner of the Official Mark, then Section 9 may result in the other party being prohibited from using the mark in question. In contrast, the test for confusion under Section 6 of the *Trade-marks Act* for regular trade-marks, although more broadly applied, takes into consideration not only whether the mark on its face is confusing but also the nature of the wares or services and the circumstances of adopting the mark. None of these factors are relevant to a Section 9 Official Mark. Instead, only a bare comparison is made of the marks to determine whether the mark might be mistaken for the Section 9 Official Mark.

(b) The comprehensive prohibition of a Section 9 Official Mark means that a charity can totally "occupy the field" and ensure that the Official Mark cannot be used by anyone else for any application whatsoever. This is particularly important where a charity wants to ensure that other organizations or businesses do not use a trade-mark to embarrass the charity in an application that would otherwise fall outside the wares and services in a regular trade-mark registration.

As such, the impact of a Section 9 Official Mark has very broad application and extends to the barring of a pending trade-mark application by another person from proceeding to registration if it is found to be confusing. Although common law trade-mark rights and existing trade-mark registrations persist, arguably the owners of the common law trade-mark would have no right to extend

the use of those trade-marks to other wares and services. This means that a Section 9 Official Mark has the effect of prohibiting the owner of an existing trade-mark registration from extending its registration to any further wares and services. However, the remedies associated with a Section 9 Official Mark publication is limited to obtaining an order prohibiting the unauthorized use of the Official Mark but does not extend to a claim for damages.

(c) Although the filing fee for an Official Mark is \$300.00 compared to \$150.00 for a regular trade-mark application, the legal fees for a Section 9 Notice are considerably less than those associated with a regular trade-mark registration, in part because there is no prosecution or opposition proceedings associated with an Official Mark application.

(d) A Section 9 Official Mark Notice does not have to be renewed. Regular registered trade-marks, on the other hand, must be renewed every fifteen years together with the payment of regular renewal fees.

(e) Regular trade-marks are vulnerable to expungement from the Trade-Mark Registrar either for abandonment or non-use. The only grounds upon which a Section 9 Official Mark Notice will be vulnerable is if the notice were to be challenged in the Federal court on the basis that it had been adopted by a body that was not a public authority. If true, it is likely that the notice of the Section 9 Official Mark would be void *ab initio*, although the underlining trade-mark rights would still be in existence.

(f) A Section 9 Official Mark can indirectly be licensed, similar to a registered trade-mark, by virtue of providing a written consent to use the Official Mark. In this regard, Section 9(2) of the *Trade-marks Act* states that Section 9(1) does not prevent the adoption, use or registration of a trade-mark if there is the consent of the public authority in

question. In addition, as a result of the amendments to section 50 of the *Trade-marks Act* in June of 1993 that expanded the ability to license trade-marks, both registered and unregistered trade-marks can now be licensed without executing and filing a registered user agreement that had previously been required.

As a result, a charity that has a Section 9 Official Mark could allow other organizations to use the Official Mark pursuant to an agreement that would both document a consent under Section 9(2) of the *Trade-marks Act* as well as license the unregistered trade-mark rights in the Official Mark pursuant to Section 50 of the *Trade-marks Act*. The result is that a Section 9 Official Mark can indirectly be licensed similar to a registered trade-mark, although it is still advisable to register an Official Mark as a regular trade-mark and license it in that context as well.

3. What Constitutes A Public Authority

Only a "public authority" is entitled to obtain an Official mark. A "public authority" is not defined in the *Trade-marks Act* and therefore its meaning has to be derived from the statutory purpose of Section 9. No ridged test has been established. Generally, the case law has established that a public authority must exhibit the following characteristics:

- (a) the entity must be non profit;
- (b) there must be a public benefit, instead of a private benefit;
- (c) there must be some degree of government control shown;
- (d) there must be some degree of government financial support shown.

The most difficult characteristics of a public authority to establish to the satisfaction of the Trade-Marks Office is that a charity is subject to government control and that there

is a degree of government financial support. Both of these characteristics can be satisfied by virtue of the considerable control exercised over a charity both the federal and provincial governments, as well as the indirect financial support provided by charitable tax receipts available for donations to charities. However, notwithstanding the obvious degree of government control and financial support for charities in Canada, it is still necessary to document how a charity satisfies the requirements for a "public authority". This is particularly important when the charity applying for Section 9 Official Mark Status is a charity that is incorporated outside of Canada. Section 9 Official Mark protection is not limited to only Canadian charities and will be available for charities incorporated in other jurisdictions provided that they meet all of the criteria referred to above for a "public authority".

4. Section 9 Official Mark v. Regular Trade-Mark Application

Ideally more trade-mark protection will be available if a charity applies for both a regular trade-mark registration and a Section 9 Official Mark. If on the other hand, the charity has only a limited budget to work with and cannot afford to do both, it should apply for a Section 9 Official Mark first with a regular trade-mark application to follow as soon as funds become available. The only difficulty with this approach is that a charity will often assume that they have sufficient protection with a Section 9 Official Mark and may find it difficult to subsequently prioritize the matter or justify the expenditure of applying for a registered trade-mark at a later time.

For charities that have an internet domain name, it is also important that the charity understand that a Section 9 Official Mark is not the equivalent of a registered trade-mark required by the current Internic Domain Name Dispute Policy, and as such a Section

9 Official Mark cannot be relied upon to substantiate an Internet domain name from possible challenges. Instead, a regular registered trade-mark must be obtained to obtain the required protection in this regard.

In addition, a Section 9 Official Mark is effective only as of the date of publication and is not retroactive to the date of first usage. A regular trade-mark registration, on the other hand, is effective as of the date of first usage in Canada. If the trade-mark maturity has been in existence for a number of years, it is very important that the trade-mark rights in that trade-mark be recognized as of the date of first usage instead of only as of the date of publication with the Section 9 Official Mark.

5. Possible Future Restrictions for Section 9 Official Marks

As a result of the significant benefits associated with a Section 9 Official Mark and its expanded application over the last fifteen years, it is conceivable that there may be changes made to restrict the application of Section 9 under the *Trade-marks Act*. If Section 9 is amended to restrict its availability or application, it is uncertain whether such amendment would have retroactive effect on existing Section 9 Official Marks so that existing Section 9 Official Marks would be converted into regular registered trade-marks. Notwithstanding this uncertainty, it would be prudent to advise charities to err on the side of caution and obtain a Section 9 Official Mark now while they are still able to do so instead of waiting to see what may transpire in the future concerning legislative changes.

For more information on the advantages of Section 9 Official Marks, reference can be made to an article by the writer entitled *Avoiding Wasting Assets Trade-Mark Protection for Charities* found at our web page at www.charitylaw.ca. The article also con-

tains more information on the process of obtaining Section 9 Official Marks Registra-

C. THE IMPORTANCE OF SECURING DOMAIN NAMES ON THE INTERNET

The next issue of the *Church & the Law Update* will include an article explaining the importance for charities to obtain domain names on the internet that utilize the trade-marks of the charity. In the meantime, since domain names are issued on a "first come first serve basis", it is extremely important that charities be vigilant in securing internet domain names that include both their corporate names and trade-marks, as well as any variation that might be potentially confusing with the trade-marks of the charity, in con-

5. INTERNET UPDATE

A. LEGAL ISSUES IN FUNDRAISING ON THE INTERNET

BY: MERVYN F. WHITE

Recent surveys show that Canadians remain highly concerned over their privacy on the internet. Charities wishing to fundraise on the internet need to address these concerns in order to instill confidence in donors and reduce their own liability for misuse of private information. Failure to do so may limit any advantage that fundraising on the internet offers, as potential donors shy away from on-line giving.

The Federal Government of Canada has tabled legislation to regulate the collection, retention and use of personal information by private organizations, including charities and private fundraisers. Bill C-6 *The Personal Information and Electronic Documents Act* (the "Privacy Act") is intended to

tion for those charities that are interested.

junction with the first level URL's of ".org", ".com", ".net" and ".ca". This should be done as soon as possible.

Even though a charity will not likely utilize multiple domain names that it may register, by securing multiple domain names, the charity will at least ensure that other organizations are not able to start using a domain name that could be potentially confusing with that of the charity. It is also important for a charity that is utilizing a domain name to obtain registered trade-mark protection for the domain name that it is using, in Canada, and in the United States.

bring Canada in line with privacy legislation enacted in the European Union in 1995.

In substance, the Privacy Act incorporates the principles of the Canadian Standards Association *Model Code for the Protection of Personal Information*. The principles include:

- **Accountability:** An organization is responsible for personal information under its control and should designate an individual or individuals in the organization who will be accountable for the organizations compliance with the applicable principles;
- **Identifying Purposes:** The purposes for which information is collected should be identified and disclosed at or before the information is collected;

- Consent: The knowledge and consent of the individual providing the information should be required for its collection, use and retention;
- Limited Collection: The collection of personal information should be limited to that which is necessary for the purposes identified by the organization, and shall be collected by fair and lawful means only;
- Limited Use, Disclosure, and Retention: Personal information should not be used or disclosed for purposes other than those for which it was collected, except with the consent of the individual or as required by law, and personal information shall be retained only as long as necessary for fulfillment of those purposes;
- Accuracy: Personal information should be accurate, complete, and up-to-date as is necessary for the purposes for which it is to be used;
- Safeguards: Personal information should be protected by security safeguards appropriate to the sensitivity of the information;
- Openness: An organization should make readily available to individuals specific information about its policies and practices related to the management of collected information;
- Individual Access: Upon request, an individual should be informed of the existence, use and disclosure of his or her personal information and shall be given access to that information, and shall be given the opportunity to challenge the accuracy of that information and have it amended where appropriate;
- Challenging Compliance: An individual should be able to address a challenge concerning compliance with the above noted principles to the designated individual or individuals in the organization.

Once enacted, the Privacy Act will impose a high legal burden upon organizations with respect to the collection, retention and use of private information. In the interim, it should be the goal of all organizations doing business on the internet - and especially charities which rely on the goodwill of their donors - to ensure the continuing privacy of information collected from Canadians over the internet. Charities should consider establishing a written privacy policy which incorporates the principles of the Canadian Standards Association model noted above. The written privacy policy should be incorporated into the charity's web site and should be voluntarily complied with when fundraising on the internet.

Charities employing private fundraisers should also determine whether private fundraisers have policies on privacy and should consider incorporating a privacy policy into any contract for fundraising services. Private fundraisers hold themselves out to the Canadian public as agents for the charity. How they use the private information that they collect on behalf of a charity may expose the charity to vicarious liability. As a result, charities should take all reasonable steps to ensure that the private information that private fundraisers collect remains the property of the charity and is not used by the fundraiser for its own benefit. Fundraisers should not be allowed to sell such information, or use the information on behalf of other unrelated charities or businesses.

In conclusion, the internet provides new and exiting opportunities for fundraising. The

advantages to be gained by charities should not be limited or lost through the inappropriate use of private information collected from donors. Charities should take all reasonable steps to ensure that private informa-

tion is properly retained and used. By doing so, charities will help to instill in Canadians a greater sense of confidence in gift giving over the internet.

B. HELPFUL WEB SITES ON CHARITABLE ISSUES

The following are a list of a few web sites providing resource materials on charitable issues that was originally published in *Charitable Thoughts* a publication of the Charity and Not-for-Profit Law Section of the Canadian Bar Association of Ontario.

Canadian Association of Gift Planners - www.cam.org/-cagp/

Canadian Centre for Business in the Community - www.conferenceboard.ca/ccbc/

Canadian Centre for Philanthropy - www.ccp.ca

Canadian Policy Research Network - www.cpm.ca

Charity Village - www.charityvillage.com

Charities Division, Canada Customs and Revenue Agency (Revenue Canada) - www.ccr-aadrc.gc.ca

CultureNet - www.culturenet.ca

National Society of Fund Raising Executives (Greater Toronto Area) www.nsfre.toronto.org

Voluntary Sector Roundtable - www.web.net/vsr-trsb

Public Guardian and Trustee of Ontario - www.attorneygeneral.jus.gov.on.ca/pgt

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