

CHURCH & THE LAW UPDATE – No. 11

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Updating Churches and Church related Charities on recent legal developments and risk management considerations.

1. INTRODUCTION

This is the eleventh issue of *Church & the Law Update*. It is intended to provide an update for churches and charities on current legal developments, as well as providing recommendations on matters of legal risk management where appropriate. The Church & the Law Update is prepared as a service to churches and charities and is published approximately three to four times a year as legal developments occur.

This issue of the *Church & the Law Update* provides:

- (ii) A summary of Ten Essential Steps to Protect Churches and Christian Ministries;
- (iii) An Update on Amendments to the *Charities Accounting Act* of Ontario; and
- (iv) Information on the Charities Programme by the CBAO Charities Committee.

2. TEN ESSENTIAL STEPS TO PROTECT CHURCHES AND CHRISTIAN MINISTRIES

By: Terrance S. Carter, B.A., LL.B.

The following presentation was given at the 1997 Annual *Church & the Law Seminar* as a highlight of ten essential steps to be taken by local churches and Christian ministries to reduce the risk of liability exposure. The summary is an expansion of the brief "Legal Risk Management Tips for Churches" that appeared in the *Church & the Law* No. 8 in June of 1996.

1. ORGANIZE YOUR THOUGHTS - REVIEW AND UPGRADE THE CHURCH CONSTITUTION

A. Essential For A Church To Have A Written Constitution

- avoids infighting, misunderstandings and lawsuits
- required by Revenue Canada for charitable status

B. Develop A Written Procedure For Biblical Discipline And Include It As Part Of The Church Constitution



(See CCCC Bulletin on Discipline No. 2 - 1992 and No. 2 - 1993)

C. Include An Indemnification Provision For Church Leaders As Part Of The Church Constitution



(See CCCC Book on Incorporation of Churches)

D. Set Out An Explanation Of Qualification For Membership And The Expectations Placed Upon Church Members

- E. Have The Church Constitution Authorize The Implementation Of Policy Statements On Practical Applications Of Biblical Principals And Christian Conduct



(See CCCC Bulletin on Discipline No. 2 - 1992 and No. 2 - 1993)

- F. Provide A Definition Section To Simplify Terminology In The Church Constitution To Avoid Confusion And Misunderstanding
- G. Identify And Avoid Conflicts Of Interest Involving Remuneration Of Directors



(See CCCC Bulletin on Remuneration No. 3 - 1991 and No. 4 - 1993)

- H. Precedents Are Useful But Need To Be Carefully Reviewed And Customized
- I. Need To Educate The Church Board On Its Constitution And Related Matters By Developing A Board Binder Including All Constitutional Documents

2. RAISE THE SHIELD - CONSIDER CHURCH INCORPORATION



(See CCCC Book on Incorporation of Churches)

A. The Advantages Of Church Incorporation

- limited liability protection for members of the church
- perpetual existence
- stability in ongoing corporate structure
- indemnification of church leaders
- maintain and defend legal actions in the name of the corporation
- purchase, sell, mortgage and lease land and buildings in the name of the church corporation
- avoidance of anachronisms of the *Religious Organization Lands Act* (Ontario) for unincorporated churches
- insurance is in the name of the church corporation as opposed to trustees who would otherwise not be covered
- federal incorporation will permit the church to obtain an Internet Domain Name using the designation of ".ca"

B. Disadvantages Of Church Incorporation

- incorporation is more costly than organizing as an unincorporated church
- corporate filings must be maintained for change of directors, officers and head office
- proper corporate minutes of meetings of members and directors must be kept
- drafting an effective general operating by-law for a church corporation is often challenging
- the ability to lease surplus land for 40 years pursuant to the *Religious Organization Lands Act* is not available for an incorporated church

C. Do It Right Or Don't Do It At All

- a deficient general operating by-law and letters patent for church corporation can be more problematic than not incorporating at all
- the membership, assets and liability of the unincorporated church must be transferred to the incorporated church
- charitable registration number must be transferred
- remaining unincorporated church association must be formally dissolved

3. KEEP YOUR HOME IN ORDER - MAINTAINING THE CORPORATE STRUCTURE



(See "Legal Risk Management Checklist" in Church and the Law Update No. 7)

A. Avoid Failure To File Government Forms And Notices

- forms required under the Ontario *Corporation Information Act* for change of directors, officers and head office
- forms required under the *Canada Corporations Act* on an annual basis

- corporate changes required for change of head office (both Federal and Provincial corporations)
 - corporate changes required for variation in number of directors (for Ontario corporations)
- B. Avoid Having To Reconstruct Corporate Records By Maintaining Up To Date Corporate Minutes And Filings
- C. Avoid Unauthorized "*Ultra Vires*" Activity By Ensuring That Corporate Activities Fall Within The Objects In The Letters Patent
- D. Draft A General Operating By-law That Reflects The Personality Of The Church Instead Of Utilizing A "Boiler Plate" By-Law
- E. Need To Educate Church Staff And Key Members On How To Operate The Church As A Corporation
- F. Need To Develop A Board Binder To Consist Of
- letters patent
 - general operating by-law
 - policy statements
 - a legal explanation of the duties and responsibilities of directors of a charitable corporation
- G. Avoid Improper Use Of Corporate Name
- ensure that the full corporate name is used on all documents
 - ensure that ministry names are registered under the *Business Name Act* of Ontario

4. TRANSFER HIGH RISK MINISTRIES TO SEPARATE CORPORATIONS



(See 1995 and 1996 Church and The Law Conference Tapes on Multiple Corporations)

- A. Identify High Risk Ministries
- education - i.e., daycare centres, elementary schools, high schools
 - youth ministries - i.e., camps and outdoor ministry programs
 - counselling - i.e., crisis pregnancies, spiritual/emotional counselling, recovery from sexual abuse
- B. Advantages Of Utilizing Associated Corporations
- diverts liability of high risk ministries away from assets of the church
 - additional corporate structure allows more people to be involved in associated ministries
 - the requirement for a separate board of directors can reduce the amount of work of the church board
- C. Essential To Indirectly Control Associated Church Corporations
- include statement of faith of Church in the letters patent of associated corporation
 - ensure that upon dissolution any remaining assets revert to the church
 - require church approval and membership as a qualification to become either a director or member of the associated corporation
 - require unanimous approval by board members of associated corporations before an amendment can be made to the letters patent
 - maintain "closed membership" of associated corporation to avoid takeover by special interest group

5. KNOW WHAT YOU STAND FOR - DEVELOP AND IMPLEMENT CHURCH POLICY STATEMENTS

- A. Purpose Of Church Policy Statements
- to articulate expectations of the church
 - to avoid claims of discrimination
 - to avoid complaints to the Ontario Human Rights Commission
- B. Cross Reference Policy Statements To Authority In The Church Constitution

C. Develop A Policy Statement To Avoid Physical And Sexual Abuse Of Children



(See Church and the Law Update No. 2, No. 5, No. 8 and No. 9)

- implementing comprehensive screening process with application form and references
- require mandatory criminal record checks
- develop procedures to minimize risks to children
- establish reporting requirements reflecting provincial child welfare legislation

D. Policy Statements And Lifestyle Expectations



(See Church and the Law Update No. 6)

- lifestyle expectation policy statement should only be implemented if the church is prepared to follow through with discipline
- need to carefully define what lifestyle expectations are

E. Examples Of Other Important Areas Of Policy Statements

- counselling
- sexual harassment
- divorce and remarriage

6. WHAT'S IN A NAME - PROTECTING MINISTRY GOODWILL AND TRADE-MARK RIGHTS

A. The Name Of A Church Or Christian Ministry Is One Of Its Most Important Assets

B. Church Or Christian Ministry Names Are Often A Wasting Asset If They Are Not Properly Protected

C. Need To Be Pro-Active In Protecting Church Or Christian Ministry Names And Trade-Marks

D. Registration Of A Corporate Name Or A Business Name Does Not By Itself Provide Adequate Trade-Mark Protection

E. The Advantages Of Trade-Mark Registration

- it establishes presumption of ownership of the trade-mark
- trade-mark registration is effective throughout Canada instead of only in the local geographic area
- trade-mark registration provides a monopoly to use the trade-mark in relation to its stated goods or services
- trade-mark registration can be enforced across Canada

F. Enhanced Protection Available For Section 9 Official Marks For Charities

- section 9 Official Marks apply to all wares and services
- example of the Canadian Olympic symbols and Anne of Green Gables names (i.e., Official Mark for "Gilbert Blythe")
- must establish that the charity is a public authority by showing
 - * the charity is involved in pursuing a public benefit instead of a private interest
 - * there is a sufficient degree of government control, i.e., ongoing control by Revenue Canada and the Public Guardian and Trustees Office

G. Acquisition And Protection Of Internet Domain Names

- there are a limited number of Internet Domain Names available
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- a church or christian ministry interested in obtaining an Internet Domain Name should do so sooner as opposed to later
- before obtaining an Internet Domain Name it is advisable to obtain a trade-mark search to avoid trade-mark infringement
- an Internet Domain Name is regulated by The Internic Domain Name Dispute Policy effective as of September of 1996 as well as trade-mark infringement rules
- if Internet Domain Name is not available in one form, i.e., "newlife.org", then there may be other alternatives available, i.e., "newlife.com" or "newlife.ca"
- need to protect and insulate Internet Domain Name by obtaining a trade-mark registration either in Canada or in some other jurisdiction before a challenge is made to the Domain Name
- a challenge can be made to an existing Domain Name by obtaining a Trade-Mark Registered with a date of first usage prior to the activation date of the existing Domain Name

7. AVOIDING LIABILITY FROM THIRD PARTY USAGE OF FACILITIES

- A. Church Insurance Will Not Normally Cover Third Party Usage Of Church Facilities Unless There Is Written Disclosure And Endorsement By Insurance Company
- B. Third Parties Using Church Facilities Need To Provide Evidence Of Insurance With Church Shown As Named Insurer
- C. Third Parties Need To Sign Licence Agreement
 - to set out rules for use of church facilities
 - to require fair market value compensation for use by non-charity
 - to require indemnification of the church by third party

8. AVOIDING IMPROPER USE OF CHURCH FUNDS

- A. Improper Transfer To Foreign Charities
 - church can only transfer funds to a "qualified donee"
 - "qualified donee" includes registered charities, prescribed universities, municipalities, etc.
 - a foreign charity is not a "qualified donee"
 - church can only transfer monies to a foreign charity if
 - * an agency is signed to transfer monies to complete a specific project
 - * a joint ministry agreement is signed for an ongoing joint ministry
- B. Excessive Payments To Non-Charities
 - payments to non-charities must reflect fair market value consideration
 - payments in excess of fair market value based upon a "love gift" to a non-charity would be an unauthorized application of church monies
- C. Violation Of Revenue Canada Requirements For Acceptable Political Activity
- D. Using Church Funds To Support Unrelated Business Activities

9. SOWING THE SEED - PLANNED STEWARDSHIP FOR LOCAL CHURCHES

- A. Need To Develop A Stewardship Policy At The Local Church Level
 - to encourage estate gifts from members
 - to identify how unrestricted church gifts will be used, i.e., a percentage towards current operations and a percentage on long term endowments
 - ensure that the correct name of the church is used in wills
- B. Consider Establishing A Parallel Foundation



(See 1996 Church and the Law Seminar)

- to protect long term estate gifts
- to receive existing church assets

C. Avoid Breach Of Trust Involving Donor Restricted Trust Funds



(See 1995 Church and the Law Seminar)

- need to distinguish between donor restricted trust funds and board designated funds
- donor designated trust funds must be held as segregated trust monies to avoid breach of trust

10. DOWNLOADING RISKS - REVIEW AND UPGRADE INSURANCE POLICIES



(See "Legal Risk Management Checklist" in Church and the Law Update No. 7)

- A. Insurance Is The First Line Of Defense For A Church
- B. Churches Do Not Understand That Liability Insurance Provides "Occurrence Basis" Not "Claims Made" Coverage
- C. As A Result Quantum Of Insurance Is Often Inadequate
- D. Failure To Maintain Historical Records Of Insurance Policies And Insurance Brokers
- E. Potential Deficiencies In Insurance Coverage
 - i.e., sexual abuse and harassment exclusion
 - i.e., mental anguish exclusion
 - i.e., counselling limited to professionals
 - i.e., limited definition of who are insureds
 - i.e., limitation on geographic area covered
- F. Separate Policy Needed For Directors And Officers Coverage

3. UPDATE ON AMENDMENTS TO THE CHARITIES ACCOUNTING ACT OF ONTARIO

The *Church & the Law* Update No. 9 provided a summary of the changes that were proposed to the *Charities Accounting Act* as a result of Bills 61 and 79.

Bill 79, which authorizes the Public Guardian and Trustee's Office to adopt regulations dealing with charities, was proclaimed in force on October 31st, 1996. The anticipated regulations are in the process of being prepared by the Public Guardian and Trustee's Office and will be reviewed by a committee appointed by the Attorney General of Ontario made up of professionals and representatives from various charities, including the Canadian Council of Christian Charities. Draft regulations are expected to be available in the next few months, details of which will be summarized in future issues of the *Church & the Law* Update.

Bill 61, which provides for a simplified approval process to obtain necessary court approval, has yet to receive third reading as a result of amendments required by the Judiciary. Although the basic thrust of Bill 61 is expected to survive, the exact wording is not yet known and will not be adopted until May or June of this year. More details will follow in future issues of the *Church & the Law* Update.

4. CHARITIES PROGRAM BY THE CBAO CHARITIES COMMITTEE

The Canadian Bar Association of Ontario ("CBAO"), through the Charities Committee of the CBAO is planning to present a Continuing Legal Education Program for lawyers and executives of charities on Charities and Non-Profit Organizations entitled "*Charity and Not For Profit Law: The Emerging Specialty*". The Program will be held at the CBAO Centre located at 20 Toronto Street in Toronto, on **Thursday, May 15th, 1997**. The topics and speakers that will be participating are as follows:

- The Developer of Non-for-Profit Laws A New Legal Specialty - John P. Hamilton, Weir & Foulds
- Effective Use of Multiple Corporate Structures - Jane Burke-Robertson, Drache, Burke-Robertson & Buchmayer
- Position Yourself For Provincial, National and International Operations - Maxwell Gotlieb, Cassels, Brock & Blackwell
- How To Insulate Your Directors From Liability Exposure - M. Elena Hoffstein, Fasken, Campbell, Godfrey
- Protecting Wasting Assets - Trade-Mark Protection For Charities - Terrance S. Carter
- Current Problems in Developments in Charities Law - Eric Moore, Director of the Charities Division of the Public Guardian and Trustees Office
- Panel Discussion on Developments in Charities Law
 - Glen N. Davis, National Trust Company
 - Maurice Cullity, Q.C., Davies, Ward & Beck
 - Eric Moore, Public Guardian and Trustees Office
 - David Boyd-Thomas, University of Toronto
 - John Hodgson, Q.C., Blake, Cassels & Graydon
- Charitable Remainder Trust - Wolfe D. Goodman, Q.C., Goodman & Carr
- Implication of Recent Tax Changes to Estate Planning - Arthur B.C. Drache, Drache, Burke-Robertson & Buchmayer

More details will be available through a brochure that will be distributed in the near future. For those that would like to register for the Program or to receive more information on the topics, should contact the Canadian Bar Association at 1-800-668-8900 Attention Hillary Ross, Program Coordinator.

DISCLAIMER: This *Church & the Law Update* is a summary of current legal issues provided as an information service. It is current only as of the date of the Update and does not reflect changes in the law that have occurred subsequent to the date of the Update. The Church & the Law Update is distributed with the understanding that it does not constitute legal advice or establish the 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 written opinion concerning the specifics of their particular situation.

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