
THE 2008 ANNUAL CHURCH & CHARITY LAW™ SEMINAR

Toronto – November 6, 2008

Incorporation of Churches and Charities: The Basics and a Few Twists to Consider

By Jacqueline M. Demczur, B.A., LL.B.

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The Basics and Some Twists to Consider**

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OVERVIEW OF TOPICS

- Introduction
- The Basics
 - Considering Incorporation
 - The Nuts and Bolts of Incorporation, Together with Some Twists to Consider
 - Bringing Your Corporation to Life
 - Effectively Using Your Corporation
- Other Twists to Consider
 - Utilization of Multiple Corporate Structures
 - Focus: Property Holding Corporations
 - Risk Management Issues

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A. INTRODUCTION

- Why Incorporate?
- Resource Materials
 - See the following materials at www.charitylaw.ca for more information:
 - Article entitled “To Be or Not to Be: Incorporation of Autonomous Churches”

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- **Charity Law Bulletin #96, Applying for Federal Incorporation and Charitable Status, July 19, 2006**
- **Strategies for Protecting Charitable Assets Through Multiple Corporate Structures, March 31, 2008**
- **Charity Law Bulletin #115, Effective Asset Protection Through Multiple Corporate Structures, April 24, 2007**

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B. THE BASICS

1. Considering Incorporation

- **Characteristics of an unincorporated church**
- **Characteristics of an incorporated church**
- **Advantages of church incorporation**
 - **Limited liability protection for members**
 - **Perpetual existence as separate legal entity**
 - **More effective organizational control**
 - **Indemnification of directors and officers**
 - **Can maintain and defend legal actions**
 - **Can own assets in name of corporation, not trustees**

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- **Disadvantages of church incorporation**
 - **Costs**
 - **Completing corporate filings**
 - **Maintaining corporate records**
 - **Drafting corporate by-law**
 - **Leasing land restrictions**
 - **Objections to government control**

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- **When is incorporation appropriate?**
 - **At any time, but it is particularly appropriate in the following situations:**
 - **Building programs or other expansion**
 - **Incurring debt**
 - **Entrenchment of biblical beliefs through Statement of Faith and Policy Statements, e.g. marriage, lifestyle, etc.**

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- **Ministries involving liability exposure**
- **Wrongful dismissal actions**
- **Church discipline problems**
- **No one-size-fits-all solution**
 - **Evaluate the church's needs and exposure**
 - **Seek legal counsel for advice**

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2. The Nuts and Bolts of Incorporation, Together with Some Twists to Consider

- **Preparation**
 - **Do it right or not at all**
 - **Designate small committee or one individual to co-ordinate incorporation**
 - **Obtain congregational approval to proceed with incorporation**
 - **If incorporating a brand new church, obtain charitable registration number after incorporation**

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- **Choice of jurisdiction**
 - **Federal vs. Provincial?**
 - **Advantages of federal incorporation**
 - **Update on amendments to *Canada Corporations Act* and *Corporations Act* (Ontario)**
- **Documentation**
 - **Form must follow substance**
 - **Consult with denominational head office, if applicable, for sample incorporation documents or if their approval of draft incorporation documents is required**

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- **Prepare draft application for letters patent**
 - **Objects and power clauses**
 - **Standard objects for most churches**
 - **Need customized objects for charities to ensure sufficient corporate authority to do all proposed activities**
 - **Should reference CRA and PGT model objects**
 - **Dissolution clause**
 - **Assets usually directed to church or charity with similar objects and statement of faith**
 - **Twist: Assets may be directed to the denomination or an affiliated charity on dissolution or these entities can be given right to approve or be consulted about the recipient charity**

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- **Prepare draft general operating by-law**
 - **Membership qualifications**
 - **Churches usually have broad membership**
 - **Twist: Alternatively, a “closed” membership is sometimes used, i.e. the corporate members are the same as the controlling board members**
 - **Used where there is a large congregation and regular members meetings are cumbersome, or where the church is hierarchically structured**
 - **Congregation though usually has limited role as congregational members**

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▪ **Membership admission**

- Admission sometimes approved by members, but usually by the controlling board, or by the Pastor together with those responsible for spiritual matters in the church

▪ **Membership term**

- Usually perpetual
- **Twist: But some churches now imposing limited term, e.g. 3 years, with renewal requirements**

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▪ **Dispute resolution and discipline of members**

- May need to follow discipline procedure of denomination
- Discipline of members not the same as discipline of employees
- Discipline procedures differ where member is under 18, i.e. need to involve parents or guardians
- However, if abuse is involved, need to follow church's policies on abuse

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▪ **Establishment of controlling board (i.e. deacons or elders)**

- Single board
- Double board
- **Twist: Ex officio board**
 - Controlling board made up of people who hold another office or position in the church

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- Election of controlling board members
 - Usually by vote of members
 - Minimum percentage of vote to elect, although it can vary
 - Twist: Some churches do ratification process instead
- Term of office and removal
 - Usually set term of 1 to 3 years
 - Rotating term recommended
- Removal of controlling board members
 - Automatic removal if resign
 - Board can remove if no longer meets qualification requirements

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- Members can remove controlling board members if they:
 - Engage in immoral conduct contrary to biblical principles – usually 2/3rds vote or higher required
 - Are unfit to hold office for any other reason – usually high percentage vote required, e.g. 75% or higher
- Procedure for members and board meetings

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- Definition and duties of minister and associate ministers
 - Some churches give additional responsibilities to minister
 - For example, although the minister cannot be a director because he or she is paid employee, could be given right to be chair of board
- Definition and duties of officers and term
 - Usually officers are chair or president, vice-chair or vice-president, secretary or clerk, treasurer, or possibly secretary-treasurer, and possibly moderator
- Twist: Controlling board usually elects officers, but sometimes members elect some or all of them
- Indemnification

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- **Committees**
 - Can set out parameters of specific committees, e.g. nominating, finance, etc.
 - Or can set out general parameters of committees and that controlling board can establish them from time to time
 - Or can set out single paragraph authorizing controlling board to establish committees and their parameters from time to time
- **Policy Statements – e.g. children’s ministries, lifestyle, etc.**
 - Board policies
 - Bylaw policies

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- Obtain formal congregational approval for application for letters patent and general operating by-law
- Confirm availability of corporate name
- Submit signed documentation to the federal government with checklist
- Issuance of letters patent and choosing implementation date of transfer of assets and liabilities

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- 3. Bringing Your Corporation to Life**
- **Overview**
 - Getting incorporated only first step
 - Second and equally important step is transfer of assets and liabilities from unincorporated church and its dissolution
 - **Choosing effective date for transfer of assets and liabilities**
 - **Conducting appropriate due diligence searches ahead of time, e.g. real estate including environmental assessments, title searches, etc.**

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- **May need to involve denomination if they hold property for unincorporated church in trust or hold mortgage on the property**
- **Initial meetings of directors and members of church corporation**
- **Convene final meeting of members of unincorporated church to:**
 - **Advise that incorporation is complete and operations will be transferred as of effective date**
 - **Authorize transfer of members, charitable number, assets and liabilities**
 - **Authorize dissolution**

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- **Complete formal transfer of membership, charitable registration number and assets to incorporated church**
- **Assumption of debt by incorporated church and indemnification of unincorporated church**
- **New banking documents**
- **Filing of government forms**
- **Obtain final report from legal counsel**

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- 4. Effectively Using Your Corporation**
- **Proper use of corporate name**
 - **Proper use and registration of ministry names**
 - **Protection of corporate and ministry names**
 - **Completion of required corporate business and maintenance of corporate records**
 - **Regular board meetings**
 - **Recommend minimum of four per year although most churches have monthly board meetings**
 - **Annual meeting of members**
 - **Appoint auditor**
 - **Elect people to controlling board**

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- Elect officers, as applicable
- Approve financial statements
- Need to prepare detailed minutes of all meetings and file in corporate minute book
- Regular review of corporate documents and updating as required
- Related corporations to be considered from time to time, as ministry programs change, assets grow, etc.

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- C. OTHER TWISTS TO CONSIDER**
- 1. Utilization of Multiple Corporate Structures**
- Purpose
 - Significant advantages for charities
 - Asset protection
 - Reduction of liability exposure
 - Types of multiple corporate structures
 - Parallel operating charities
 - Parallel foundations
 - Umbrella associations

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- General Issues to Address
 - Need for relational provisions
 - Inter-corporate relational models
 - Ex officio relational model
 - Corporate relational model
 - Franchise relational model
 - Association agreements
 - Intellectual property
 - Minimizing cross-over liability

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2. Focus: Property Holding Corporations

• **Overview**

- Board of directors has fiduciary obligation at common law to protect charitable assets
- Most important asset is usually real property leading to growing popularity of parallel property holding corporations (“property holdco”) for churches and charities

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• **Purpose of Church/Charity Property Holdco**

- Offers better protection of valuable assets, land and buildings
- Involves land and buildings to be owned by property holdco as passive holding corporation
- Property holdco then leases or licenses the use of land and buildings to the operating church or charity

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• **Structure of Property Holdco**

- First step is to incorporate property holdco
- Letters patent
 - Sole object will be to provide and maintain facilities for sole benefit of operating church or charity
 - Could add other affiliated charities to benefit as well
 - Property holdco to have identical statement of faith to operating church or charity
 - Directors and members required to subscribe to said statement of faith

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- Dissolution clause will require operating church or charity to approve or be consulted on entity to receive property holdco's assets on dissolution
- Need to be careful about cross-over liability
- General operating bylaw
 - All directors and members to be members in good standing of church or charity
 - 50% less (1) of directors to receive and maintain written approval of operating church or charity
 - Corporate documents cannot be amended or repealed without consent of operating church or charity

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- Application for charitable status
 - Application submitted immediately after incorporation
 - Assets of operating church or charity can not be transferred until charitable status granted
- Documentation to be prepared to put multiple corporate structure in place
 - Asset transfer agreement
 - Association agreement
 - License agreement
 - Facility use policy (optional, but recommended)

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- Advantages of establishing property holdco
 - Asset protection
 - But need to operate property holdco at arm's length from main church or charity to ensure such protection
 - Avoiding potential land transfer tax
 - Avoiding merger of adjoining properties where more than one property involved
- Disadvantages of establishing property holdco
 - Municipal property tax issues, i.e. potential loss of existing exemption as a place of worship
 - Increased costs
 - Ongoing operation of multiple corporate structure

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3. Risk Management Issues

- Incorporation alone not enough
- Need to do regular risk management review and develop and implement appropriate risk management policies, e.g. child protection
- Need for regular legal audits

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