### 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. © 2010 Carters Professional Corporation



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### **OVERVIEW OF TOPICS**

- Introduction
- ٠ **Organizational Structures**
- **Governing Documents**
- **Bringing your Corporation to Life**
- Canada Not-for-Profit Corporations Act

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- ٠ **Multiple Corporate Structures**
- ٠ **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 ٠ Corporations Act by Chapter 52 of the Statutes of Canada 1964-1965
- ٠ Many religious institutes have been incorporated pursuant to Special Acts of Parliament or the Provincial Legislature

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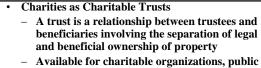


- Other religious institutes have been incorporated under the *Canada Corporations Act* or provincial corporations acts
- This presentation will review the basics of incorporation and how the corporate structure can be tailored for religious institutes
- Since this is a national meeting, references will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

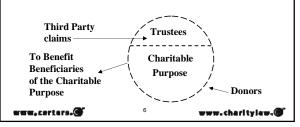
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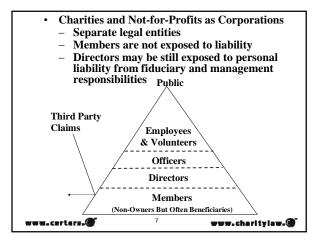


- Available for charitable organizations, public foundations and private foundations
- Trustees are exposed to liability











- 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

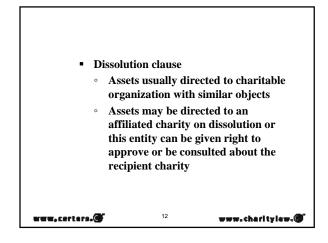
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- Examples of Special Provisions
  - Directors (as distinct from officers and employees) and Members required to be in full communion with the Catholic Church or adherents of the Catholic Church
  - Canon law to be respected in operation of corporation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

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- 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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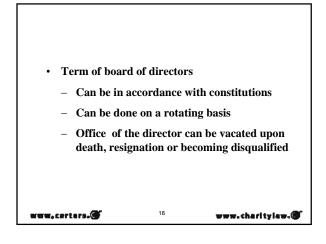
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- Composition of board of directors

   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
  - 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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- 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

• 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

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 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

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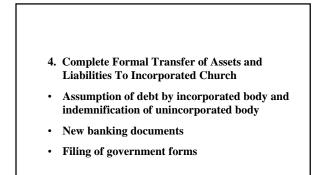
Issuance of letters patent

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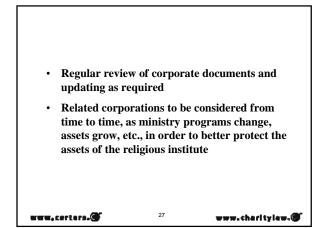
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•	Elect officers, as applicable
•	Approve financial statements
	CCA requires corporations to file
	Annual Returns, maintain proper
	accounting records, Minutes of Membe
	and Directors meetings, Members and
	Directors Registers
	Failure to maintain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

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#### 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-٠ 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 www.certere.

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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 Nonsoliciting 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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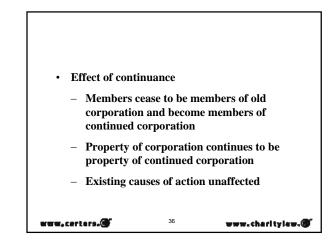


- 5. Application of CNCA to Special Act Corporations
- Only certain provisions apply
  - Capacity and rights of natural person
  - Requirement to hold an annual meeting
  - Filing annual returns
  - Provisions for change of name
  - Dissolution provisions
  - Right to continue as a corporation under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

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•	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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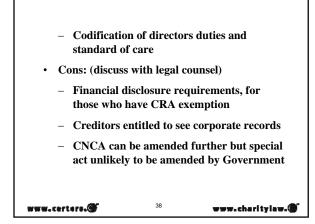


- 7. Should Special Act Corporations Continue Under the CNCA?
- Pros: (discuss your situation with legal counsel)
  - Opportunity to be part of modern regime
  - Can consolidate various amendments made by special acts over the years
  - Can make amendments at same time as continuance clarifying and simplifying language

- Easier to subsequently amend than going to Parliament or the Legislature

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### F. MULTIPLE CORPORATE STRUCTURES

1. Purpose

- Significant advantages for charities
- Asset protection
- Reduction of liability exposure
- 2. Types of Multiple Corporate Structures

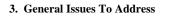
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- Parallel operating charities
- Parallel foundations
- Umbrella associations

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- 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 Corpora	ations
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- 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

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- 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) 50 www.certere.G www.charitylaw.
  - 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 <u>www.antiterrorismlaw.ca</u> *Criminal Code*Bill C-45 (Westray Mines) for negligence in work place safety
Section 336 – criminal breach of trust









### 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 <u>www.charitylaw.ca</u> 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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