
**SAINT-PAUL UNIVERSITY, FACULTY OF CANON LAW
LEGAL EDUCATION FOR LEADERSHIP OF
RELIGIOUS INSTITUTES**

August 21, 2010

Corporate Structures and Religious Institutes

**By Terrance S. Carter, B.A., LL.B., Trade-mark Agent
and Jennifer M. Leddy, B.A., LL.B.**

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OVERVIEW OF TOPICS

- Introduction
- Organizational Structures
- Governing Documents
- Bringing your Corporation to Life
- *Canada Not-for-Profit Corporations Act*
- Multiple Corporate Structures
- Statutory Duties and Liabilities
- Risk Management
- Further Resources

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A. INTRODUCTION

- Historically, not-for-profit corporations were incorporated by Special Act of Parliament until the *Companies Act Amending Act, 1917*
- *Companies Act* became the *Canada Corporations Act* by Chapter 52 of the Statutes of Canada 1964-1965
- Many religious institutes have been incorporated pursuant to Special Acts of Parliament or the Provincial Legislature

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- Other religious institutes have been incorporated under the *Canada Corporations Act* or provincial corporations acts
- This presentation will review the basics of incorporation and how the corporate structure can be tailored for religious institutes
- Since this is a national meeting, references will be to the current *Canada Corporations Act* (“the CCA”) and the still unproclaimed new *Canada Not-for Profit Corporations Act* (“the CNCA”)

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B. ORGANIZATIONAL STRUCTURES

- Charities and Not-for-Profits as Unincorporated Associations
 - Not a legal entity
 - Generally used for starting up a charity or not-for profit in its early stages
 - Flow through liability to members

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- Charities as Charitable Trusts
 - A trust is a relationship between trustees and beneficiaries involving the separation of legal and beneficial ownership of property
 - Available for charitable organizations, public foundations and private foundations
 - Trustees are exposed to liability

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- Charities and Not-for-Profits as Corporations
 - Separate legal entities
 - Members are not exposed to liability
 - Directors may be still exposed to personal liability from fiduciary and management responsibilities

Public

Employees & Volunteers

Officers

Directors

Members
(Non-Owners But Often Beneficiaries)

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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
 - Ministries involving liability exposure
 - Wrongful dismissal actions
- Choice of jurisdiction
 - Federal vs. Provincial?
 - New Federal Act coming into force
 - Consult with your legal counsel

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C. GOVERNING DOCUMENTS

1. Relationship of Civil Law and Canon Law
 - Corporation provides canonical entity of the religious institute with its legal personality and protection
 - Corporation is civil expression of the canonical entity so that when religious institute hires or fires staff, enters contracts or purchases property it does so as the corporation
 - Canonical and civil entities mirror each other but are not identical nor do they run on parallel tracks
 - However, they should be integrated as much as is practically possible

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2. Letters Patent (or Articles of Incorporation)

- **Objects**
- Establishes corporate purposes and restrictions
- If corporation intends to apply for charitable status objects need be exclusively charitable:
 - Relief of poverty
 - Advancement of religion
 - Advancement of education
 - Other purposes beneficial to community recognized by the court

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- **Examples of Special Provisions**
 - Directors (as distinct from officers and employees) and Members required to be in full communion with the Catholic Church or adherents of the Catholic Church
 - Canon law to be respected in operation of corporation unless conflicts with civil law

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- **Dissolution clause**
 - Assets usually directed to charitable organization with similar objects
 - Assets may be directed to an affiliated charity on dissolution or this entity can be given right to approve or be consulted about the recipient charity

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3. General Operating By-law

- General operating by-law sets out governance and key internal operational structures
- Tailor By-law to religious institute’s history and structure
 - Include material about history, charism, mission, spirituality
 - Don’t need to use term “board of directors”; Provincial council or other canonical body can be deemed to be the board of directors
 - Provide that canonical constitutions govern in matters of spirituality

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- Membership qualifications
 - “open” corporation - all members of the religious institute
 - “closed” membership - the corporate members are the same as the board members
 - Does not affect role of members in canonical entity
- Membership admission
 - For “open” corporation, can be approved by members or more usually by the board of directors
 - For “closed” corporations, coincides with becoming a director

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- Term of membership
 - For closed corporation, for so long as member is a director
 - For open corporation, until death, resignation or dismissal according to Religious Institutes constitutions which are referred to in by-law
- Classes of membership
 - In “open” corporations there can be voting members (e.g. professed) and non-voting members (e.g. novices, temporary vows)
 - The new CNCA will allow non-voting members to vote in some circumstances

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- **Board of directors (governing board)**
 - Board of directors is the governing board and manages or supervises management of corporation
 - The name given to the board is not important, what is important is its function and authority
 - Can delegate day to day operations but directors must retain control and accountability
 - Must ensure objects properly carried out, corporation's financial stability and proper training and supervision of staff
 - Have fiduciary duty to put best interests of corporation ahead of own

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- **Composition of board of directors**
 - Could be Provincial Council elected according to constitutions
 - Could be a majority of members from the Provincial Council and balance subject to approval of Provincial Council (either members of the religious institute or the public)
 - Superior or Moderator's canonical role can be provided for by requiring his or her vote to be included in any majority for the resolution to carry

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- **Term of board of directors**
 - Can be in accordance with constitutions
 - Can be done on a rotating basis
 - Office of the director can be vacated upon death, resignation or becoming disqualified

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- **Officers of corporation**
 - An officer carries out the day to day functions of the corporation at the direction of the board, can also be a director
 - An officer also has a fiduciary obligation to the corporation
 - An officer can be appointed by the board or elected by members
 - Can be described as “President”, “Treasurer” or a canonical term such as “Supreme Moderator” or “Provincial Treasurer”

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- **Procedure for members and board meetings**
 - Place
 - Notice
 - Quorum
 - Participation by telephone/electronic
 - Consensus decision-making
 - Conflict of interest
 - Under CCA not permissible for directors to sign written resolutions in lieu of meeting but members may do so

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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 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

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D. BRINGING YOUR CORPORATION TO LIFE

1. Incorporation Process

- Obtain formal approval from unincorporated body 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

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2. Initial Meetings of Directors and Members of Church Corporation

- Enacting by-law, election of directors, appointment of officers, admission of members, banking resolution, etc.
- 3. Convene Final Meeting of Members of Unincorporated Religious Institute**
- Advise that incorporation is complete and operations will be transferred as of effective date
 - Authorize transfer of assets and liabilities to corporation
 - Authorize dissolution of unincorporated body

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4. Complete Formal Transfer of Assets and Liabilities To Incorporated Church

- Assumption of debt by incorporated body and indemnification of unincorporated body
- New banking documents
- Filing of government forms

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5. 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
 - Annual meeting of members
 - Appoint auditor
 - Elect members of governing board

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- Elect officers, as applicable
- Approve financial statements
- CCA requires corporations to file Annual Returns, maintain proper accounting records, Minutes of Members and Directors meetings, Members and Directors Registers
- Failure to maintain corporate records could result in a fine of \$20.00 for each day the failure exists

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- 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., in order to better protect the assets of the religious institute

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E. SOME FEATURES OF CANADA NOT-FOR-PROFIT CORPORATIONS ACT

1. Overview

- Simplified process of incorporation – system of letters patent replaced by corporation as of right
- Corporation has capacity and rights of a natural person
- No ministerial approval of by-laws
- Distinction between “soliciting” and “non-soliciting” corporation

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2. Directors

- Must be elected; therefore *ex officio* directors no longer possible but ways around it
- Articles can allow for appointment of directors by board (up to 1/3 of those elected)
- Codifies directors’ duties and standard of care
 - Act honestly and in good faith with a view to best interests of corporation
 - Exercise the care, diligence and skill of reasonably prudent person
 - Can rely on financial statements and reports of professionals

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3. Members

- Members have more robust remedies such as the right to seek an oppression remedy against the corporation, a winding up and liquidation order or to commence a derivative action
- Special exemption for religious corporations if the act, omission, conduct or exercise of powers by corporation is based on a tenet of faith held by members of corporation and it was reasonable to base decision on tenet of faith having regard to activities of corporation

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- Fundamental changes require special resolution by members including non-voting members

4. Distinction Between Soliciting and Non-soliciting Corporations

- A soliciting corporation receives in excess of a “prescribed amount” within a prescribed period from public sources (individuals and government)
- “prescribed amount” expected to be a low threshold such as \$10,000

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- Implications of being a “soliciting corporation”
 - Minimum of three directors, at least two of whom are not officers or employees
 - Audit and public accountant rules more stringent for soliciting corporations
 - Required to file financial statements with Director which may be accessed by public
 - Can apply to be deemed not to be a “soliciting corporation” and/or for an exemption from filing financial statements

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- Director can deem corporation not to be a “soliciting corporation” so long as it is not prejudicial to the public interest
- The exemption from filing financial information could be granted if the harm caused by the requirement outweighs the public interest
- Note: CRA exemption from filing publically accessible portions of T3010 does not apply to financial disclosure requirements under CNCA

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5. Application of CNCA to Special Act Corporations

- Only certain provisions apply
 - Capacity and rights of natural person
 - Requirement to hold an annual meeting
 - Filing annual returns
 - Provisions for change of name
 - Dissolution provisions
 - Right to continue as a corporation under new act but not required

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6. Continuing Under the CNCA

- All existing CCA corporations will be required to “continue” under the new Act within three years of it coming into force or face possibility of dissolution
- Continuance involves preparing articles of continuance that are similar to articles of incorporation – can make amendments at same time

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- Effect of continuance
 - Members cease to be members of old corporation and become members of continued corporation
 - Property of corporation continues to be property of continued corporation
 - Existing causes of action unaffected

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7. Should Special Act Corporations Continue Under the CNCA?

- **Pros: (discuss your situation with legal counsel)**
 - Opportunity to be part of modern regime
 - Can consolidate various amendments made by special acts over the years
 - Can make amendments at same time as continuance clarifying and simplifying language
 - Easier to subsequently amend than going to Parliament or the Legislature

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- Codification of directors duties and standard of care
- **Cons: (discuss with legal counsel)**
 - Financial disclosure requirements, for those who have CRA exemption
 - Creditors entitled to see corporate records
 - CNCA can be amended further but special act unlikely to be amended by Government

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F. MULTIPLE CORPORATE STRUCTURES

1. Purpose

- Significant advantages for charities
- Asset protection
- Reduction of liability exposure

2. Types of Multiple Corporate Structures

- Parallel operating charities
- Parallel foundations
- Umbrella associations

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3. 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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4. 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 religious institutes and other charities

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- 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 religious institute

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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 religious institute**
 - **Could add other affiliated charities to benefit as well**
 - **Directors and members could be required to adhere to the Catholic faith or to be in full communion with the Catholic Church**

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- **Dissolution clause will require operating religious institute 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 adherents of the Catholic Church or in full communion with the Catholic Church**
 - **50% less (1) of directors to receive and maintain written approval of operating religious institute**

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- **Corporate documents cannot be amended or repealed without consent of operating religious institute**
- **Application for charitable status**
 - **Application submitted immediately after incorporation**
 - **Apply for CRA exemption at the same time**
 - **Assets of operating religious institute can not be transferred until charitable status granted**
- **Documentation to be prepared to put multiple corporate structure in place**
 - **Asset transfer agreement**
 - **Association agreement**

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- License agreement
- 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 operating corporation to ensure such protection
- Disadvantages of establishing property holdco
 - Municipal property tax issues, i.e. potential loss of existing exemption as a place of worship
 - Increased costs
 - Ongoing maintenance of multiple corporate structure

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G. STATUTORY DUTIES AND LIABILITIES

- Overview
 - Many federal and provincial statutes impose offences and penalties for acts and omissions of corporate directors
 - Generally strict liability applies
 - Directors can be held personally liable, as well as jointly and severally, with other directors for statutory duties
 - Only defence is due diligence
 - Resigning as a director may not limit liability though there are generally limitation periods

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- Federal Statutes
 - *Canada Corporations Act*
 - Unpaid wages
 - Directors are jointly and severally liable for all unpaid wages due for services by employees for the corporation while they were directors
 - Conflict of interest
 - Every director with an interest in a contract with the corporation must disclose such interest

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- Reporting requirements
 - Annual summary for the corporation to be filed each year
- Books, minutes and records
 - Corporation required to maintain proper books, records and accounting records
- General penalty
 - Directors will be liable to fine of \$1000 and imprisonment of not more than a year for doing anything contrary to the legislation or failing to comply where specific penalty not prescribed

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- *Income Tax Act (Canada)*
 - Directors jointly and severally liable to pay employee income tax deductions for two years after term of office
 - Directors may be personally liable if charity fails to comply with numerous reporting requirements, e.g. annual charity information return, improper charitable receipts, or giving improper tax advice
 - Directors may also face fines and imprisonment if they are involved in making false or deceptive statements or evading compliance with the *Income Tax Act* (e.g. improperly characterizing employees as independent contractors)

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- Avoid liability by showing positive steps taken to ensure compliance
- *Excise Tax Act (Canada)*
 - Directors jointly and severally liable for corporation's failure to collect & remit GST/HST
 - Liability continues for two years after cease to be director
- *Canada Pension Plan*
 - Joint and several liability where corporation fails to remit employee pension premiums

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- *Canadian Environmental Protection Act*
 - Positive duties imposed on directors to ensure compliance in relation to air and water pollution as well as toxic substance storage and disposal
 - Failure to comply could result in prison terms and fines
- *Anti-terrorism Legislation*
 - Legislation has serious liability risks for charitable corporations and directors, particularly those involved in overseas work

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- Risks include seizure of charitable property, loss of charitable status and *Criminal Code* charges
- See www.antiterrorism.ca
- *Criminal Code*
 - Bill C-45 (Westray Mines) for negligence in work place safety
 - Section 336 – criminal breach of trust

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- Provincial Statutes
 - Verify your own provincial obligations with legal counsel concerning labour legislation, retail sales tax, workplace safety, pension benefits, environmental protection, fundraising, etc.

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H. 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, investment policies, facility use policies,
- Need for regular legal audits
- Need to develop a legal risk management checklist (see handout)

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I. FURTHER RESOURCES

See the following materials at www.charitylaw.ca



- Article entitled “To Be or Not to Be: Incorporation of Autonomous Churches” 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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