
THE OTTAWA REGION CHARITY LAW SEMINAR

Ottawa – February 11, 2009

Incorporation of Churches and Charities: The Basics and Some Twists to Consider

By Terrance S. Carter, B.A., LL.B., Trade-mark Agent

© 2009 Carters Professional Corporation

CARTERS™.ca

Carters Professional Corporation / Société professionnelle Carters
Barristers, Solicitors & Trade-mark Agents / Avocats et agents de marques de commerce

Ottawa (613) 235-4774
Mississauga (905) 306-2791
Orangeville (519) 942-0001

Toll Free: 1-877-942-0001

www.charitylaw.ca

THE OTTAWA REGION
CHARITY LAW SEMINAR
Ottawa – February 11, 2009

Incorporation of Churches and Charities:
The Basics and Some Twists to Consider

By Terrance S. Carter, B.A., LL.B.
© 2009 Carters Professional Corporation



Ottawa, Mississauga, Orangeville
Toll Free: 1-877-942-0001
Carters Professional Corporation / Società professionale Carters
Charities, Solicitors & Trusts - Les Agents / Associação de advogados de negócios
www.charitylaw.ca www.carters.ca

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

2

A. INTRODUCTION

- Why and when should a church or charity incorporate?
- Resource materials to assist in identifying and reviewing applicable issues
 - See the following materials at http://www.carters.ca/pub/article/charity/1995/tob_eornot.pdf for more information:
 - Article entitled “To Be or Not to Be: Incorporation of Autonomous Churches”

3

- Charity Law Bulletin #96, Applying for Federal Incorporation and Charitable Status, July 19, 2006 at <http://www.carters.ca/pub/bulletin/charity/2006/chv1b96.pdf>
- An article entitled “Strategies for Protecting Charitable Assets Through Multiple Corporate Structures”, March 31, 2008 at <http://www.carters.ca/pub/article/charity/2008/sc0331.pdf>
- Charity Law Bulletin #115, Effective Asset Protection Through Multiple Corporate Structures, April 24, 2007 at <http://www.carters.ca/pub/bulletin/charity/2007/chv1b115.pdf>

4

B. THE BASICS

1. Considering Incorporation

- **Characteristics of an unincorporated church or charity**
 - A group of individuals who associate on a voluntary basis
 - The church or charity has no existence apart from the members themselves
 - The members of the church or charity may be liable for debts and civil liabilities of the church or charity, even if caused by other member of the church or charity
- **Advantages of church or charity incorporation**
 - Limited liability protection for members

5

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

6

- **When is incorporation appropriate?**
 - At any time, but it is particularly appropriate in the following situations:
 - Embarking on building programs or other expansion
 - Undertaking incursion of debt
 - Desire by a church to entrench biblical beliefs through statement of faith and policy statements, e.g. marriage, lifestyle, etc.

7

- Operations or ministries involving liability exposure
- Wrongful dismissal actions
- Church discipline issues
- However, no one-size-fits-all solution
 - Therefore imperative to evaluate the needs and exposure that a church or charity is facing
 - Need to seek legal counsel for advice

8

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

- Preparation
 - Do it right or don't do it at all
 - Designate small committee or one individual to co-ordinate incorporation
 - Obtain congregational or membership approval, as applicable to proceed with incorporation
 - If incorporating a brand new church or charity, obtain charitable registration number after incorporation

9

- Choice of jurisdiction
 - Federal vs. provincial?
 - Advantages of federal incorporation
 - Generally faster
 - More flexible corporate structure
 - Provides corporate name protection across Canada
 - Update on amendments to *Canada Corporations Act* and *Corporations Act* (Ontario)
- Documentation
 - Form must follow substance

10

- Consult with denominational or charity head office, if applicable, for sample incorporation documents or if their approval of draft incorporation documents is required
- 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/or Ontario Public Guardian and Trustee model objects

11

- Dissolution clause
 - Assets usually directed to church or charity with similar objects and statement of faith
 - Twist: Assets may be directed to the denomination, head office or an affiliated charity on dissolution, alternatively these entities can be given right to approve or be consulted about the recipient charity

12

– Prepare draft general operating by-law

- Membership qualifications
 - Non-church charities will usually have a small corporate membership
 - Churches usually have a broad based membership in order to include the congregation
 - Twist: Alternatively, a “closed” membership is sometimes used, i.e. the corporate members are the same as the controlling board members

13

- Used where there is a large congregation and regular members meetings are cumbersome, or where the church is hierarchically structured
- In this situation the congregation, usually has a limited role as being supporting congregational members but in a non-voting capacity

14

- Membership admission
 - Admission sometimes approved by members, but usually by the controlling board, or by the minister together with those responsible for spiritual matters in the church
- Membership term
 - Usually perpetual
 - Twist: Some churches and charities are now imposing limited term, e.g. 3 years, with renewal requirements in order to clear out “deadwood”

15

- 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

16

- Establishment of controlling board (i.e. deacons, elders, board of management, trustees or board of directors)
 - Single board
 - Double board
 - Twist: Ex officio board
 - Controlling board made up of people who hold another office or position in the church

17

- Election of controlling board members
 - Usually by vote of members
 - Minimum percentage of vote to elect, although it can vary
 - Twist: Some churches and charities do ratification process instead of voting
- 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

18

- Members can remove controlling board members if they:
 - Are unfit to hold office for any other reason – usually high percentage vote required, e.g. 75% or higher
 - For churches - engage in immoral conduct contrary to biblical principles – usually 2/3rds vote or higher required
- Procedure for members and board meetings need to be carefully articulated
- Definition and duties of minister and associate ministers
 - Some churches give additional responsibilities to minister

19

- For example, although the minister cannot be a director because he or she is paid employee, could be given right to be acting 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 can elect some or all of them
- Indemnification of directors and officers need to be authorized in accordance with provincial regulations

20

- **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. child protection, marriage and divorce, lifestyle, etc.**
 - Board policies – requires board approval only
 - Bylaw policies – requires membership approval

21

- Obtain formal congregational approval for application for letters patent and general operating by-law (or membership approval if not a church)
- 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

22

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 or charity 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.**

23

- **May need to involve denominational or charity head office if they hold property for unincorporated church in trust or hold mortgage on the property**
- **Initial meetings of directors and members of church or charitable corporation**
- **Convene final meeting of members of unincorporated church or charity 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 of unincorporated church or charity

24

- Complete formal transfer of membership, charitable registration number and assets to incorporated church or charity
- Assumption of debt by incorporated church or charity and indemnification of unincorporated church or charity
- New banking documents need to be adopted
- Filing of government forms
 - Federal
 - Form 3 – annual summary
 - Provincial
 - Extra provincial license
 - Business name registration
- Provide final report with explanation of compliance issues for the board of directors

25

4. Effectively Using Your Corporation

- Proper use of corporate name
- Proper use and registration of ministry names
- Protection of corporate and ministry names through incorporation and trade-marks
- 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 members to controlling board

26

- Elect officers, as applicable
- Approve financial statements
- Need to prepare 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.

27

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

28

- **General issues to address**
 - Need for relational provisions between multiple corporations
 - The need to minimize cross-over liability
 - Inter-corporate relational models
 - Ex officio relational model
 - Corporate relational model
 - Franchise relational model
 - The need for intellectual property licensing
 - The need for an association agreement

29

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

30

- **Purpose of 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

31

- **Structure of property holdco**
 - First step is to incorporate property holdco
 - Letters patent
 - Sole object is 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, where applicable

32

- Dissolution clause will require operating church or charity to be consulted on entity to receive property holdco's assets on dissolution
- Need to be careful about cross-over liability issues
- General operating bylaw
 - All directors and members to be members in good standing of church or charity
 - Up to 50% less (1) of directors to receive and maintain written approval of operating church or charity

33

- Relevant portions of corporate documents cannot be amended or repealed without consent of operating church or charity
- 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

34

- License agreement for facility
- Facility use policy (optional, but recommended)
- 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

35

- Increased costs
 - Ongoing operation of multiple corporate structure
3. Other 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
 - Need to review all forms of insurance on a regular basis

36

DISCLAIMER

This handout is provided as an information service by Carters Professional Corporation. It is current only as of the date of the handout and does not reflect subsequent changes in the law. This handout is distributed with the understanding that it does not constitute legal advice or establish a solicitor/client relationship by way of any information contained herein. The contents are intended for general information purposes only and under no circumstances can be relied upon for legal decision-making. Readers are advised to consult with a qualified lawyer and obtain a written opinion concerning the specifics of their particular situation.

© 2009 Carters Professional Corporation



Ottawa, Mississauga, Orangeville
Toll Free: 1-877-942-0001

Carters Professional Corporation / Société professionnelle Carters www.charitylaw.ca
Carters, Solicitors & Trade-mark Agents / Avocats et agents de marques de commerce www.carters.ca