To Be or Not to Be: Incorporation of Autonomous Churches in Ontario

This paper and the attached precedents have been adapted from material prepared by the author of the law Society of Upper Canada Seminar to assist churches entitled “Fit to be Tithed: Risk Management issues for Charities and Churches”. The paper and attached material can be copied free of charge for use by churches, provided that all pages are copied in whole, including all appendices. Since the incorporation of a church is a complicated process, it is essential that the church obtain legal assistance. However neither this paper nor the attached precedent constitute a legal opinion or the giving of legal advice.

January 15, 1995

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CHAPTER 1

INTRODUCTION

In an ever increasing litigious society where even a corner convenience store generally carries on business through a corporation, a legitimate question that is being more frequently asked at church boards and congregational annual meetings is whether or not a church should incorporate and if so what is the procedure that needs to be followed to complete the incorporation process. This book has been prepared to answer these questions. The first portion deals with the issue of whether or not a church should incorporate. The second part deals with how a church can implement the decision to incorporate on a step by step basis. The last portion of the book consists of sample general precedent material that can be used as a starting point in beginning the process of incorporation.

For those readers who would prefer to peruse the synopsis of only the pros and cons of incorporation that are discussed in this book, there is a summary towards the end of the book. To fully understand that summary, though, it is recommended that the book together with all appendices be read in their entirety.

However, before embarking on a discussion of the relevant issues, it is important to explain the limitations of this book. The limitations can be summarized as follows.

(a) The book is addressed generally to churches that are located within the Province of Ontario. However, many of the comments will have application to the organization of churches elsewhere in Ontario.

(b) It is directed at churches that are currently organized as unincorporated churches under the Religious Organizations Lands Act of Ontario, which would include some hierarchical churches, such as the United Church of Canada.

(c) Notwithstanding the length of this book, it does not purport to constitute a discussion of all relevant law or statute law and as a result contains an acknowledged subjective selection of what the author feels is relevant to the discussion.

(d) The book must be read as a whole together with all four appendices, which are attached to it.

(e) For those churches considering incorporation, it is essential that legal advice be obtained before implementing any suggestions contained in the book. The information presented in this book is for educational and discussion purposes only and is not intended to be relied upon as a legal opinion.

As a matter of preliminary note, whenever a church is referred to in this book as a charity, it is in the context of the church having objects dedicated to the advancement of religion that qualify it as a charity at law in accordance with the four categories for charitable objects established by the British case of Commissioners for Special Purposes Income Tax Act v. Pemsel.
CHAPTER 2

HISTORICAL SUMMARY OF LEGAL STRUCTURE FOR CHURCHES IN ONTARIO

(1) Overview
To understand why the issue of incorporation of churches, particularly autonomous churches, has traditionally been such a difficult issue for churches to deal with, requires an understanding of numerous inter-related issues as well as a basic overview of the historical development of church structures in Ontario. Although the issue of ecclesiastical incorporation is becoming a significant topic of discussion for many churches in Ontario, there has been little published on the subject. This is probably because any attempt to make a definitive recommendation either to incorporate or not runs the risk of oversimplifying a complicated issue and adding further confusion to an already controversial area. However, for this reason a discussion of the relevant issues should be addressed.

In reviewing the applicable cases and legal analysis by other commentators, there is a theme that begins to emerge that assists in understanding why churches in Ontario over the last two centuries have generally been organized as unincorporated churches and why at the same time in recent years the option of incorporation is attracting more attention.

The theme that becomes evident reflects an inherent historical tendency by both the Christian church and secular society to perceive the "church" as a corporate entity, i.e. as an actual legal person that is separate from its individual members. When either for political or social reasons it is not possible for the church to organize itself as a corporate entity, the local church has continued to function in the legal form of an unincorporated association of individuals, i.e. as a group of individuals who agree to collectively function together for a common purpose but which group has no separate legal entity. When political or social impediments to incorporation are removed, however, there is a general tendency for churches to naturally revert back to operating within the context of a corporation.

Although the Christian church over the last two thousand years has primarily functioned within the protection of the corporate vehicle, social and political pressure in Ontario over the last one hundred and sixty years necessitated an alternative church organizational structure to the corporate model. This alternative consists of the organization of local churches as unincorporated associations and occurred in Ontario as a result of the enactment of legislation in the early 1800's allowing unincorporated churches to own property through trustees on a perpetual basis. The legislation was first proclaimed in 1828 and has survived to the present time through numerous amendments and is now known as the Religious Organization Lands Act, R.S.O. 1990, c.R.23, (referred in this book as R.O.L.A.). Although the enactment of R.O.L.A. has effectively permitted unincorporated churches to own land, there are serious limitations inherent in this legislation. The primary deficiency of R.O.L.A. is that it does not provide members of an unincorporated church with the protection of limited liability. In other words, members of an unincorporated church that have utilized the provisions of R.O.L.A. may be liable for the debts and civil liability of the church caused by other members of the congregation even though they themselves were not responsible. Possibly in the future, there may be amendments to R.O.L.A. or new legislation to extend limited liability protection to members of churches. However, until appropriate legislation is enacted in Ontario to provide this type of protection, churches by necessity will increasingly look to the option of incorporating as part of an overall risk management review of church operations.

As is discussed later in this book, incorporation is not always a realistic option for every church. The benefits that are available from incorporation, though,
are so significant that a church that is currently unincorporated should be advised to carefully review whether or not the circumstances of their particular congregation justify incorporating.

(2) **Specifics of Historical Summary**

What follows is a brief historical summary of the development of the legal structure of churches in Ontario. This summary is important in order to understand the benefits and limitations of R.O.L.A. and of incorporating a church.

For a detailed discussion of the history of church organizations in Ontario and in the United States, reference should be made to the in-depth commentaries by Professor A.H. Oosterhoff at the Faculty of Law at the University of Western Ontario, Professor M.H. Ogilvie*, professor of law at Carlton University, and Professors Paul Kauper and Stephen Ellis, both of the United States.

Although the two options currently available for church structures in Ontario consist of the incorporated church entity on the one hand and the unincorporated church association on the other, there have been four different and sometimes contradictory sources of law in relation to church legal structures in Ontario. They are as follows:

(a) the common law, including the law of trust and the development of the concept of the "corporation sole", i.e. the church existing as a separate legal entity through a minister or rector;

(b) private and special acts of incorporation for individual religious bodies, as is the case with the Anglican Church, the Catholic Church, the Salvation Army, the United Church, and numerous other denominations that were established in the nineteenth and early twentieth century;

(c) R.O.L.A. and its antecedent legislation allowing unincorporated churches to own land through trustees; and

(d) general incorporation statutes, such as the Ontario Corporations Act, R.S.O. 1990, c. C.38 as well as the Canada Corporations Act, R.S.C. 1970, c. C.32, as amended, in so far that these statutes have application to the creation of "not for profit" charitable corporations.*

Notwithstanding that the use of church corporations in Ontario over the last century has been overshadowed by the implementation of R.O.L.A., the use of ecclesiastical corporations has a long lineage in the history of the Christian church dating back to Constantine in the fourth century. The legal concept of the corporation as a separate entity in the church context was derived from the Roman collegia and universitates, societies which were organized by trades and professions within the Roman Empire. The use of the legal corporation was transposed to the Christian church through the Edict of Milan in 313 A.D. and the Edict of 321 when Constantine "recognized the validity of the bequests to the Catholic Church, thereby enabling the church in its corporate capacity to receive, hold, and accumulate property, and laying the foundation for the erection of a legal structure that was to have profound implications for both the church and the state."

As a result of these edicts, the "local congregations and later the Church Universal were regarded as having juristic personality", i.e. recognized as being a separate legal entity.

The development of the ecclesiastical corporation before the Reformation was emboldled in the recognition of the parson in charge of the village church as a "corporation sole", i.e., the parson was himself a body corporate in which the indivisible body of the church was represented and which continued in perpetual succession by subsequent parsons. The recognition at common law of the "corporation sole" developed after the Reformation into the state giving specific grants of corporate status to the church for institutions such as hospitals and universities. This was consistent with the assertion by the state that all corporations must derive their status by the express consent of the state, either by Letters Patent from the crown, an act of Parliament or, as is normally the case today, pursuant to a general incorporation statute. Unfortunately, however, when Ontario was colonized in the late eighteenth and nineteenth century, the simplicity of the ecclesiastical corporation was denied to all churches in Ontario with the exception of the Anglican Church. As one legal commentator has observed, "the untidiness of the civil law in relation to the regulation of religious organizations of Ontario and in most other provinces may be traced to the uncertain nature of the religious settlement of the Canadian colonies at the beginning of the nineteenth century."

This confusion arose out of the status of the Anglican Church as the established church in England and the corresponding imposition of restrictions upon all other denominations as dissenting churches. In Upper Canada from 1791 through to 1828, the political elite assumed that the Church of England was the established church and had the status of a body corporate pursuant to common law tradition. As such, there was no need for special legislative provisions to
allow the Church of England to operate as a corporation, since it was assumed that it had always been a corporation in accordance with its historical status in England.

Initially, no provision was made for either Roman Catholics or dissenting Protestant churches to organize themselves in Ontario, as it was presumed that these churches suffered legal disabilities and therefore did not have need for legal forms by which they could hold and use property. This meant that all churches in Upper Canada, with the exception of the Anglican Church, were organized as unincorporated associations and were unable to hold property in the church’s name. Instead, property was purchased in the name of individual members who acquired title to land in trust on behalf of the church.

However, as religious tolerance and ecclesiastical plurality developed during the early years of the 19th century in Ontario, the government of Upper Canada had to create a legal technique to enable “...non-established churches, especially those with presbyterian or congessional styles of government, to use and own property.”

The remedial legislation that was passed in Upper Canada to accomplish this, however, did not grant full corporate status to the dissenting churches. Instead, it only facilitated the owning and conveying of land by trustees on behalf of the local congregation in perpetuity. The remedial legislation passed in 1828, known as An Act for the Relief of the Religious Societies Therein Mentioned, (1828), U.C., c.2, (referred to in this paper as the “Act of 1828”) being the forerunner to the present R.O.L.A. did not grant dissenting churches the ability to establish themselves as corporations. The purpose of the Act of 1828 was only to simplify the awkward mechanism of having to convey land between successive individuals who agreed to hold land in trust for local churches.

Up to 1828, dissenting churches had no alternative but to acquire and hold land in the name of individual members in trust for the local congregation on a successive basis. However, there were obvious difficulties encountered when a trustee either died, moved away, or was no longer a member of the congregation. To alleviate these difficulties, the Act of 1828 enabled churches “...to take conveyances of land for their purposes in the name of trustees who, with their successors in perpetual succession, by the name expressed in the deed, could hold the land and commence and maintain actions to protect it.” To the extent that there was perpetual succession of ownership, the Act of 1828 allowed church trustees to act as a quasi-corporation.

The trustees were not a corporation in the ordinary sense of the word. For instance, trustees in their quasi-corporate capacity were not able to make bylaws to govern the affairs of the corporation, they could not offer limited liability protection for its members, nor were the trustees able to act as a board of directors, as all of their actions were under the direct and ultimate control of the congregation which appointed them. Therefore “…although they [the trustees] were endowed with some corporate attributes, they could not be said to constitute a true corporation.”

In essence, what occurred in 1828 was the granting of remedial legislation to the dissenting churches to allow them to operate more effectively in their handicapped status of unincorporated associations by being able to own land, but without affording those churches the opportunity to fully organize as separate corporations. Although the Act of 1828 was amended on numerous occasions, its original purpose, that being to allow churches to hold land in trust through perpetual trustees, has been maintained. This purpose has generally been thought of as sufficient justification to conclude that the structuring of religious organizations under R.O.L.A. has been the best option available for churches in Ontario. However, the fact that most churches continue to organize themselves as unincorporated associations pursuant to R.O.L.A., has more to do with the social and political reality of 1828 than it has to do with a rational decision of what is the most appropriate form of legal structure for churches today.

Although the limitations inherent in R.O.L.A. and its antecedent legislation have become cloudy over the passage of time, the need to move beyond the inadequacy of the earlier form of R.O.L.A. was not lost upon many religious denominations in the middle of the nineteenth century. Churches in the 1840s recognized that the Act of 1828 was essentially only a conveyancing statute allowing churches to hold land in trust and did not adequately deal with other aspects of the church, such as using property for education, evangelism, missionary work and social welfare programs: “to facilitate property used for such purposes, the practice of incorporation [by private statute] was adopted by the congregational higher government levels by all churches... Thus the corporation device was adapted to church life in the 1840's and resulted in the creation of a number of ecclesiastical corporations whose activities were sometimes subject to the regulations of the Act of 1828 and sometimes subject to their own private Act.”

The list of churches that incorporated either at the denominational or local level included most of the mainline churches, including the Anglican Church in 1843, the Roman Catholic Church in 1845, and the Presbyterian Church in 1847. In addition, from the
1850's through the early 1900's, numerous specific incorporation statutes were enacted for a wide range of church related organizations, including individual congregations, synods, dioceses, presbyteries, schools, pension funds, religious orders and church sponsored charitable organizations.\textsuperscript{17}

Specifically, the Roman Catholic Church was established corporately in 1845 by \textit{An Act to Incorporate the Roman Catholic Bishops of Toronto and Kingston, in Canada, in each Diocese}, 8 Victoria, c.82. The statute had the effect of making the Bishop in each diocese a body corporate.

The Anglican Church became incorporated in 1841 pursuant to \textit{The Church Temporalities Act}, Treed Victoria, c.74. The Act has been amended in excess of 25 times since 1841 in relation to the dioceses of Toronto, primarily dealing with an attempt to simplify the holding of lands by the church.

The Salvation Army became incorporated in 1909 by \textit{An Act to Incorporate the Governing Council of the Salvation Army in Canada}, 8-9 Edward, VII, c.132. The initial Act gave the General Council the ability to acquire and hold real property. Subsequent legislation has been passed dealing with property matters as well as the division of administrative matters of the Salvation Army into the Governing Council of the Salvation Army, Canada East, and the Governing Council of the Salvation Army, Canada West.

The United Church of Canada was established in 1924 under special act of parliament, being \textit{The United Church of Canada Act}, 14-15 George, V, c.100. A subsequent act was passed by the Ontario Legislative Assembly in 1923 by an \textit{Act called The United Church of Canada Act, S.O. 1925,} c.125, to deal with matters involving property.

Newer denominations, such as the Fellowship of Evangelical Baptist Churches in Canada organized themselves on a denominational basis through the passing of special legislation, either by the provincial or the federal Parliament, to establish either a single hierarchical church structure, or an umbrella association of independent congregational churches, as is the case with the Fellowship of Evangelical Baptist Churches. The use of private legislation to incorporate churches was significantly curtailed in 1953 by a substantial revision to the \textit{Ontario Corporations Act}, which then encompassed non-profit corporations as well as all corporations that had been previously created by special or private acts of the province. Similar changes were subsequently done to the \textit{Canada Corporations Act}. As such, denominations that have been recently formed, such as the Congregational Christian Churches in Canada in 1989, now establish themselves as a corporate entity through the issuance of Letters Patent under general incorporation statutes, either at the provincial or federal level.

Notwithstanding that most churches operate at the denominational level through a corporate vehicle, those churches organized on the congregational model (which to a certain degree would include local congregations of the United Church of Canada) have primarily maintained their status as unincorporated associations operating under the provisions of R.O.L.A. This is primarily due to the simplicity inherent in using R.O.L.A. to own land and establish a church. As a general rule, when a local church is initially established, little thought is put into comparing the option of a church organization under R.O.L.A. to that of an incorporated entity. What the next part of this paper will do is analyze the strengths and weaknesses of church organizations under R.O.L.A. versus those of incorporated entities.
CHAPTER 3

ORGANIZATION OF AUTONOMOUS CHURCHES UNDER R.O.L.A.

(1) The Nature of an Unincorporated Church Association
An unincorporated church association is in essence a group of individuals who associate on a voluntary basis but which has no existence apart from the members themselves. The members of the church join together for the promotion of Christian objects and their conduct in relation to one another is regulated in accordance with a constitution, bylaws, rules or regulations of the church to which they have subscribed. This is to be compared to an incorporated church where the collectivity of the church as a congregation is recognized as a separate legal entity.

Since an unincorporated church association is not a person at law, it does not have the ability to own property in its own name. As mentioned, historically this limitation was overcome by the appointment of trustees pursuant to the implementation of a trust. In the context of owning property, this meant that an individual or individuals owned property in their own names in trust for the unincorporated church association. To facilitate this form of ownership by churches, R.O.L.A. and its antecedent legislation permit trustees to be appointed on behalf of the church to hold land and do so on a perpetual succession basis, notwithstanding that individual trustees may come and go. However, the remedial benefit of ownership of land through successive trustees is predicated on the assumption that a trust has been created by the members of the church. As such, an unincorporated church functions differently from other unincorporated associations, such as a service club, in that an unincorporated church is structured on the premise that it is, at least to a limited extent, a charitable trust.

It is doubtful, however, whether many churches in Ontario understand that their congregations are structured as a charitable trust and that their church constitution constitutes, at least in relation to land, a declaration of trust. Similarly, it is unlikely that many unincorporated churches recognize that the basic organization of their church by necessity must reflect concepts of trust law. Instead, most unincorporated churches simply include a provision in their constitution for the appointment of trustees to comply with R.O.L.A., without understanding that the whole basis of the remedial relief available under R.O.L.A. is structured on the presumption that the church is in fact structured as a trust. What in fact occurs in many congregations is that the church constitution only makes reference to the appointment of trustees for limited purpose, i.e. the holding of land, without structuring the whole church as a charitable trust. As a result, a typical unincorporated church in Ontario has three elements to it:

(i) the creation of a limited purpose trust through the appointment of trustees to hold land on behalf of the church,

(ii) the establishment of those trustees as a quasi-corporation under R.O.L.A. to achieve perpetual succession in ownership of the land for the church, and,

(iii) the structuring of an unincorporated association without trustees akin to other unincorporated groups for all other purposes of the church, particularly, for example, when non-trustee officials within the church such as deacons or members of a board of management, are empowered to oversee the administration of the church instead of the trustees.

Needless to say, these three threads, i.e. the appointment of the trustees, the quasi-corporate capacity of those trustees, and the voluntary
association of individuals on a non-trust basis for
other purposes has and continues to create significant
confusion. For instance, many churches that purport
to own land under R.O.L.A. do not have any
provision within their church constitution for the
appointment of trustees. Who then are the trustees for
purposes of owning land under R.O.L.A.? It is
probably the members of the governing board, i.e.
board of deacons or board of management. However,
this conclusion has to be arrived at after reviewing the
tacts involved in the operations of that church, which
in turn necessitates that a legal conclusion be drawn
concerning who in fact are the trustees of the church.
Other church constitutions automatically deem
members of the governing board to be trustees for the
church. Nevertheless, it is unlikely that members of
those church boards perceive their role as being
trustees of a charitable trust. Rather, it is probable
that they consider themselves as members of the
controlling board of the church only, without much or
any recognition of their role and duties as trustees of a
charitable trust.

(2) Structure of Unincorporated Church
Associations
Contrary to general perception, R.O.L.A. does not
prescribe statutory prerequisites for the establishment
of unincorporated church associations. All that
R.O.L.A. does is to permit an unincorporated church
to own land through the appointment of trustees. Not
only does R.O.L.A. not set out any statutory
requirements for establishing an unincorporated
church, there is no legislation in Ontario which
mandates any standards or requirements for the
establishment of an unincorporated church association.
This lack of government intervention is probably the
primary reason why most churches continue to
organize themselves and operate as unincorporated
church bodies. The only government regulation of
any significance is the requirement by Revenue
Canada that there be a church constitution and that the
constitution confirm that the church is being carried
on exclusively for charitable purposes, that upon
dissolution its assets will be transferred to another
registered charity, that the church be operated without
profit or gain to its members, and that there be some
type of basic church government in place, i.e. the
church officers and a controlling board.
For many churches that have been recognized by
Revenue Canada as charitable organizations for
decades, it is conceivable that there may be no church
constitution in existence, as Revenue Canada did not
initially require the filing of church constitutions for
existing churches when registration of charities was
implemented in 1967. As a result, there are
doubtlessly many churches in Ontario organized as
unincorporated associations that hold land by trustees
on a perpetual basis pursuant to R.O.L.A. but which
do not have any written constitution. Needless to say,
this is a very dangerous situation for a church, as
amongst other limitations, there would be no
established procedure for the appointment or removal
of church leaders nor would there be any ability to
discipline church members, (for a commentary on the
need for church discipline, see A Legal Analysis of
Church Discipline in Canada, CCCC Bulletin No. 2,
1992), and Church Discipline Update, CCCC Bulletin,
No. 2, 1993 attached as Appendix III to this paper.
For the majority of unincorporated churches that do
have constitutions, the primary advantage in being
organized as an unincorporated association is that
there is almost total freedom to craft the church
constitution based upon ecclesiastical structure and
principles without having to worry whether the church
constitution complies with any type of government
regulations. To the extent that the church does have a
written constitution, the flexibility of what can or
cannot be included in a church constitution is a further
reason why many churches have remained as
unincorporated church bodies.

(3) Ownership of Assets
While R.O.L.A. provides a comprehensive statutory
code for the acquisition, holding, mortgaging and
selling of land through trustees who are appointed to
act on behalf of the church, it is not generally known
that R.O.L.A. is a statute which is limited to
conveying land only. Section 2 of R.O.L.A. states
that a religious organization may acquire and hold
land for certain purposes in the name of trustees either
individually or by collective designation and by their
successors in perpetual succession for the benefit of
the religious organization. Although R.O.L.A. does
establish an effective quasi-corporate capacity for
trustees to hold land, it totally ignores the issue of
who is to own other church property, i.e. chattels,
bank accounts, investment funds, etc.. This is clearly
a serious limitation in the legislation.

As discussed, an unincorporated church association
is not a legal entity at law and therefore is not capable
of owning property. To overcome the awkwardness in
having moveable property, such as bank accounts,
owned by all church members in common, the
concept of owning property in the name of an
individual or individuals in trust is required.
However, in the vast majority of church constitutions
of unincorporated churches, if there is any reference to
trustees at all, it is only in the context of trustees
owning land. Church constitutions seldom specify
that church trustees are to hold all property of the
church in trust for the congregation. Many church constitutions are silent as to who in fact owns church property other than land. Even if a church constitution states that all church property is held by church trustees, the benefit of perpetual succession under R.O.L.A. is not available in relation to church property other than land. Therefore, it is necessary that the awkward procedure of transferring title of the moveable property between successive trustees in theory at least, be addressed. However, few if any churches ever concern themselves with the appointment of successive trustees for non-land property.

Even on the matters that R.O.L.A. does address, i.e. the ownership of land, there are serious limitations. The first is that Section 2 of the Act states the purpose for which trustees can hold land for a religious organization is limited to that of a) a place of worship, b) a residence of its religious leader, c) a burial or cremation ground, d) a book store, printing or publishing office, e) a theological seminary or similar institution for religious instruction, f) a religious camp, retreat or training centre, or g) any other religious purpose. Although the last object, i.e. "any other religious purpose", is intended to be a catch all. it may not be broad enough to permit trustees to hold land for a church operated daycare, an elementary or high school, because the primary purpose of such institutions has more to do with general education than it does the advancement of religion.

In addition, Section 6(1) of R.O.L.A. states that the ability of trustees to own land in perpetual succession or to do anything else under the Act is only available if the unincorporated church adopts a resolution conferring such authority upon the trustees. As such, if the church constitution does appoint trustees to own land on behalf of the church, or if there is no church constitution, or if there has never been a resolution adopted by the congregation authorizing trustees to hold land on behalf of the congregation, then there would be no authority for trustees to hold church property in perpetual succession. This could mean, subject to a court interpretation, that the original trustees who acquired title for the church property may in fact still be holding the legal title to the property on behalf of the church.

A church could remedy this situation pursuant to Section 3(6) of the Act, by passing a resolution appointing trustees to hold land on its behalf. This would have the effect of automatically vesting the church property in the names of the newly appointed trustees without the necessity of any conveyances. However, there are probably many churches that have not taken advantage of this remedial provision of the  

Act because they are not aware of the problem in the first place. In such churches, it is possible that trustees have signed deeds or mortgages on behalf of the church without ever having been properly appointed or authorized to act on behalf of the church either by the church constitution or by resolution. Alternately, those conveyances or mortgages may be invalid, which may mean that individual members of the church may be personally liable for any detrimental consequences.

Even where trustees have been properly appointed by the church, there is always the possibility that they may either refuse or be reluctant to follow the direction of the congregation. Where such situations do occur, the removal or replacement of a trustee will be necessitated, accompanied by all of the unfortunate church political ramifications that such a removal entails.

If the trustees do acquiesce to the direction of the congregation, a tension still exists because of the dichotomy caused by the lack of authority inherent in being a trustee under R.O.L.A. and the significant legal liability that a trustee is exposed to by virtue of holding that position. R.O.L.A. states that trustees cannot exercise any of the powers contained in the Act until they are authorized to do so by resolution of the church congregation. As such, trustees are virtually powerless and are little more than figureheads of the church similar in role to the Governor General of Canada when required to sign legislation on the direction of the elected government. On the other hand, a person who agrees to act as a trustee for a church assumes significant personal liability. Even though the trust established under R.O.L.A. is a "bare" trust, i.e. the trustee holds land upon the complete direction and control of the beneficiaries, a trustee is not exempt from personal liability: "so long as a trustee holds property in trust, he always retains his legal duties, namely to exercise reasonable care over the property, either by maintaining it or by investing it; he cannot divest himself of these duties."  

The dichotomy occurs because a trustee is imbued with significant fiduciary obligations and liabilities at common law but under the provisions of R.O.L.A. is stripped of any ability to make decisions on his own and therefore protect himself, other than to ask "where do I sign?" when directed to execute a deed or mortgage on behalf of the congregation.

One significant limitation in the authority given to trustees to deal with land under R.O.L.A. involves the restrictions around mortgaging. Section 9(1) of R.O.L.A. states that trustees may mortgage church land only for purposes of securing a debt incurred for the acquisition or improvement of land or for the
building, repairing or extending or improvement of any buildings thereon. While this provision authorizes the vast majority of mortgages that churches are required to give, it is not inconceivable, particularly in a time of economic downturn, that a church may be required to give to its banker a collateral mortgage to obtain an operating line of credit to meet their day to day operating expenses. If this line of credit has nothing to do with buying land, improving land, building, repairing or improving structures on land, then there would be no statutory authority to allow trustees to sign such a collateral mortgage. If a bank proceeded with a power of sale against the mortgaged church property and the subsequent purchaser of the property prior to closing questioned the authority under which the mortgage had been given, it is conceivable that the sale of the property might fall through and that the trustees that signed the collateral mortgage might be held personally liable for providing the bank with an invalid collateral mortgage.

One of the primary reasons given in support of organizing churches as unincorporated associations under R.O.L.A. is the authority given under Section 10 of the Act permitting a church to lease land that is no longer required for its purposes for up to forty (40) years. Although this provision under R.O.L.A. is more generous than what is provided for under either the Ontario Corporations Act (where it is limited to seven (7) years), or the Ontario Charities Accounting Act, R.S.O., 1990, c. C.10, (which permits the Public Trustee to vest land in itself if land is not being used for charitable purposes for a period of three (3) years), it is still more restrictive than many special acts of the Province of Ontario which do not contain any limitations at all concerning how long surplus land can be leased for, i.e. was the case with the Anglican Church, in Incorporated Synod of the Diocese of Toronto v. H.E.C. Hotels Ltd. 20

Notwithstanding the Public Trustee's assertion that the ability to lease land for forty years is a significant benefit of using R.O.L.A., it is unfair that through the haphazard practice of granting special legislation to certain churches that some churches, but not all, are able to lease land on an unrestricted basis. The same opportunity should be afforded to all religious organizations.

Even though R.O.L.A. does permit leases up to forty years, it can only be done where the congregation has first determined that the land is no longer required for its purposes. Where church lands may still be needed for the charitable purposes of the church, then under Section 10(5) of the Act, only permits trustees to enter into leases for terms of no more than three years. Therefore, if a church has an additional sanctuary (possibly remaining after a new structure is built) that it wishes to rent out until its long term plans of starting a "daughter church" in the old location can be commenced, the length of lease that it can offer to another church cannot exceed three years. This could very well be a hindrance in attracting another church to rent the facility where the other church was wanting the security of a longer term lease.

Another limitation of R.O.L.A. is that the trustees' ability to sell land on behalf of the church is limited to situations where the congregation has determined by resolution that the land in question is no longer necessary for its purposes. While this form of resolution will not normally be a problem, it is conceivable that a church that is struggling financially may very well have to sell its church buildings to obtain sufficient cash to maintain its operation and rent other facilities in the short term until the congregation can again become financially viable. Where this happens, it may be difficult for a congregation to pass a resolution stating that the church lands are no longer necessary for its purposes, when in fact the church building is still needed by the church but the church simply cannot afford to retain ownership of the land and buildings.

Often church constitutions will state that a decision to buy, sell or mortgage land will require a percentage vote greater than the majority of the members present at the meeting, i.e. a two-thirds majority vote.

However, Section 17 of R.O.L.A. overrules this provision in that the Act specifically states that any resolution passed in accordance with the Act is automatically adopted if a majority of those present at the meeting and entitled to vote thereat support the resolution. As such, unincorporated churches operating under R.O.L.A. would do well to review and possibly revise their constitution so that it does not contradict this mandatory provision of R.O.L.A.

An interesting, but annoying statutory obligation created by R.O.L.A. that trustees are not probably aware of is the requirement under Section 16 that trustees who are either involved in leasing or selling land, make available on the first Monday in June of each year for inspection to members of the church a detailed statement showing the rents that accrued during the preceding year and all sums in their hands for the use and benefit of the church that were in any manner derived from land under their control or subject to their management and show the application of any portion of the money that is being expended on behalf of the church. Even if the church has not recently sold land or entered into any long term lease agreement, if there have been any short term rentals, such as a lease to a community group for a limited duration, Section 16 of the Act would require the
preparation of disclosure statements to the congregation. Why the first Monday of June was selected is not clear, but of all the days of week that people are apt not to be at church, the day after Sunday services would surely qualify as the most unlikely day. The choice of day is an indication of the degree of the anarchisms that are contained in R.O.L.A. and how the Act has failed to keep pace with the current needs of church organizations in Ontario.

A further limitation of R.O.L.A. is Section 27(2), which states that the Act is specifically subject to the trusts in any deed, conveyance or instrument. For churches that acquired land during the early portion of this century, those trustees may have received title subject to the terms of trust contained in the applicable deed. The terms of trust may be very different and might even be contradictory to the statutory authorization in R.O.L.A. not to mention the current practices and doctrines of the church. In such a situation, legal advice should be obtained to determine how the current trustees can comply with the terms of the trust in the original deed but still obtain the benefit of conveying the land under R.O.L.A.

A final limitation of R.O.L.A. is that it remains biased in favour of religious organizations with a congregational form of government21. Under the Act, the trustees are appointed and derive all of their authority from the congregation assembled in a meeting called for that purpose. It is possible that the congregational model is not appropriate for many religious organizations, which are governed by a local or denominational board: “those organizations for whom the Act are not suitable must therefore seek incorporation either under general statute or under a special act.”22

(4) Legal Action
Although Section 8 of R.O.L.A. authorizes trustees to maintain and defend actions for the protection of land and the interest of religious organizations in such land, an unincorporated church association does not have any other authority to initiate or defend legal action in the name of the church. This is because an unincorporated church association is not a legal entity. In the recent decision of Campbell et al v. Toronto Star Newspapers Ltd.23, the court held in an action for defamation by a person on his own behalf and on the behalf of all of the members of a church that the church could not pursue the action itself since it was an unincorporated church and not a legal entity: “the church is not an entity or person in law except to the extent of being able, through its trustees, to hold land and to sue and be sued in regard to its interest in such land by virtue of the Religious Organizations Land Act. The church has no persona for other purposes and so cannot suffer defamation.”24

Although some unincorporated associations in Ontario, such as labour unions, have been granted legal status to commence and defend legal action for limited purposes, there is no legislation which would permit legal action to be initiated or defended in the name of an unincorporated church, with the exception of actions involving land. As such, legal action by unincorporated churches involving matters not related to land under R.O.L.A. would have to be initiated or defended in the names of the members of the church themselves instead of in the name of the church. This leads inevitably into the thorny issue of liability of trustees, officers and members of unincorporated churches.”

(5) Personal Liability of Trustees, Officers and Members
Personal liability may arise in an unincorporated church association in relation to

(a) actions against trustees, primarily as a result of their signing mortgages and debt documents on behalf of the church,

(b) actions against officers of the church, primarily as a result of contracts that they enter into on behalf of the church, and

(c) actions against church members in their personal capacity in all situations where the church is liable, whether that liability is in contract or tort (i.e. a wrongful act or omission such as sexual abuse or negligence).

In regard to personal liability of trustees, there is conflicting case law which in some situations find trustees personally liable and in other situations find that they are not. The different results depend primarily upon how the trustees have signed debt documentation. In one case, Beatty v. Gregory,25, the court found that trustees who had been duly appointed by a religious organization and who had signed a mortgage on behalf of the church in their capacity as trustee were not personally liable. However, in another case, Cullen v. Nickerson,26, the court found that a contract describing individuals as church trustees but signed by them in their own personal names without clearly indicating that they were signing as trustees resulted in those individuals being personally liable under the terms of the contract. As such, although church trustees will not normally be held personally liable for mortgages or contracts that they sign on behalf of the church, they do run the risk of personal liability if they have not clearly indicated that they are signing as trustees, or they have not been duly appointed as trustees on behalf of the church by
either its constitution or by resolution, or they have not acted within the scope of their lawful powers, i.e. entering into a mortgage without congregational approval or enter into a collateral mortgage for a line of credit that is beyond the authority provided for under the R.O.L.A.

Whether officers of a church who sign contractual documents are personally liable is also an unsettled area of the law. In one case, *McDougall v McLean* 27, the chairman and treasurer of a church were found personally liable on a promissory note even though they had signed in their officer capacities on behalf of the church. To avoid a similar possibility of personal liability for officers signing on behalf of a church, the debt documentation should clearly indicate that the individuals are signing in their capacities as officers of the church and “without personal liability.” In addition, the debt documentation should provide that repayment of the debt will only be made to the extent of the property owned by the unincorporated church association. A creditor under such a document would contractually be precluded from attempting to hold either the officers or the members of the church personally liable.

In relation to the more difficult issue of liability of members, there is, as expected, case law and legal commentaries on both sides of the issue. In the leading English case of *Wise v Perpetual Trustee Company* 28, the court held that unincorporated associations are not business partnerships or associations for gain and as such no member is personally liable for the debts of the association, other than the monies that the member has contributed to the association in question. Whether or not this English case decided at the turn of the century is questionable. The better and more cautious approach adopted by commentators on the topic is that each member of an unincorporated association may very well be personally liable for the debts of the group. “While the matter is by no means certain, the better position to take when advising any unincorporated body or its members is that all the personal assets of each member may be liable for the debts of the unincorporated body; conversely, if acting for a creditor of an unincorporated body, serious consideration should be given to commencing the action against each member of the body (or at least those who appear to have some assets).” 29

Another commentator has stated that members, as opposed to the officers of an unincorporated organization, may be liable at common law for the debts of the unincorporated organization in one of three ways:

(a) if the contract was entered into within the scope of authority of the officer, trustee or agent provided by the organization’s bylaws or rules;

(b) if the contract that was entered into was not within the scope of the authority provided by the organization’s bylaws or rules but it can be shown that the member being sued had approved or subsequently ratified the contract; or

(c) if the contract that was entered into was not within the scope of the authority provided by the organization’s bylaws or rules, but the person was held to have been authorized to enter into the contract.”

In relation to tort liability, i.e. an action against a church arising out of a wrong act or omission, “it is logical to conclude that if the tortious act or omission was committed by a trustee, officer, agent or servant of the unincorporated charitable or non-profit organization, the members may be liable if the tortfeasor was acting within the scope of his or her authority provided by the organization’s bylaw or rules.” 31

Although there do not appear to be any reported Canadian cases dealing with liabilities of members of unincorporated churches, there have been a number of recent cases in the United States. In the 1991 decision of *Hutchins v Grace Tabernacle United Pentecostal Church* 32, a Texas Appeals Court suggested that the members of an unincorporated church could be sued individually for the liabilities of the church. In that decision, the plaintiff brought action against the church arising out of the sale of her property to the church on a tax sale by the municipality for unpaid municipal taxes where the property had been previously rented by the church. Although the court dismissed the action because of a technical deficiency, the Texas Appeal Court did acknowledge that the members of an unincorporated church are legally responsible for the torts committed by members or agents of the church while acting on behalf of the congregation.

Specifically, the court “acknowledged that the members of an unincorporated church are legally responsible for torts committed by other members or agents of the church while acting on behalf of the church... that the members of an unincorporated church can be personally liable for the contracts of the church... and the liability of members for the obligations and liabilities of an unincorporated association is joint and several.” 33 Joint and several liability means that a plaintiff can recover full judgment against one or more of the members of the church. This means that, at least in the United States,
each member of an unincorporated church “must recognize that he or she has a potential personal liability for the entire damages awarded by a court in a law suit based on the torts of other church members or agents committed within the scope of their authority.”  

In another recent U.S. decision, an Indiana Appeals Court concluded that individual members of an unincorporated non-profit association were personally responsible for a contract entered into by the association.  

As a result of recent cases like these exposing members of unincorporated churches to personal liability, legal commentators in the United States have concluded that “the potential personal liability of every member for the acts of other members in the course of the associations activities render the unincorporated association form of organization highly undesirable for churches and most other non-profit organizations.” 

This has lead to a corresponding recommendation in the United States that churches should, as a matter of course, organize themselves as incorporated entities: “it is inevitable that more and more plaintiffs will seek to sue the members of unincorporated churches in their efforts to find “deep pockets” to satisfy potential judgments.” 

Members of unincorporated churches need to be warned of their potential liability. There is a simple remedy for those wishing to avoid this personal liability - incorporation. 

(6) Insurance  
A question that often arises in response to concerns about liability of members of unincorporated churches is whether or not a church’s liability insurance policy can provide an effective alternative to incorporation. Generally speaking, although comprehensive liability insurance does provide effective protection in many situations, there are equally many circumstances in which the church’s insurance will not be sufficient to provide adequate protection to its members.  

Although it is beyond the scope of this paper to provide an in-depth analysis of church liability insurance, some situations where a church insurance policy may be inadequate are the following:  

(a) Liability insurance will not provide protection against claims by creditors of the church, i.e. a claim on a promissory note or a claim by a contractor retained by the church.  

(b) Unless a specific endorsement has been added to the church’s insurance policy, the policy may not provide protection against claims arising out of negligence, pastor malpractice or layperson counselling.  

Due to increasing claims involving sexual abuse of children, it is becoming difficult if not impossible to obtain coverage arising out of sexual abuse, although there may be some limited coverage available for legal costs associated with such claims.  

The amount of the insurance may not be sufficient to cover either the amount of the claim or the legal costs associated with it. A question that often arises in response to concerns about liability of members of unincorporated churches is whether or not a church’s liability insurance policy can provide an effective alternative to incorporation. This is particularly true in a claim based on sexual abuse or sexual harassment where the amount of punitive damages could easily exceed a standard million dollar policy.  

Trustees are often unable to obtain recovery themselves under a church’s insurance policy. This is due to the fact that the policy of insurance for an unincorporated church is owned in the collective names of the trustees of the congregation. As such, if one of the trustees becomes injured at the church through an accident, that trustee may be unable to receive compensation under the church’s liability policy, as the policy will normally preclude payment to a named insured, i.e. to any of its trustees. This therefore puts the trustee in a dilemma of either not receiving compensation that he or she would otherwise be entitled to under the church liability insurance policy, or having to commence an action against his or her own church family in a situation where the church would not have any insurance coverage.  

In the United States, the same principle that prohibits a trustee recovering on a church insurance policy also precludes a church member from recovering. “in one case, a church member who was injured because of the negligence of her church was denied recovery against the church on the grounds that a member of an unincorporated church is engaged in a joint enterprise and may not recover from the church any damages sustained through the wrongful conduct of another member.” In the United States, one legal commentator has stated that the inability of members of unincorporated churches to obtain recovery from the church’s insurance policy should be a major impetus for a church becoming incorporated. For churches wishing to remain unincorporated, “... such churches
should apprise their members that if they are injured during any church activity because of the actions of another member, they may have no legal right to compensation or damages from the church or other members. The same principles may have similar application in Canada depending upon the position taken by the insurance company in question.

As a result of these real concerns about the personal liability of trustees, officers and members of an unincorporated church and the inherent limitation of liability insurance, churches should be advised to address the issues by implementing a complete risk management review. Such review would include a thorough analysis of the insurance that the church currently has in place, careful monitoring of all contracts and debt documentation signed by the church, as well as a determination of whether or not incorporation is an appropriate option. If church leaders fail to initiate a risk management review, then they should not be surprised if potential members are reluctant to subscribe for membership in the church or take on leadership positions within the church. Prospective as well as existing members of a church family have the right to expect that the church leadership have taken appropriate steps to limit as much as possible personal liability for its members and leaders.
CHAPTER 4

ORGANIZATION OF AUTONOMOUS CHURCHES BY INCORPORATION

(1) The Nature of an Incorporated Church
In comparison to an unincorporated church which has no existence separate from its members, an incorporated church is recognized at law as an artificial person which has an existence that is separate from its members. The church corporation comes into existence by virtue of the prerogative of the state either by a special act of parliament which was commonly used up to 1953 or thereafter by Letters Patent issued pursuant to either provincial or federal corporate legislation.

(2) Perpetual Existence
Since an incorporated body has an existence of its own that is separate from that of its members, the church corporation can continue to exist for a period of time even if there were no members or directors. An unincorporated association, on the other hand, is nothing more than an association of its members. As such, if there are no members of a church left, there would be no church. In addition, there would be no means of appointing successor trustees to maintain ownership of the lands. This would necessitate that a court application for directions be brought under the provisions of R.O.L.A.

(3) Limited Liability of Members
The main advantage of a church becoming incorporated is the protection that is afforded to its members from the liabilities and debts of the church corporation. Section 122 of the Ontario Corporations Act states that: "a member shall not, as such, be held answerable or responsible for any act, default, obligation or liability of the corporation or for any engagement, claim, payment, loss, injury, transaction, matter or thing related to or connected with the corporation."
This is to be compared with an unincorporated church where its members may be found personally liable and is the primary reason why almost every religious denomination and most Christian agencies have incorporated. If churches incorporate at the denominational level as a matter of course, one has to wonder why the same protection from personal liability is not afforded to church members at the congregational level.

Notwithstanding the statutory protection offered by incorporation, there are some limited instances where members can still be exposed to liability. Section 311 of the Ontario Corporations Act states that where a corporation exercises its corporate powers with fewer than three members for a period of more than six (6) months, every person who is a member of the corporation following the six month period and is aware of the fact that the corporation so exercised its corporate powers is severally liable for the payment of the whole of the debts of the corporation contracted during such time and may be sued for those debts without joining the corporation in the action or any other member. It is possible, however, to avoid liability under that section if a member serves notice in writing to the corporation and notifies the Minister of Consumer and Commercial Relations that a protest has been served.

Members of an incorporated church could also be exposed to liability in situations where the members themselves take on the control and management of the church. This might occur in a highly congregrationally organized church where all business, financial and property matters had to be discussed, reviewed, and decided upon by the membership as opposed to having it dealt with by a controlling board of the church. In such a situation, the members may take on the trustee like obligations of directors in relation to the management of the money and property of the church.
A further situation where members of a church corporation may not have full protection from liability is where a member assumes responsibility for the leadership of the corporation as a member of the board of directors. While it is beyond the scope of this paper to outline the extent of the liability associated with being a director of a charitable corporation, it is sufficient to indicate that the limited liability protection of members of a corporation does not protect a director from his or her responsibilities at law as a director. Notwithstanding these limitations, for the vast majority of members of a church corporation, the limited liability protection from debts and liabilities of the church is a significant benefit that no church should lightly ignore without first embarking on a careful review.

(4) Indemnification of Officers and Directors
Under both Ontario and federal legislation for non-profit corporations, specific authority is granted to pass bylaws permitting indemnification of directors and officers of the corporation from claims made against them arising out of the fulfilment of their duties. This is an important benefit, if a director of a church corporation is sued in his or her capacity as a director, an indemnification bylaw would authorize the church corporation to reimburse him or her for any expenses that the director incurred, (i.e. legal expenses), as well as for any damages that he or she was required to pay without the director having to first sue the church corporation for recovery.

After a director or officer is reimbursed, the church would then be entitled under its director and liability insurance policy (assuming that the church had such a policy in place) to recover the compensation that had been paid to the director or officer. The end result is that a director would be fully protected but would not be put in the embarrassing situation of having to make a claim against his or her own church corporation to recover the expenses and damages incurred in his capacity as a director.

(5) Legal Action
Unlike unincorporated church associations that can only maintain and defend actions through its trustees and then only in relation to land, a church corporation in the capacity as a separate legal entity can commence and defend all legal actions in its own name. This has the advantage of allowing the church to fully defend itself while avoiding the embarrassment of having trustees or church members named and included in the legal action.

(6) Ownership of Church Assets
Dissimilar to trustees under R.O.L.A. who are only empowered to hold church land in trust, a church corporation as a separate legal person is able to buy, sell, mortgage, lease, and otherwise deal with any assets that a natural person can deal with. including equipment, other movable property, bank accounts, as well as land and buildings. This means that all assets owned by the church corporation can be owned, mortgaged or leased by the church using its corporate name instead of the awkwardness of using trustees.

The one major limitation of incorporating a church concerns the restrictions placed upon non-profit corporations in retaining and leasing land that is no longer required for its charitable purposes. Under Section 276(1) of the Ontario Corporations Act, no corporation can acquire or hold land that is not necessary for the actual use and occupation of the corporation, or for carrying on its undertakings for more than seven (7) years after the land ceased to be necessary. Although the government can extend the seven year period of time, it can only be extended for an additional five years. To avoid this limitation, a number of churches that do incorporate proceed with an application to incorporate under the Canada Corporations Act, which has no similar restriction.

However, even if a church does obtain a federal incorporation, a church corporation operating in Ontario may still be subject to the provisions of the Ontario Charities Accounting Act. Section 8 of that Act states that if the Public Trustee is of the opinion that land held for charitable purposes has not been actually used or occupied for charitable purposes for a period of three years, or is not required for the actual use and occupation of its charitable purposes, or will not be required for actual use or occupation for charitable purposes in the near future, then the Public Trustee may take over ownership of the land by registering a notice on title.

For most churches that are incorporated, this intuition by the province will not be problematic, as their lands and buildings will more than likely be used in the fulfillment of the charitable objectives of the church. However, in a situation where the church owns surplus land which it wants to lease on a long term basis but is not permitted to do so by the Charities Accounting Act, it is still open for that congregation to operate an unincorporated church entity under R.O.L.A. as a parallel church body to the corporate entity for purposes of owning some or all of the church land and buildings. Some legal counsel have stated that they in fact usually "recommend that a religious organization exist along side an existing charitable corporation for the purposes of holding land and other ancillary purposes." However, the parallel non-incorporated church would still have to function in some limited manner as an active church to
maintain its status as a charity.

The arrangement of parallel churches has the advantage of allowing the church to lease its surplus land as an unincorporated church association for a period of up to forty (40) years pursuant to the statutory provisions of R.O.L.A., as well as retaining ownership of church land and buildings outside of the corporate entity for purposes of protecting those assets from creditors of the church corporation. The establishment of parallel church organizations, however, requires careful structuring. For instance, the names of the unincorporated and the incorporated church would have to be identifiable different to ensure that the liability incurred by the church corporation did not unwittingly become a debt of the unincorporated church body that continues to retain ownership of the valuable assets of the church. While the use of parallel church structures could function much in the same way as the relationship between a holding company and an operating company in a commercial context, its use requires detailed planning and implementation and therefore should not be adopted without first determining if the church is capable of operating two church organizations simultaneously.

(7) Objection to Government Control
An objection to incorporating churches that is often raised is that incorporation will expose the church to more government control as a result of the state issuing the Letters Patent that bring the church corporation into existence. The concern raised is that government policy in future years may change and may threaten the ability of the church to operate as freely as it currently does. However, if that was the case, then unincorporated church associations may be as vulnerable as incorporated churches. This is because an unincorporated church’s ability to own land and buildings is predicated upon the grant of a quasi-corporate capacity for their trustees pursuant to the “indulgence” of government, i.e. under R.O.L.A. In addition, virtually all churches, whether incorporated or not, receive the benefit of charitable status with Revenue Canada. This means that all churches are required to submit to the authority of the federal government under the Income Tax Act. If the federal government embarked on a policy of challenging church corporations, it is likely that all churches, whether incorporated or not, would be equally prejudiced by the loss of charitable status under the Income Tax Act.

Further, if individual church corporations became the targets of suppressive government policies, then those churches would be in good company with the incorporated denominations that the church corporations were members with as well as almost every independent missionary organization which have for many years as a matter of course operated through corporate entities. While no one can guarantee that governments will not become more oppressive in the future, if that happens, then it will invariably affect all Christian organizations.

Speculation concerning what future governments may or may not do to restrict the operation of churches does not by itself constitute a justifiable reason to circumvent evaluating the benefits that are available through incorporation. More importantly, objection to church incorporation for policy or doctrinal reasons will not provide a defence to an action against members of a church personally for the debts and liabilities of the church. As one legal commentator has succinctly stated, “church leaders who are opposed to incorporation on theological grounds should share their position with the church membership. After all, it is entirely possible that the church membership will not share this theological position when they are apprised of the potential consequences.”

(8) Choice of Jurisdiction of Where to Incorporate
If a church proceeds with incorporation, it will have an option of either incorporating in Ontario under the Ontario Corporations Act or federally pursuant to the Canada Corporations Act. Although in theory a church could seek special legislation from either the provincial or federal parliament to obtain corporate status as was done in the first half of the century, it is no longer necessary because of the general incorporation statutes that are now in place. In addition, special legislation is generally not advisable, as any fundamental changes to the structure of the church would require a further act of parliament, whereas a church incorporated under a general incorporation statute can accomplish fundamental changes to its corporate structure by simply filing an application for supplementary Letters Patent.

Generally speaking, federal incorporation through an application under the Canada Corporations Act is advisable for the four reasons listed below:

(a) A federal incorporation does not require the review and approval of the Public Trustee of Ontario. Although the Public Trustee’s Office can be helpful in making suggestions on an application for an Ontario incorporation, the additional step to having to deal with the Public Trustee’s Office can add a great deal of cost and time to the incorporation process. The federal government does not have an equivalent government position of a Public Trustee from whom government approval
must be obtained before Letters Patent are
issued. As long as the basic corporate
requirements under the Canada Corporations
Act are complied with, the staff of the
Department of Consumer and Commercial
Relations will issue the requested Letters
Patent to incorporate a church. However, to
legitimately fall within the jurisdiction of a
federal incorporation, the church must indicate
within its charitable objectives that its goal of
advancing the gospel of Jesus Christ entails a
vision that extends beyond the Province of
Ontario. Most Churches should have little
difficulty in doing this, as almost every church
actively subscribes to a primary objective of
sending missionaries either across Canada or
internationally as well as supporting
independent international missionary
organizations. Such activities would justify
charitable objects of the church that go
beyond the province in which it is located.

(b) The Canada Corporations Act does not contain
a seven (7) year limitation on the holding of
surplus land by the corporation as is found in
Section 227 of the Ontario Corporations Act.
However, it should be noted that federal
corporations owning land in Ontario are
probably subject to the provision of the
Charities Accounting Act permitting the
Public Trustee to take over ownership of
surplus land after a period of three years. As
such, an incorporated church may want to
consider maintaining an unincorporated church
association for the purposes of holding surplus
land under the provisions of R.O.L.A. that
permits the leasing of surplus land for up to
forty (40) years.

(c) If the church corporation intends to carry on
activities in other provinces, a federal
incorporation will generally exempt the
corporation from having to obtain extra
provincial licenses in other provinces,
although the church will still be required to
comply with the specific filing requirements
of each province in which it operates.

(d) There is generally more flexibility in drafting
a General Operating By-law under the Canada
Corporations Act than there is under the
Ontario Corporations Act. For instance, under
federal legislation, the number of the members
of the board of directors can be a variable
number, whereas under provincial legislation
the number of directors must be fixed. In
addition, under provincial legislation, a
corporation must give a member the right to
vote by proxy, whereas under federal
legislation such provision is optional and
therefore may result in a corporate procedure
that better reflects the actual manner in which
the church functions.

(e) A final consideration is that a federal
corporation is generally more recognizable by
international agencies where a church is large
enough and carries on activities with
international bodies outside of Canada.
For ease of reference, the following is a summary of the advantages and disadvantages of a church incorporation in Ontario.

(1) Advantages of Church Incorporation
(a) There is limited liability protection for members of an incorporated church, i.e., church members cannot be sued or held liable for the debts or legal liability of the church corporation. This is the primary reason why religious denominations at the national and provincial level almost invariably are incorporated.
(b) An incorporated church has perpetual existence and therefore is not dependent upon individuals as either trustees or members to maintain its legal status.
(c) The requirement that a church corporation be established according to rules of corporate organization means that a church corporation will have a more complete constitution to regulate church operations.
(d) Both Ontario and federal legislation permit a church corporation to pass bylaws to indemnify directors and officers of the corporation from claims made against those individuals by third parties. As such, a church corporation would have the authority to reimburse its directors and officers if claims were made against them.
(e) A church corporation can maintain and defend legal actions in the name of the corporate entity without having to involve either trustees or members of the church.
(f) A church corporation can own, mortgage and lease land and all other assets in its own name without having to rely upon trustees to do so on behalf of the congregation.

(g) The numerous limitations and anachronisms of R.O.L.A. discussed in this paper would have no application to a church corporation. For instance, a church corporation could mortgage its land for purposes of a line of credit, whereas under the R.O.L.A. such form of mortgage would not be permitted.
(h) Insurance obtained by church corporations is in the name of the corporate entity. As such, if a member or officer of the church became injured, it is possible that recovery for that individual could be obtained from the church's insurance policy depending upon the wording of the policy, whereas such a result may not be available with insurance involving an unincorporated church.

(7) Disadvantages of Church Incorporation
(a) Church incorporation is more costly than organizing an unincorporated church, as legal counsel generally has to be retained and the requisite filing fees have to be paid to the appropriate government that the application is being directed to.
(b) Requisite corporate filings and notices need to be done whenever there is a change of directors, officers, or head office.
(c) Proper corporate minutes of meetings of members and directors of the church corporation have to be kept.
(d) The drafting of the corporate bylaw can be a challenging process, as it needs to comply with both corporate requirements as well as reflect the character and organizational structure of the congregation.
(e) The benefit of being able to lease surplus land for up to forty years pursuant to R.O.L.A., is not available for an incorporated church.
However, churches that do have surplus land could hold such land through a parallel unincorporated church association to obtain the benefits of long term leasing under R.O.L.A.
CHAPTER 6

WHEN IS INCORPORATION APPROPRIATE?

Having compared unincorporated church associations under R.O.T.A. with that of an incorporated church under the Ontario or federal legislation, it is apparent that church incorporation should be seriously considered as a viable option. Even recognizing the limitations involved in incorporation and the advantages associated with the unincorporated church structure, one Canadian legal commentator has stated that "notwithstanding the above, many religious organizations still choose to incorporate...the advantages of limited liability, having a separate legal entity with permanent succession and a formalized structure within which to operate, often tip the balance in favour of incorporating."62

When other jurisdictions are looked at, there is a developing trend toward the use of corporations for church organizations. In Quebec, churches almost invariably incorporate under the Religious Corporations Act R.S.Q. 1977, c.C-71. In Alberta and some other provinces there are specific statutes directed towards facilitating church incorporation such as the Alberta Religious Societies Land Act R.S.A. 1980, c. R-14. In the United States, as a general rule, the advice given to churches is to proceed with incorporation: "unless theological considerations or the law of the state prohibits incorporation, it is generally advisable for churches to be incorporated."63

While acknowledging the general viability of incorporation, there are some circumstances where incorporation should be more seriously considered than others. Generally speaking, incorporation is particularly relevant if an existing church is going to embark on a building program or some other expansion that involves the incurring of debt or the exposure to liability. In addition, even if a church is not planning to expand but is involved in ministries that could expose its members to possible liability, such as programs directed towards youth within the community, a Christian school, a counselling ministry, or where there may be disgruntled members or adherents who might be potential litigants against the church, then the option of church incorporation should be seriously considered.

This is not to suggest that other churches should not look at the option of incorporation. However, those churches involved in circumstances described above would be more obvious candidates to benefit from the protection of incorporation.

On the other hand, if a church is very small and is not anticipating growth in the near future, or if the complexities of proceeding with the incorporation process would encounter objections and political controversy within the congregation, then the option of incorporation might be deferred to a later time. In fact, the author on one occasion recommended to a very small incorporated church consisting of only twenty-five members that it would be more expedient to operate in the future as an unincorporated church association to avoid the significant costs involved in trying to update and revise the corporate documents of the Letters Patent and bylaws until the church grew in size to a point where it could properly revise its corporate documentation.

As such, it is clearly not the intent of this paper to recommend that every church in Ontario should immediately proceed with incorporation. There are clearly advantages to doing so, but whether or not it is appropriate depends upon the particular circumstances of each church. A final determination of whether incorporation is appropriate for a church will require careful consideration by the controlling board, the minister and the membership after appropriate input has been obtained from legal counsel for the church.
CHAPTER 7

THE NUTS AND BOLTS OF INCORPORATION OF CHURCHES

Once a church has expressed interest in proceeding with incorporation, it can take a great deal of time and planning to successfully complete the incorporation process. The following is intended to provide a “nuts and bolts” discussion of how the incorporation of an autonomous church can be completed.

1) Establish Liaison with the Church
Since the incorporation process is quite technical and will involve a general overhaul of the church constitution, it is important that the church appoint a small committee of one, two or at the most three individuals who are entrusted with the job of ushering the church through the incorporation process. The committee should become the liaison between the church and the lawyer involved in completing the incorporation documentation.

2) Obtain Congregation Approval to Proceed with the Concept of Incorporation
Since the need to incorporate is generally not well understood by most churches, it is important to ensure that the congregation is provided with adequate information on the advantages and disadvantages of incorporation. This can be accomplished by providing a written summary of the pros and cons involved in incorporating a church similar to the one provided earlier in this paper, as well as holding an informal informational meeting where the chair of the incorporation committee can provide details of the incorporation process and answer any questions that may arise. A formal vote of whether or not to proceed with incorporation should be held at a subsequent meeting no later than two weeks from the informational meeting, or alternatively it can be held at the same meeting.

3) Special Considerations for a New Church

When an autonomous church is newly created, it may still be necessary for tax reasons to temporarily organize the church as an unincorporated association even if the congregation wishes to organize itself as an incorporated church entity. This is because the incorporation process will often take an average of four to ten months to complete and during that period or time members of the congregation will want to receive charitable receipts for their donations. If the congregation had to wait until the incorporation process was completed, even though the effective date of charitable registration with Revenue Canada is normally back-dated to the date of incorporation, the actual date granted for incorporation can only go back to the date that the application for incorporation was received by either the federal or provincial government, as the case may be. As such, the incorporation date will always be a number of months after the church was initially organized and charitable donations were first received.

To avoid not being able to issue charitable receipts for the initial months leading up to the date of incorporation, the church should either become affiliated under the direction of an existing church which can issue income tax receipts in the short term, or the church should organize itself as an unincorporated church association in the interim and apply for charitable status as of the date the church first began to meet. In relation to the second option, after the General Operating By-law for church incorporation has been drafted (as discussed in detail below), the format of the By-law should be modified to convert it into a constitution for an unincorporated church association. The effective date for the constitution will be deemed to be the date that the church first met as a congregation notwithstanding the fact that the date signing of the constitution may be many months later.
An application for charitable status with Revenue Canada (form T2050(E)) will need to be submitted to Revenue Canada accompanied by the constitution for the unincorporated church association. The covering letter to Revenue Canada should clearly indicate that the effective date of the unincorporated church is the date that meetings were first held as reflected by the church constitution and that the granting of charitable status for the church should be made as of the said date.

Once the charitable registration has been granted by Revenue Canada, all donations made to the unincorporated church after the effective date can be receipted. The other advantage of forming a temporary unincorporated church association arises where the congregation needs to acquire land quickly, since an unincorporated church association can acquire land by immediately taking title in the names of trustees appointed under R.O.L.A. The property could be conveyed to the church corporation at a subsequent time.

If an unincorporated church is required to enter into a lease pending incorporation, the trustees of the church appointed under R.O.L.A. to execute the lease should do so by stating that they are signing as trustees for “a corporation to be formed and without personal liability” of either themselves or of the members of the unincorporated church association.

Once the church corporation has been formed, then all of the procedural steps referred to later in this paper concerning the transfer of property from the unincorporated church to the incorporated church entity would apply. Notwithstanding that the formation of an unincorporated church adds an additional procedural complexity to the incorporation of a church, it allows the church to operate immediately, issue charitable receipts and acquire or lease land and buildings pending the completion of the incorporation process.

(4) Corporate Documentation Must Reflect Church Personality

Generally speaking, the technical provisions of both the Ontario Corporations Act and the Canada Corporations Act are difficult to use in creating a corporation to reflect the unique personality of a church. The process is akin to trying to put a square peg into a round hole and as such constitutes a daunting task for the incorporation committee and its legal counsel.

The best way to overcome this difficulty is to provide the incorporation committee with a precedent of the corporate documents used by a church that has already been incorporated and then encourage the committee to use the precedent as much as possible and delete any applicable provisions instead of attempting to create their own set of corporate documentation. In this regard, a sample application for Letters Patent of a church is attached (Appendix I) and a sample draft General Operating By-law is attached (Appendix II). The attached sample precedent is for a federal incorporation of a church but can be modified without much difficulty to apply to a provincial incorporation. The attached precedents generally reflect the personality of an autonomous evangelical church. Therefore, many of the provisions contained in it are unique to the particular theological understanding of such a church structure, although it has been modified to make it gender neutral for this paper. Notwithstanding the need to modify the precedent, the attached material will provide a starting point for both the incorporation committee and its legal counsel in drafting corporate documentation that will eventually reflect the unique flavour of their particular congregation.

Unlike mainline and hierarchical churches, every autonomous church in Ontario has its own unique understanding of church government and as a result it would be difficult if not impossible to find any two autonomous churches which agree on how to structure church incorporation documentation. The job of legal counsel is to sensitively enquire into how the church operates and then suggest ways in which the precedent material can be modified to ensure that the structure of the incorporated church will accurately reflect how the church actually operates instead of simply adding an irrelevant layer of procedural bureaucracy to the operation of the church that may become misunderstood and resented by the church congregation in future years. The cardinal rule in acting for a church is to ensure that “form follows substance”, i.e. that the needs of the church will dictate the form of the corporate documentation instead of the reverse.

(5) Drafting Letters Patent

The application for Letters Patent, whether done pursuant to the Ontario Corporations Act or the Canada Corporations Act, constitutes the foundational document for the future church corporation and as such merits specific discussion.

(a) Objects

The objects will not only set out the legal parameters in which the church corporation can function but will establish the charitable objectives that are required by Revenue Canada. Although the primary objectives will be the advancement of the Christian faith, it is worthwhile to set out a number of auxiliary objects and power clauses which although not technically
necessary will help to articulate to both the current
congregation and future congregations specifically
what it is that the church corporation can do.
Generally speaking, it is helpful for a church to have a
detailed list of auxiliary objects and power clauses so
that its members will know what sorts of activities fall
within the primary religious object of the church. In
addition, it allows the church to articulate the type of
ministries that the church envisions it may become
involved with in the future.
It should be noted that many of the auxiliary objects
and power clauses that are shown in the precedent
attached as Appendix I will not have application to
every church and therefore must be modified or
deleted accordingly.

(b) Name of Church
The application for Letters Patent must include the
corporate name of the church. This in turn will
require that a computerized name search be obtained
and filed together with a consent from the existing
church if a similar name is being used.
Generally speaking, it is easier for a church to use
its existing name as the corporate name without the
addition of suffices such as Inc., Ltd., Incorporated,
Limited, Corp., Corporation, or Co. The advantage of
excluding these suffices in the name is that the
church is unlikely to use those designations in its
regular operations, such as church bulletins,
correspondence, signs, cards, etc. If the church uses
any name other than its full corporate name, it will
have to register a business trade name for the
corporation. This will then require that the church
designate the trade name as a division of the full
corporate name or risk losing limited liability
protection. For instance, if the corporate name was
"ABC Church Inc.", but the church was operating
under the name "ABC Church", the church would
have to identify itself in all of its documentation as
"ABC Church, a division of ABC Church Inc.";
clearly an awkward situation to be avoided.
The better alternative is to have the church
incorporate itself under the name of its usual trade
name of "ABC Church". However, the church should
clearly describe itself as either an Ontario or federal
corporation on all of its correspondence,
documentation, signs, or other communications as
follows: "ABC Church Inc. (a federal corporation)"
with limited liability for its members. This
designation will ensure that any individuals or
creditors dealing with the church corporation cannot
subsequently claim that they were not aware that the
church was incorporated. This is discussed in more
detail in Chapter 9.

(c) Statement of Faith
Although not technically necessary, it is possible to
include the statement of faith of the church within the
application for Letters Patent. Since Letters Patent are
more difficult to amend than By-laws, i.e., it requires
at least a two-thirds resolution of the members (or a
greater percentage vote if the By-laws so provide), by
including the statement of faith in the Letters Patent, it
will be more difficult to amend the statement of faith
at a later time and as such will impress upon future
congregations that the statement of faith is intended to
be the foundational doctrinal document of the church.
This is an important consideration for autonomous
churches, as there will often be sufficient flexibility
within the rules of its particular denomination to
permit each member church to adopt its own separate
statement of faith, provided that such statement of
faith does not conflict with basic doctrines established
by the denomination.

(d) Incorporators
Since the incorporators will become the first members
of the church corporation for purposes of initially
organizing the church, it is recommended that the
current church leadership, i.e., the board of deacons,
board of elders, or management committee, as the
case may be, sign the application for incorporation on
behalf of the church. This will allow the church
leadership to act as the first directors and the first
members of the church corporation for purposes of
initial corporate organization so that when the transfer
of membership and assets from the unincorporated
county to the incorporated church is to be completed,
the church corporation will already be duly organized.

(6) Drafting General Operating By Law
(a) General Comments
The greatest hurdle in incorporating a church is
drafting the General Operating By-law. The General
Operating By-law is the equivalent of the church
constitution, in that it sets out the procedure by which
the church functions. The By-law covers everything
from the establishment of criteria for membership, the
procedure for membership meetings, the creation of a
controlling board, the establishment of officers, the
creation of committees, the drafting of a detailed
procedure for discipline (i.e. restoration) of members,
as well as establishing the terms of reference for the
election and removal of church leaders.
Since corporate statutes at both the federal and
provincial level set out certain mandatory
requirements, the preparation of a By-law that reflects
both the character and traditions of the church while
at the same time fulfilling all of the corporate
requirements of the applicable incorporating
legislation requires careful drafting.

Many churches that are already incorporated have simply adopted the model By-law suggested by Industry and Science Canada in the "Incorporation Kit" which, although perfectly legitimate from a corporate standpoint, is totally irrelevant from the context of how the church operates. For instance, a "boiler plate" By-law may require a 6 person board of directors, a president, secretary and a treasurer, when in fact the church elects a 12 person board of deacons, an 8 person board of elders, a chairman, vice-chairman, clerk and church treasurer. To avoid having to amend the General Operating By-law at a later time to make it relevant to the actual functioning of the church, it is prudent to take the additional time during the incorporation process to ensure that the By-law for the church corporation is a document that will be both legally correct as well as relevant to the operation of the congregation for years to come.

Although the drafting of an effective General Operating By-law is often a struggle for both the church and its legal counsel, a worthwhile by-product is that the church not only obtains limited liability protection for its membership but also acquires a revamped and more effective church constitution.

(b) Definitions
It is suggested that a definition section be placed at the beginning of the General Operating By-law, since many church terminologies need to be defined in a corporate context. For instance, if the board of deacons is to be the controlling board of the church, then the board of deacons should be defined as being the board of directors, even though the balance of the By-law will refer to the controlling board as being the board of deacons. In addition, having a definition section at the beginning of the By-law will mean that the balance of the By-law can be drafted without requiring repetitive and long explanations of various church offices. Suggested definitions are set out in Section 1 of the draft General Operating By-law (See Appendix II).

(c) Membership
Since membership in a church is in essence a voluntary association of individuals who agree to work together toward common goals of worship, fellowship and outreach pursuant to certain rules and expectations, it is important that the membership section of the By-law is carefully drafted to ensure that those individuals who wish to be members of the church know what it is that they have become a member of and give evidence of their agreement to be under the authority of the church. The importance of clearly establishing the church membership becomes a critical factor in the event that the church has to discipline one of its members. For a more detailed discussion of church discipline and the need to establish evidence of membership, reference should be made to two articles on church discipline that the author prepared for the Canadian Council of Christian Churches which are included in this book as Appendix III. Suggested wording dealing with membership is set out in Section 3, 4 and 5 of the draft General Operating By-law (see Appendix II).

(d) Adherents
Many churches want to accommodate individuals who are regular church attendees but for doctrinal reasons or matters of principle do not wish to become formal members of the church. In this regard, a provision can be added to the General Operating By-law which will define a class of individuals to be called "Adherents". They will in essence constitute another class of membership in the church allowed to participate in some areas of ministry but will not be entitled to any voting rights. However, by becoming an adherent, the individual will have agreed to be under the authority of the church. This is particularly important for churches that have adherents as well as members who are involved in active ministry within the church. Adherents could be allowed to participate in certain church functions, such as teaching Sunday School, without having to be full members, but would still have evidenced an agreement to respect the church constitution and be under the authority of the church in the event that church discipline is required. Suggested wording dealing with Adherents is set out in Section 7 of the draft General Operating By-law (see Appendix II).

If possible, however, churches should be encouraged to require all individuals who wish to be active in church ministry to become full members. Not only is this in accordance of New Testament teachings, but it will ensure that those individuals are clearly under the authority of the local church in the event that a disagreement between the church governing body and a member should occur.

(e) Withdrawal and Removal from Membership
Although members should generally be able to unilaterally withdraw from formal membership in the church at any time, that right should be curtailed in the event that the individual is being disciplined by the church. Otherwise, any time that discipline proceedings are contemplated, the individual in question could simply circumvent the process by unilaterally withdrawing from membership. To ensure that this does not occur, the General Operating By-law should contain a provision that clearly explains that an
individual's right to unilaterally withdraw from membership will be held in obeyance pending the completion of the discipline process, after which time the individual would be free to withdraw upon his or her initiative. In addition, a provision should be added to the By-law that would allow the church to unilaterally remove an individual from membership in the event of a significant period of habitual absence from the church. Suggested wording in regards to withdrawal and removal from membership is set out in Section 8 of the draft General Operating By-law (see Appendix II).

(f) Resolution of Church Disputes
Many churches feel strongly that members should be encouraged to resolve disputes amongst themselves in accordance with New Testament teaching. In this regard, a summary of the procedural process arising out of applicable sections of the New Testament can be added to the General Operating By-law to provide for resolution of disputes amongst members. Sample wording in this regard is set out in Section 10 of the draft General Operating By-law (see Appendix II).

(g) Church Discipline
Church discipline is the one area of church function that is most vulnerable to interventions by the courts. As a result, it is advisable that the General Operating By-law contain a procedure for discipline that is both comprehensive as well as fair to the individual being disciplined. In the event that the church follows the discipline procedure contained in the By-law and ensures that the individual is being fairly treated in accordance with principles of natural justice recently articulated by the courts, there will be less chance that the substantive decision by the church concerning discipline will be overturned by a court on a subsequent application for judicial intervention. For a more complete discussion of legal issues involving church discipline and the expectations of the courts as set out in recent case law, reference should be made to the two articles by the author on church discipline (see Appendix III).

While mainline and hierarchical churches will invariably have a discipline code that applies to all members and churches within the denomination, autonomous churches will normally have to establish their own. However, very few autonomous churches have taken time to implement a comprehensive procedure for disciplining a member. To overcome this deficiency, the General Operating By-law needs to provide as much detail as possible concerning the procedure to be followed in disciplining a member. In this regard, sample wording establishing a procedure for the discipline of members is set out in Section 13 of the draft General Operating By-law (see Appendix II). In addition, Section 14 of the draft General Operating By-law contains a general waiver in relation to legal action arising out of the disciplinary proceedings. Such waiver will obviously not preclude a disgruntled member from attempting to bring court application against the church. However, it will at least act as an effective deterrent to judicial proceedings being commenced, provided of course that the church has followed its own disciplinary code and has ensured that there has been fair and just treatment of the member being disciplined in accordance with principles of natural justice. For those members who feel that they have been unfairly treated by the church, section 14 of the draft General Operating By-law (see Appendix II) sets out a mechanism for mandatory Christian mediation.

(h) Procedure for Members Meetings
To facilitate the church leadership in conducting membership meetings, as much detail as possible concerning the procedure to be followed should be set out in the General Operating By-law, such as notice of meetings, quorum, proxy votes if applicable, (mandatory for provincial incorporations), voting rights, procedural handbook to be followed, establishment of a chairperson, as well as establishing a tentative agenda of matters to be discussed at the annual meeting. Sample wording in this regard is set out in Section 15 of the draft General Operating By-law (see Appendix II).

(i) Controlling Board
If the church has a two board structure, i.e., board of deacons and board of elders, then a determination must be made concerning which board is to function as the controlling board of the church, i.e., as its board of directors. Whatever board is to act as the controlling board will then have all of its duties set out in a similar fashion to what is required for a board of directors. However that board will be described by its church terminology, i.e., board of deacons or board of elders, as applicable.

Pursuant to the Ontario Corporations Act, the number of directors must be fixed. However, under the Canada Corporations Act, the number of directors may be either fixed or may be a variable number determinable by formula having a minimum of three directors.

If the church operates by means of a rotating board, the General Operating By-law can set out a procedural mechanism to implement the rotation (with an Ontario corporation, the mechanism for a rotating board must be set out in the letters patent). However, the church should be cautioned to ensure that they are diligent in
actually implementing a rotating board in accordance with the General Operating By-law, as often churches will encounter confusion during the election of the directors at the annual meeting unless the provision for the rotating board is carefully followed each year.

Provisions dealing with conflicts of interest and a prohibition on a director receiving direct or indirect remuneration from the church should be clearly set out under the General Operating By-law. In addition, the grounds on which a director can be removed from the board and the procedure to be followed in such a situation needs to be delinated to avoid potential misunderstanding and possible litigation. For instance, if it’s the expectation of the church that a director (i.e., a deacon) or even a member can be removed because that person’s lifestyle is contrary to biblical teachings (i.e., adultery), then such expectation needs to be unequivocally explained in the By-law and consistently followed, otherwise a disgruntled former deacon or member may be successful in a complaint to the Ontario Human Rights Commission on the grounds of discrimination contrary to the Ontario Human Rights Code.

For those churches that have a two board structure, an explanation of what the second board, i.e., the board dealing with spiritual matters, such as a board of elders, is to do needs to be explained to avoid overlap with the controlling board of the church that is to act as the equivalent of the board of directors.

Suggested wording dealing with the board of directors and a second board, i.e., board of elders, if applicable, is set out in Section 16 through 33 of the draft General Operating By-law (see Appendix II).

(j) Description of Minister
In many autonomous churches, the minister is not only the spiritual head of the church but also acts as the chief executive officer. In this regard, it is advisable to specifically describe the role of the minister. This would include setting out what are the qualifications of being either the senior minister or an associate minister of the church as well as a description of the procedure to either call or remove a minister.

In addition, since the minister will invariably be receiving a salary from the church, as a result of recent case law in Ontario, the minister cannot be a member of the controlling board of the church. However, to ensure that the minister has an effective role in the operation of the church, the description of the minister in the General Operating By-law should provide that the minister is entitled to receive notification and minutes of all board meeting, is entitled to be present at all board meetings and to fully participate thereat (save and except for salary discussion), but without making the minister an actual member of the board. It is probably insufficient to describe the minister as being a non-voting member of the board, since the trustee-like fiduciary obligations that are imposed upon all board members would even apply to a non-voting member of the board, thereby precluding any board member, whether voting or not, from receiving remuneration either directly or indirectly from the church. For a more detailed discussion of this issue, reference should be made to two articles on remuneration of directors that the author prepared for the Canadian Council of Christian Charities attached to this paper as Appendix IV. A description of the role of the minister and associate minister is set out in Section 34 through 38 of the draft General Operating By-law attached as Appendix II. The precedent material refers to the Minister as “Pastor” but can be changed to “Minister” depending upon the tradition of the particular church.

(k) Staff Members
In consideration of the usual expectations by the congregation that all staff members, whether ministers or not, will maintain a lifestyle that is consistent with the churches’ teaching, it is recommended that all staff members enter into some form of engagement letter or contract which would explain to a prospective staff member what sort of behaviour will be considered cause for dismissal. Otherwise, the removal of a staff member for violation of lifestyle expectations may not a sufficient cause for dismissal and may also lead to a violation of the Ontario Human Rights Code. Sample provisions dealing with terms of employment for general staff members is set out at Section 39 of the draft General Operating By-law (see Appendix II).

(l) Description of Officers
The normal officer positions within a non-profit corporation of president, secretary, and treasurer will normally need to be modified and expanded to reflect the actual operations of an autonomous church. For instance, it may be appropriate to have a chairperson of the board of deacons instead of a president, as well as additional church related officer positions, such as a moderator who would act as an impartial chair of members meetings, or a church clerk.

In addition, since church officers will hold leadership positions within the church, the qualifications to become an officer must be clearly set out together with the basis on which those officers can be removed from their positions. Sample provisions dealing with church officers are set out in Section 40 through 46 of the draft General Operating By-law (see Appendix II).
(m) Indemnification
The general indemnification provision of a By-law
should be expanded to include not only directors and
officers of the church corporation, but all other
leadership positions within the church, such as, elders,
ministers, and even members and adherents, if
applicable. The federal government, however, may
object to a modified clause on indemnification from
the one that is set out in their model By-law, although
there is no substantive reason for their objection. A
draft of a modified indemnification provision is set
out at Section 47 of the draft General Operating By-
law (see Appendix II).

(n) Committee Structure
Churches by their very nature need to function
through a well established committee structure, but
one that is not overly rigid or impractical. In this
regard, it is advisable for a church to determine which
committees are essential and long-term to the overall
church structure, such as, the finance committee
and/or a missions committee. For those essential
committees it is recommended that the General
Operating By-law specifically describe their function
with a defined purpose, membership, term, meeting
requirements, and/or procedure for removal.

To provide flexibility for future needs of the church,
it is generally advisable to accommodate all other
committees other than essential committees under a
general provision dealing with establishment of
"Standing Committees" and/or "Special Committees".
Sample provisions dealing with specific committees as
well as standing and special committees are set out in
Section 48 thought 70 of the draft General Operating
By-Law (see Appendix II).

(o) Policy Statements
Since an autonomous church will not normally be
subject to policy decisions established by the
denomination as a whole, it is often necessary for
each individual autonomous church to establish policy
positions of their own on matters such as, divorce,
remarriage, sexuality, as well as physical and sexual
abuse. If those policy positions are intended to be the
basis upon which a member can be disciplined, it is
essential that a prospective member be made aware of
what those policy positions are, either when they
become a member or when the policy positions are
subsequently adopted by the church.

A mechanism to ensure the policy positions are
given the same weight as the church constitution as
established in the General Operating By-law is to
include a provision in the General Operating By-law
which states that policy positions that are adopted by
the church from time to time and approved by the
church membership are deemed to be a part of the
overall constitution of the church as contained in the
General Operating By-law. Although such policy
statements are not technically part of the General
Operating By-law, a provision in the General
Operating By-law stating that policy statements are
deemed to be part of the church constitution that are
binding upon all members means that the church will
stand a good chance of being able to hold a member
accountable for a violation of the policy statement in
the event that church discipline is required. Such
provision will also provide the flexibility for an
autonomous church to develop policy statements in
the future instead of trying to develop a full range of
policy positions when the church is only initially
being organized or reorganized in a corporate context.

Sample wording for a provision to allow for policy
statements is contained in Section 72 of the draft
General Operating By-law (see Appendix II).

(p) General Corporate Matters
Although not normally part of a constitution of an
unincorporated church, the General Operating By-law
for an incorporated church must include general
corporate matters, such as, the adoption of a corporate
seal, the manner in which documents are to be
executed, the financial year end for the corporation,
the establishment of a head office, the location of
books and records, the appointment of an auditor, as
well as a mechanism to approve financial statements
and budget for the church corporation.

Sample wording for these general corporate revisions
are set out at Section 73 through 79 of the enclosed
draft General Operating By-law (see Appendix II).

(q) Amendment:
Under both the Canada Corporations Act and the
Ontario Corporations Act, application for
supplementary Letters Patent must be approved by a
special resolution, i.e., by two-thirds vote of the
membership of the corporation. However, some
churches may want to increase the percentage beyond
the two-thirds vote in the event of changes to
fundamental matters set out in the Letters Patent, such
as, statement of faith and the church's charitable
objectives. If this is the direction that the church
wishes to adopt, then the General Operating By-law
should set out the higher percentage vote that the two-
thirds vote normally required for an application for
supplementary Letters Patent.

On the other hand, change to the General Operating
By-law will usually require a lesser percentage vote,
being either a simple majority vote or possibly a two-
thirds vote. Again, whatever the expectation of the
church is concerning amendment to the General
Operating By-law needs to be contained within the General Operating By-law.

Sample wording concerning the amendment provisions of both the Letters Patent and the General Operating By-law are set out at Section 80 of the draft General Operating By-law (see Appendix II).

(7) Obtaining Congregational Approval for Draft Letters Patent and By-Law
Once the incorporation committee has prepared a draft application for Letters Patent and General Operating By-law, the two documents should be bound together and labelled as a draft "Constitution" of the new incorporated church. It is generally easier for laypersons in the church to relate to the concept of a "Constitution" as opposed to more formal provisions of Letters Patent and General Operating By-law. In this regard, a definition should be added to the General Operating By-law which explains that reference to the "Constitution" is deemed to include both the Letters Patent and the General Operating By-law of the church.

The draft Constitution should then be circulated amongst the members of the controlling board of the church for approval and amendments, after which time the final formal draft can be distributed to the church membership. In this regard, it is recommended that each member of the congregation be provided with a draft Constitution (or at least one copy per family) with an informational meeting of church members being set approximately two weeks thereafter. The information meeting will provide an opportunity to answer any questions and clarify any misconceptions about the incorporation process or the draft Constitution that church members may have.

After input from the congregation has been obtained and a final form of draft Constitution has been completed with any amendments being circulated back to the members, a formal membership meeting should be held to vote on whether to proceed with incorporation in accordance with the draft Constitution as prepared. The resolution passed by the membership should include a provision allowing the draft Constitution to be amended to reflect minor changes required either by the provincial or federal government to whom it is submitted for issuance as well as any changes required by Revenue Canada. This will avoid having to bring the draft corporate documents back to the church membership in the event a small change is required.

(8) Approval by Revenue Canada
Once the church has approved the form of church constitution, a draft copy should be forwarded to Revenue Canada to request "informal" approval of the church constitution. This will avoid the headache and the embarrassment of obtaining Letters Patent and then submitting the same to Revenue Canada only to find out that the Charities Division of Revenue Canada requires an amendment to be made to the Letters Patent before they will accept the documentation.

(9) Submission of Application
Upon receiving pre-approval from Revenue Canada, the formal application for Letters Patent can then be submitted to the either the federal or provincial government, as applicable. In both situations, a written consent by the unincorporated church for use of the name will be required to be filed together with an undertaking that the unincorporated church will cease to exist within a reasonable period of time after the incorporation is completed. With federal applications, a completed checklist must also be included.

One additional procedural requirement with a federal incorporation is that a draft By-law must be submitted with the application for Letters Patent. However, since a By-law should be prepared for pre-approval by the membership before the formal application for incorporation is made, the requirement to include a draft General Operating By-law with the formal application does not add any additional time or procedural complexities to the incorporation process.

(10) Issuance of Letters Patent
Generally speaking, an application for federal incorporation forwarded to the Ministry of Industry and Science Canada of the Federal Government should take between ten to fourteen days to process. However, if an application is made to the provincial government, the application must be first forwarded to the Public Trustee of Ontario for approval before formal application can be made to the Ministry of Consumer and Commercial Relations. Depending upon the amount of time required by the Public Trustee's office for pre-approval, the process of incorporation in Ontario can often take many months to complete as opposed to only ten to fourteen days required with the federal incorporation.

One additional procedural requirement with a federal incorporation is that a draft By-law must be submitted with the application for Letters Patent. However, since a By-law should be prepared for pre-approval by the membership before the formal application for incorporation is made, the requirement to include a draft General Operating By-law does not at the time that the formal application is made add any additional time or procedural complexities in the incorporation process.
With both applications for incorporation to the federal government and the provincial government, it is a general government policy that the effective date of incorporation will be back-dated to the date that the application for Letters Patent is received by the government that is issuing the Letters Patent.
CHAPTER 8

INITIAL ORGANIZATION OF THE INCORPORATED CHURCH

(1) Organizing Resolutions of Directors and Members

Once the Letters Patent have been issued by either the federal or provincial government, the incorporators as the first directors will need to convene to do the following:

(a) formally adopt the General Operating By-law;
(b) adopt a Borrowing By-law;
(c) adopt a Banking By-law, if applicable;
(d) adopt a banking resolution;
(e) confirm the incorporators as the first members of the corporation;
(f) adopt the corporate seal;
(g) approve the use of any ministry names other than the full corporate name of the church and the necessary registration of these names under the Business Name Act;
(h) approve the transfer of the charitable registration number from the unincorporated church to the incorporated church by Revenue Canada;
(i) approve the transfer of assets from the unincorporated church to the incorporated church; and
(j) appoint those officers to the church corporation who are to be appointed by the directors as opposed to the members.

Once the initial directors’ meeting has been held, the same individuals in their capacity as initial members of the corporation will then convene an initial membership meeting to do the following:

(a) approve of the passing of the initial By-laws;
(b) confirm the incorporators to be the directors of the corporation by electing the same individuals as directors until the first annual meeting of the new church corporation; and
(c) elect those officers of the church corporation who are to be elected by the members as opposed to being appointed by the directors.

(2) Filing Government Forms

For a federal corporation, the following initial forms must be filed:

(a) a Form 2 - Notice of a Provincial Corporation operating in Ontario pursuant to the Ontario Corporation Information Act;
(b) for any ministry name being used by the church corporation, a Form 2 under the Business Name Act of Ontario;
(c) an initial report to the Public Trustee of Ontario to include:
   (i) copies of the Letters Patent and General Operating By-law;
   (ii) a list of the directors and officers;
   (iii) a list of the assets and liabilities of the church together with the financial statements of both the unincorporated church and the incorporated church;
   (iv) the charitable registration number for the church; and
   (v) an explanation that the unincorporated church will cease to exist and that all assets of the unincorporated church are to be transferred to the incorporated church as of a particular date;

(d) a Form 3 "Annual Summary" to be filed with the Federal government by June 30th of each year setting out the names and addresses of the directors and any change in the name or address of the corporation effective as of March 31st of each year.

(3) Transfer of Membership

One of the most difficult procedural matters involved in the incorporation of a church is to determine how best to transfer the membership of the unincorporated church to the incorporated church. Since it is recommended that all members of the incorporated
church evidence their agreement to be under the authority of the church by virtue of a written application, it is preferable that all members, both existing and new members, sign the same form of application for membership. The difficulty is that the existing members may resent having to sign an application for membership in a church that they may have been members of for many years. As a result, a careful explanation needs to be given to all members of the existing church concerning the benefit to the church as a whole in having all members clearly evidence their agreement to be part of the church corporation and under its authority to avoid possible court intervention at a later time if disciplinary action needs to be taken against one of its members.

To facilitate the transfer of membership, it is generally recommended that the initial board of directors of the incorporated church pass a resolution which deems all members of the unincorporated church to be members of the new incorporated church automatically for a period of six months from the date of incorporation, during which period of time those members must either complete a written application for membership in the new church corporation, or at the end of six months, lose their membership in the church corporation.

While there may still be a few members who oppose the process by giving existing church members a period of six months in which to confirm their transfer of membership, in consideration of the input and approval by the congregation throughout the incorporation process, there is little substantial reason why existing members should expect that they be treated differently from new members who come into the church after the incorporation is completed. For those few members in question who continue to oppose such procedure as a matter of principle, the church board could authorize that in special circumstances evidence of agreement to become a member of the new church corporation could be established by means other than a written application for membership, i.e., by a written statement by a deacon or elder that he or she has interviewed the existing member and is satisfied that such person understands the new church constitution and has agreed to be a member of the church corporation and under its authority.

(4) Transfer Charitable Registration Number Revenue Canada will generally cooperate in transferring the charitable registration number from the unincorporated church to the new incorporated church. This becomes particularly useful if the effective date chosen for the transfer to the incorporated church is the year end date of the congregation. What is required is for a letter be sent to Revenue Canada together with a certified copy of the Letters Patent, General Operating By-law, the list of the current officers and directors of the corporation, together with an explanation that the new church corporation is in essence one and the same congregation as the unincorporated church and is now functioning within the protection of a corporate shell. As a result, the letter will request that Revenue Canada assign the current registration number for the unincorporated church to the incorporated church.

In the event that the name of the church corporation is different from the unincorporated church, the new name should be clearly explained to Revenue Canada with a request that the records of Revenue Canada be changed to reflect the new name of the church corporation made effective as of the date of transfer between the unincorporated and the incorporated church.

(5) Effective Date of Transfer As it will be necessary to determine a date on which the church will operate as an incorporated church, it is generally advisable that the year end of the unincorporated church be chosen as the effective date of transfer. By choosing the year end as the effective date, it will avoid having to prepare an additional set of financial statements for the few months beyond the financial year end to the date of transfer. An alternative to choosing the financial year end for the unincorporated church is to make January 1st the effective date of transfer. This has the advantage of allowing all charitable receipts to be issued in the year prior to the effective date under the name of the unincorporated church with all charitable receipts to be issued after January 1st being issued in the name of the incorporated church. The final decision concerning which date to choose as the effective transfer date needs to be done in consultation with the accountant for the church and its legal counsel.

(6) Transfer of Assets Unless the church has decided to maintain the unincorporated church as a parallel organization to own the church's land and buildings and then lease it to the incorporated church, either for purposes of further liability protection or to allow the church to lease surplus lands for up to 40 years pursuant to provisions of R.O.L.A., it will be necessary for the unincorporated church to transfer its assets to the incorporated church as of the effective date. The transfer of church assets involve two separate conveyances. The first conveyance involves the preparation and registration of a deed from the trustees of the church appointed pursuant to R.O.L.A.
in favour of the church corporation. In the event that the unincorporated church has a mortgage registered against the property, the written consent of the mortgagee would have to be obtained to transfer the said property together with the preparation and execution of a mortgage assumption agreement. If possible, the mortgagee should release the members of the unincorporated church from the terms of the mortgage, although such a release may not be easy to obtain.

The second conveyance involves a bill of sale for all moveable assets, such as, furniture, equipment, books, and bank accounts. The bill of sale should be signed by the duly elected leaders of the unincorporated church in addition to the trustee under R.O.L.A. in consideration of the fact that R.O.L.A. trustees only have authority over real property.

One of the considerations that need to be addressed in the registration of the deed for the land and buildings between the unincorporated and incorporated church is whether or not Land Transfer Tax needs to be paid. Since the deed is from the unincorporated church to itself in a new corporate format, there is no need to pay Land Transfer Tax. However, a supplementary affidavit will need to be filed with the deed to evidence that the transfer is by trustees to a beneficial owner, with the trustee under R.O.L.A. being the designated trustees and the church corporation being the intended beneficiary. To comply with the terms of the Land Transfer Tax Act, the supplementary affidavit would need to be signed by one of the trustees and filed at the time of the registration of the deed.

The directors of the incorporated church will also need to authorize the signing of a Transfer of Assets and Assumption of Liability agreement between the unincorporated and incorporated church whereby the incorporated church agrees that in return for the transfer of assets, all of the debts and obligations of the unincorporated church are to be assumed by the incorporated church. In addition, the agreement will specify that the incorporated church agrees to indemnify and save harmless the leaders, officers, and members of the unincorporated church in the event that legal action is commenced against any of them arising out of the debts and liabilities of the unincorporated church.

In the event that the unincorporated church owns a vehicle, such as a bus, the appropriate transfer of vehicle registration will need to be completed and filed with the Ministry of Transportation. In addition, in the event that the church is subject to a security agreement either with a bank or other secured party, notification will need to given to the secured party so that the appropriate notice of change can be registered under the Personal Property Security Act.

(7) New Banking Documentation
Since the existing banking resolutions and other bank forms will no longer be applicable to the incorporated church, certified copies of the General Operating By-law, Borrowing By-law and banking resolution, together with other supporting banking forms, will need to be completed, signed and forwarded to the bank or trust company serving the church.

(8) Dissolution of Unincorporated Church
Subsequent to the board of the directors of the incorporated church holding the initial organizational meeting for the corporation and prior to the effective date of transfer of assets from the unincorporated to the incorporated church, a general membership meeting of the members of the unincorporated church will need to be held for the following purposes:

(a) to advise the congregation that the incorporation process has been completed and that the church operations will be transferred to the incorporated church as of the effective date;
(b) to authorize the transfer of assets of the unincorporated church to the incorporated church;
(c) to authorize the transfer of the charitable registration number for the unincorporated church to the incorporated church; and
(d) to authorize the dissolution of the unincorporated church as of the effective date, subject to the trustees of the unincorporated church having residual authority to execute whatever documentation may be subsequently required in accordance with any outstanding obligations.

(9) Report to Church
As part of the incorporation process, a detailed report should be provided to the members of the controlling board of the church by the lawyer who has completed the incorporation process to explain the following:

(a) the incorporation and initial organization of the new church entity;
(b) the requirements that will need to be met to operate the church within the context of a corporate structure;
(c) the duties and responsibilities of directors of an incorporated church;
(d) the responsibilities of a director of a charitable corporation in relation to the requirements of the Income Tax Act of Canada;
(e) the transfer of assets from the unincorporated church to the incorporated church; and
(f) the dissolution of the unincorporated church.
It is not sufficient to simply incorporate a shell for a church, transfer its assets and membership to it and then leave it to function on its own without guidance or direction. What is required is for the lawyer completing the incorporation to provide an explanation both verbally and in writing to the leaders of the church concerning how the new church corporation is to be used to effectively protect its members and leaders from liability.

(1) Effective Use of Corporate Name
Since the incorporated name of the church should be similar if not identical with the unincorporated name of the church, it is important that the church be advised on how to correctly use the corporate name to avoid either directors, officers or members being found personally liable. This can be done through adopting the following procedures:

(a) All creditors and suppliers of the church should be informed in writing that the church is now operating as an incorporated entity. Copies of these letters should be kept in the church records.

(b) On all of the printed materials showing the church name, as well as on all advertisements, notices, bulletins, and signs, the full corporate name of the church should be shown together with a brief description below the name that the church is either a federal or provincial corporation. For instance,

ABC Church of Toronto
(federal corporation)

Although it is not necessary to indicate that the new church entity is a federal or provincial corporation, as the case may be, it is recommended to do when the name of the incorporated and the unincorporated church are similar, otherwise creditors and suppliers of the church may be able to argue that they thought they were still dealing with the unincorporated entity and as such might be able to make a claim against the members of the church personally.

(c) Whenever documents are to be signed on behalf of the church, the authorized individuals should be careful to sign in their designated capacity as an officer of the corporation as opposed to signing the document in his or her own name. For instance, documents should be signed

ABC Church of Toronto

"signature"
per chairperson - authorized signing officer

(2) Registration of Ministry Name
If a profit-making corporation was operating under various business names other than its corporate name, there would be little question that each of the business trade names would be registered separately under the Business Name Act of Ontario. However, this is seldom done in relation to an incorporated charity, particularly a church corporation. There is no particular reason for this deficiency, other than general oversight. However, the church runs a very serious risk of not being able to defend a legal action brought against it involving a business name unless that name has been registered under the Business Name Act of Ontario.

The church should determine if there are areas of on-going ministry where the specific ministry name has become separately recognizable. For instance, if the church operates a day care centre under a name different from the church which has not been separately incorporated, all documentation, advertisement and correspondence for that ministry would need to clearly indicate that the ministry name of the day care centre in question is a part of the church corporation.
Suggested wording to ensure that a ministry name is effectively used is as follows:

ABC Day Care Centre,
a ministry division of ABC Church of Toronto

“signature”
per chairperson - authorized signing officer

(3) Maintaining Corporate Records
To ensure that the church corporation maintains its corporate records, the board of directors will need to be advised of the following:

(a) the procedure to be followed to record a change of head office;
(b) the procedure to be followed to record a change in the number of directors;
(c) the requirements for filing government forms with either the federal or provincial government, as necessary;
(d) the need to annually file with the Public Trustee of Ontario copies of financial statements together with the names and addresses of all directors and officers; and
(e) the need to hold and duly record annual meeting of members to elect directors, approve financial statements and appoint an auditor.

Unless the church corporation is properly advised concerning the steps required to maintain corporate records, the corporation may face the possibility of loosing its incorporated status as well as incurring significant legal fees in trying to recreate corporate records after the fact.

(4) Multiple Corporations
The operation of some churches may be large enough that the exposure to increased risk, may justify the use of multiple corporations. For instance, if a church operates a Christian school, a day care centre, a summer camp, or is involved in high risk ministries such as an outreach mission to abused street children, the church will generally be exposed to greater risks, such as allegations of sexual abuse. As a result, it would be prudent for the church to contain these high risk ministries within the context of a separate corporation. The operations of such associated corporation could be effectively controlled by the church through including provisions within the Letters Patent and By-laws of the associated corporation, requiring that as a qualification to be either a member or a director of the associated corporation, such person must be first approved by the board of directors of the church corporation.

If the church has significant equity in either investments, endowment funds or lands and buildings, it may be worthwhile to have one or all of those major assets owned by a separate corporation set up as parallel foundation for the church. If land and buildings are part of the assets transferred to the foundation, the foundation would then lease the land and buildings to the church corporation pursuant to a net lease. There are numerous issues, however, that would need to be addressed in establishing an effective church foundation which are beyond the scope of this paper, such as whether the net lease constitutes a business of the charity or an investment, whether the foundation would qualify as a “religious organization” under the Assessment Act to insure that the tax exempt status of church property under that Act was not lost, how to establish effective control over the membership and board of directors of the foundation, as well as how to maintain the traditional use of the foundation as a funding vehicle for the operations of the church corporation. Notwithstanding these issues, the option of establishing a separate corporation to own some or all of the major assets of the church through the use of a foundation is a viable option that some larger churches may be in a position to consider and as such should be discussed with the church as part of an overall risk management review of its operations.
CHAPTER 10

CONCLUSION

From the historical summary included earlier in this paper, it is apparent that the political and historical reality of the early nineteenth century had a profound and lasting impact in limiting the remedial relief of R.O.L.A. as Ontario's only general religious legislation to that of a conveyance statute only. What should have occurred is the evolution of effective legislation in Ontario, such as has been done in Alberta and Quebec, to facilitate the incorporation of religious organizations to afford churches the protection of limited liability for its members. Appropriate legislation permitting the incorporation of churches could also address other issues that are specific to churches, such as how to provide meaningful input by ministers on the controlling board of a church without putting them in a conflict of interest contrary to fiduciary duties imposed on directors of charitable corporations. Until specific legislation is enacted directed towards churches in Ontario, however, local churches will be required to look to general incorporating statutes in both Ontario and federally to obtain the benefit of limited liability for membership and perpetual existence.

Whether or not the option of incorporation is appropriate is a decision that each church will have to make after reviewing its own particular circumstances. However, given the limitations inherent in R.O.L.A. and in consideration of the considerable benefits that are available through incorporation, local churches would be well advised to place the issue of incorporation before their congregation as a viable option either now or sometime in the near future.

For those churches that do decide to incorporate, the process of incorporation is much more complicated than simply obtaining Letters Patent from either the federal or the provincial government. The issues of By-law provisions, transfer of membership, transfer of assets, initial organization of the incorporated church, and the dissolution of the unincorporated church all need to be addressed and properly recorded. Failure to fully document the incorporation process and the wind down of the unincorporated church could leave the congregation in a worse position than before it was incorporated. As such, the incorporation of an autonomous church should be approached cautiously and with considerable attention being given to detail. It would be better for the church not to incorporate at all than to leave the church with a corporate organization that is either irrelevant to the actual workings of the congregation or has not been made practical so that the benefits of limited liability protection of the corporate structure can be implemented by the church.

Hopefully, the explanation of the process of incorporation contained in this paper will assist in making the incorporation process result in the establishment of an effective church structure with the benefit of limited liability for its members. However, the success of attaining this goal is very much a factor of how carefully the corporate documentation are assembled. For this reason, a church that may want to do a "simple" incorporation must either have the task done in a careful and thorough manner or not at all. This paper has been prepared to assist those churches that wish to follow the first alternative, as the establishment of a practical church corporation is a worthwhile and useful undertaking that will provide a firm organizational foundation for the congregation for years to come.
ENDNOTES


6. M.H. Ogilvie, supra, endnote 3, at pg. 80

7. A.H. Oosterhoff, supra, endnote 2, at pg. 443


9. A.H. Oosterhoff, supra, endnote 2, at pg. 443.


11. A.H. Oosterhoff, supra, endnote 2, at pg. 444.

12. M.H. Ogilvie, supra, endnote 3, at pg. 81.


14. A.H. Oosterhoff, supra, endnote 2 at pg. 450

15. Ibid, at pg. 451

16. M.H. Ogilvie, supra endnote 3, at pg. 86.
17. Ibid, at pg. 87.


22. Ibid.


24. Ibid at pg. 192.


28. Wise v Perpetual Trustee Company [1903], A.C. 139 at 149


31. Ibid.
A. INTRODUCTION
For those who consider church discipline to be an anachronism akin to the Spanish Inquisition, recent legal developments may justify that more attention be paid to this little understood and often ignored area of church life. The current high profile that this once historical footnote has acquired is evidenced by the substantial press attention that has been directed toward the implementation of the medieval "Bishop's Court" in the Reverend James Ferry hearing by the Anglican Church in Toronto concerning his acknowledged homosexual activities. On the front page of Canada's national newspaper, the "Globe & Mail" on Saturday, February 1st, 1992, the headline read "Anglican Doctrine Faces Court Test"; hardly the normal front page article for a conservative newspaper. Specific reference was made to the structure and jurisdiction of the Bishop's Court, whose origins, the paper stated, "date back to a time long before the reformation in England... used exclusively for violations of Cannon Law..." What was interesting in that case was not the issue of homosexuality but rather the "Globe & Mail's" recognition that church discipline is alive and functioning as an integral part of the church's ministry.

For those congregations which have never addressed the issue of church discipline or have not reviewed their disciplinary procedure in recent years, this analysis is intended to provide a summary of legal issues that may be of assistance in addressing this challenging but potentially volatile area in church polity. Included in the analysis is a section outlining practical recommendations on the implementation of church discipline, both in the context of church constitutions as well as in practice. In addition, attached to the analysis as a schedule are sample constitutional excerpts dealing with various aspects of church discipline involving both church members and staff.

What this article is not, is a commentary on the biblical basis or implementation of church discipline. It is also not a commentary on employer/employee relationships, except as recent court developments relate to the broader issue of discipline of members within the church. Further, the brevity of format required for this article precludes covering all relevant
case law or statute law and reflects an acknowledged emphasis upon legal developments and statutes in the Province of Ontario. For those churches and institutions which intend to review the matter of church discipline, it is essential that legal advice be obtained before implementing any suggestions contained in this analysis. The information contained in this article is for educational and discussion purposes only and is not intended to be relied upon as a legal opinion.

B. THE CONTEXT OF CHURCH DISCIPLINE AS A LEGAL ISSUE

Before discussing specific legal principles, it would be helpful to briefly explain the context in which church discipline functions as a legal issue before the courts. Discipline within the church would not be an issue for secular courts to deal with if an ongoing tension between church and state did not exist. In the ideal society proposed in St. Augustine’s “City of God” the interests of the state and the interests of the church are seldom, if ever, at odds: as both the church and state are seen as parts of one integrated theocracy.

Historically, what has developed is a separation of church and state with the church having exclusive jurisdiction over ecclesiastical matters and the state having exclusive jurisdiction over civil matters.

Within the realm of exclusive church jurisdiction, church discipline has historically been recognized as a key element in the structure of the church, not so much as a vehicle to ensure order but rather as a remedial ministry to restore fellowship amongst its membership. John Calvin stated that discipline serves the church as its sinews through which the members of the body hold together each in it’s own place. The Belgic Confessions of 1561 referred to the practice of church discipline as the third mark of the true church.

Tenston between church and state has heightened over the centuries because of expanding jurisdiction of both institutions. This has resulted in a collision of overlapping interests in which the courts have had to intervene. On the one hand, the jurisdiction of the church has expanded into moral and social areas beyond its exclusive arena of spiritual matters. This has emanated from the church’s mandate to be the whole institution for the whole regenerated man. An example of the extent to which the spiritual realm dictates all aspects of life, including property and business, are the Hutterite communities in western Canada and the Mennonite communities in Ontario. The extent to which the church is involved in the everyday lives of its members in these communities is quite different from a more traditional church with jurisdiction normally being limited to Sunday services.

As a general rule, though, the Christian church now exercises a greater degree of involvement in the lives of its members than it did even fifteen years ago. This is evidenced by the church’s involvement in retirement homes, Christian education, counselling services and the articulation of stands on social issues such as disarmament, abortion, the nuclear family and public education, to the extent that church discipline acts as the sinew in holding these newly extended limbs of the body of the church together, the implementation of church discipline will come under more scrutiny by the courts where such discipline is exercised in areas which are not strictly limited to liturgy and church doctrine.

Simultaneous with the church expanding its sphere of influence, the state has also extended its jurisdiction. The state is now involved in areas that until recently had been considered purely social concerns, such as day care and non profit housing, to such an extent that the proposed amendment to the Canadian Constitution may include a social charter of rights.

The extension of the state’s jurisdiction into those new areas not only overlaps with some of the church’s traditional interests, but also reflects an emphasis on individual rights. The church on the other hand emphasizes the collectivity of group interests manifested through a community of believers. Legislation such as the Ontario Human Rights Code1 establishes the paramountcy of the rights of the individual over the collective rights of groups. In such legislation, the rights of the individual are clearly delineated, whereas the rights of groups are referred to only as an exception to the rights of the individual.

As the orbits of influence of both the church and state expand, incidents of conflict increase. In those situations, it is the task of the courts to balance the competing interests of both institutions. In the recent 1991 unreported decision of Kelly Parks, Holly Maclntyre and Christian Horizons2, the Board of Inquiry for the Ontario Human Rights Commission succinctly summarized the role of the courts in resolving the overlapping jurisdictions of church and state when it stated that “where a statutory or constitutional framework creates two sets of equal but competing individual and group rights, the adjudicative task is to find the balance of justice. This means that each right must be given effect, but only to the extent that one right does not overwhelm and destroy the other”.

This statement has equal application when the courts are judicially reviewing incidents of church discipline. The courts will be called upon to weigh the interests of the state in protecting the rights of the individual
and balance it against the rights of persons to voluntarily come together and function as a group of believers.

C. LEGAL PRINCIPLES
When the courts are called upon to adjudicate on church affairs and in particular upon matters of church discipline, they have traditionally been reluctant to become enmeshed in church affairs. This reluctance has more to do with the court recognizing the concept of voluntary association than an inherent respect for freedom of religion. The following synopsis of legal principles is intended to provide a framework for understanding the circumstances under which the courts will intervene to resolve disputes on church discipline and other related matters.

1. Church as a Voluntary Association
Historically, Canadian courts have considered churches to be voluntary associations of persons that come together for a collective purpose. To the extent that the individuals have voluntarily decided to be associated with the fulfillment of the religious objectives of the church, the courts have both recognized the existence of and the legitimacy in protecting the rights of the church in fulfilling those objectives. The Supreme Court of Canada in the 1940 decision of Ukrainian Greek Orthodox Church et al. v. Trustees of Ukrainian Greek Orthodox Cathedral of St. Mary's the Protectress et al. recognized that the law has stated over decades that unless property or denial of procedure is affected, the civil courts will not allow their process to be used for the enforcement of purely ecclesiastical decrees or orders. The extent to which the courts have recognized the state's legitimate interest in property and procedural matters is reviewed later in this analysis.

2. The Church's Mandate to Deal with the Whole Person
Unlike developments in the United States, Canadian courts have recognized that the Christian church, rather than being simply voluntary associations of persons restricted to doctrine and liturgies, in fact exemplifies a world view that permeates the whole person. In the 1984 decision of Re Caldwell et al. and Stuart et al., the Supreme Court of Canada in deciding the issue of whether a Catholic school was justified in terminating the employment of a Catholic teacher who had married a divorced man in a civil ceremony recognized the following principle: "It is a fundamental tenet of the church that Christ founded the church to continue his work of salvation. The church employs various means to carry out His purpose, one of which is the establishment of its own schools which have as their object the formation of the whole person, including the education in the Catholic faith...The Catholic church is a genuine community bent on imparting over and above an academic education all the help it can to its members to adopt a Christian way of life".

The approach taken by the Supreme Court of Canada is a far cry from the juridical attitude in the United States where, as the former director of the Christian Legal Society in a 1984 article stated, "the courts (as well as the state) are inclined to view religion almost exclusively in narrow and often institutional terms; that is, they see churches as little more than institutions, liturgies, clergy and doctrines... Thus, free exercise of religion is relegated to only those areas where the state has little if any interest (ie. doctrine) and is left with little vitality when real tensions develop".

3. Church Membership Required
While Canadian courts recognize that the church has a valid interest in the whole person, the courts also require that before a church can exercise discipline over its members, it must be first shown that the member has voluntarily become associated with the church as a member and has succumbed to its authority. In Re Caldwell et al. and Stuart et al., the Supreme Court found that the school in question was justified in dismissing a teacher concerning her remarriage because evidence was led that the observation of church standards concerning remarriage were clearly part of the teacher's contract. The court also recognized that when one member strays from the standards of the church, the wayward behaviour can act as an adverse example to the rest of the church, particularly as it relates to children. The Supreme Court found that the Catholic teacher, as part of the Catholic community, had an obligation to exemplify the values of the church to children.

"The teaching of doctrine and the observance of standards by the teacher form part of the contract of employment of teachers. They are required to exhibit the highest model of Christian behaviour"

Similarly, in a church context, it must be shown that the member being disciplined has accepted the authority of the church as set out in it's constitution. By doing so, the church will be able to justify disciplining one of its members not simply on the basis of violation of church standards but also in recognition that each member had been a party either in establishing those standards or at least in voluntarily agreeing to submit to the standards already in place.
4. Procedural Fairness

Even when the church is justified in disciplining a member, the manner in which the discipline is carried out can become the subject of judicial review. Generally, where the procedure for discipline is clearly stipulated in the constitution of a church and reflects the basic elements of natural justice, the courts have held that a review of the procedures involved in the disciplinary hearing is beyond their jurisdiction. In the recent Manitoba case of Lakeside Colony of Hutterian Brethren v. Hoffer, a dispute arose between Mr. Hoffer and his supporters and the leaders of the Hutterite community on a question of patent infringement resulting in Mr. Hoffer and his followers refusing to obey the leadership of the colony. Three meetings of the colony were held, which Mr. Hoffer and his supporters were asked to attend. They refused to. When Mr. Hoffer and his followers were expelled from the colony they also refused to leave. The colony was then forced to terminate their membership in the colony. In upholding the decision of the church to exclude Mr. Hoffer and his followers, the court stated that "when a congregation is faced with a dissident member who chooses disobedience rather than obedience, who chooses not to adhere to, or be governed by his church, whether that be in spiritual or temporal terms...they have the right to expel that member: to expel him, provided it is done fairly and within the precepts laid down in the rules of the church, and by a majority of the members of a particular congregation".

Where there is no procedure adopted or where the procedure set out in the constitution is either not followed or varied on an arbitrary basis, the courts have been quick to intervene to protect the individual who may have been unfairly dealt with. In essence, the courts have found that the church has a duty to exercise "procedural fairness" or what is otherwise called "natural justice" in the administration of its right to discipline its members.

In the 1985 decision of Ro Lindenburg v. United Church of Canada, the presbytery involved had declared a pastoral charge vacant and the minister refused to abide by the court for judicial review. The court held that even though the established procedure of the Ontario Judicial Review Procedures Act, might not apply to a non-governmental body, since the church was a creature of statute of both federal and provincial legislatures, and since the United Church ministers to the spiritual needs of a large segment of the Canadian public, the court was justified in reviewing the procedures followed by the United Church in its disciplinary action. The court found that since the minister in question had already tendered his resignation, the involvement of presbytery was limited to determining the date that the minister's resignation would become effective. This limited administrative task by presbytery did not warrant the courts interfering in the internal operation of the church. However, the court did confirm their expectations that church discipline matters should be conducted in such a way that the member in question receives as fair and impartial a hearing as possible.

In the 1991 decision of McCaw v. United Church of Canada, the court found that proper procedures had not been followed. In that case, a controversy developed amongst members of a congregation concerning the ministry style of their pastor. Pursuant to the authority given to it, the local presbytery ordered the minister to take a course of study. Subsequently, the local presbytery recommended to the conference that the minister be removed as an employee of the church on the grounds that he had not taken the directed program. The recommendation was accepted. At the trial and appeal level the court found that the minister had been wrongly dismissed and that the minister should be reinstated as a minister of the United Church of Canada. In coming to its conclusion, the court held that a number of the hearings were held without notice being given to the minister and were conducted in the absence of the interest of the minister being represented. In addition, the court found that the minister had been deprived of an opportunity of listening to what was said by the numerous witnesses who testified. Further, the minister was never told of the object of the inquiry or of the conduct on his part which had led the disciplinary procedure to be initiated.

What the court is looking for in relation to a fairness in procedure is a clear manifestation of "natural justice". In practical terms, this means that the individual should be advised of the nature of the allegations, be given notice of the hearing, be allowed to hear the evidence presented at the hearing, be afforded an opportunity to speak on his own behalf at the hearing, and be advised of the decision arising from such hearing.

The courts have also suggested that in consideration of the "spirit of Christianity", the proceedings followed should be as uncomplicated as possible. In Lindenburg v. United Church of Canada, the court stated "the less complicated the proceedings the better, and one would hope there would not be undue resort to legalistic thinking; there is no reason why men of good will cannot, on both sides, conduct themselves in a fair manner. That is all that the law and spirit of Christianity requires of them."

Although the courts will interfere with the internal
affairs of a church to ensure that a member of the church is dealt with according to the basic principles of due process, the extent of its willingness to do so is limited to rectifying procedural unfairness and does not extend to interfering in the internal decision making of the church. In both Lindenburger v. United Church of Canada and McCaw v. United Church of Canada, the courts were not prepared to restore the ministers in question to their specific pastoral charges, even if a procedural injustice had occurred, as the courts felt that to do so would amount to an undue interference in the internal affairs of the United Church.

The courts are also reluctant to interfere in church procedure where it is perceived that a member who is claiming a denial of rights is attempting to avoid the legitimate procedures of the church. In the Lakeside Colony of Hutterian Brethren v. Hoffer decision, both the lower court and the appeal court concluded that the member had waived his rights to allege procedural unfairness when the member in question refused to attend meetings of the church which he had been asked to attend for the specific purpose of dealing with allegations that had been raised.

5. Invasion of Privacy
Even if a church has followed procedural steps that reflect the basic elements of natural justice, the courts may still intervene if they detect that an individual’s privacy has been jeopardized. Although there does not appear to be any Canadian decisions dealing with invasion of privacy in a church context, there are American cases that have dealt with this issue and may be precursors of future developments in Canada. In the 1989 appeal decision by the Oklahoma Supreme Court in Marian Guinn v. the Church of Christ of Collinsville, Oklahoma et al., the court held that the jury at the trial level was justified in finding that the decision by the elders of the church to publicly advise the congregation and neighbouring churches about the adultery of one of its members after she had withdrawn from membership was an unjustified invasion of the former member’s privacy intended to inflict emotional harm on the parishioner.

The facts of the Marian Guinn case have some similarities to the recent controversy surrounding the Bishop’s Court hearing in February, 1992 involving the homosexual activities of Reverend James Ferry. Reverend Ferry had confessed to his Bishop that he was a practicing homosexual. The Bishop gave him a choice of either ending his homosexual relationship or voluntarily resigning. When Reverend Ferry refused to do either, the Bishop relieved Reverend Ferry of his duties. The Bishop subsequently read a written statement to the local congregation the following Sunday that Reverend Ferry had been dismissed together with the reasons for the dismissal. Reverend Ferry responded by commencing legal action for wrongful dismissal and breach of confidence coupled with a claim of damages for $600,000.00. Although an agreement was reached between the parties to refer the matter to a Bishop’s Court to avoid proceeding further with the civil action, the fact that a civil suit was initiated for invasion of privacy involving a minister has very serious consequences by opening the door to similar litigation if a church member or minister who has been disciplined feels that his or her privacy has been violated.

In a non-church but related court decision, the Supreme Court of Ontario in Hunt v. Board of Governors of Fanshaw College of Applied Arts and Technology was asked to grant an order prohibiting the college from investigating allegations of unprofessional conduct of one of its instructors through the dissemination of questionnaires to students. The questionnaire was alleged to be leading and suggestive, i.e. “have you felt yourself to be the object of prejudicial or unfair treatment by this instructor?”. In granting an order restraining the college from distributing such questionnaires, the court found that the college had an obligation to respect the confidentiality of the allegations being made against the instructor and a responsibility not to damage the reputation of the instructor any more than was necessary.

In light of the need to respect the confidentiality of the allegations being raised, a church can take steps to protect a member’s privacy by prohibiting the release of any information to other members of the church unless the information being given results in an affirmative answer to the following two part question. “Does the information need to be disseminated to assure other members of the church that the integrity of the collective ministry of the church is being maintained and can it be reasonably concluded that the said information will not unduly embarrass or prejudice the reputation of the member in question?”

6. Withdrawal from Membership
A corollary issue to the requirement that a person be a member before a church can proceed with disciplinary proceedings is under what circumstances can an individual withdraw his or her membership in a church. This issue will often arise where the individual being disciplined decides to withdraw from membership before the disciplinary process is completed in an attempt to circumvent the jurisdiction of the church.
In the Marian Quin v. The Church of Christ of Collinsville, Oklaholma et al., case, the plaintiff wrote to the church and stated that she withdrew her membership “immediately”. Notwithstanding her resignation, the church continued to exercise jurisdiction over her by subsequently reading a letter to the church and advising other churches in the area about her adulterous relationship. The fact that the plaintiff had withdrawn her membership in the church was a key factor in the appeal court deciding that the actions of the church had violated the member’s privacy contrary to her desire to be left alone.

Although the doctrine of the Church of Christ taught that membership in the church extended for life, thereby precluding unilateral withdrawal from membership, the court held that because there had been no specific waiver of the plaintiff’s right to withdraw from membership either in the church constitution or otherwise, her letter to the church constituted a valid termination of her membership. This in turn had the effect of terminating the right of the church to continue with disciplinary proceedings against her after she resigned.

If church discipline is for the primary purpose of inflicting punishments against members, the retention of a member’s right to unilaterally withdraw from membership in the church at any time would be understandable. However, since the biblical purpose of church discipline is to restore the member spiritually into a renewed fellowship with both the church family and God, it would be self-defeating to have the church establish a doctrine and procedure for restorative discipline when the very person such process is intended to assist can preempt the legitimate remedial ministry of the church by unilaterally withdrawing from membership. For those infrequent situations when an abuse in the disciplinary process by the church does occur, an application for judicial review to the courts will continue to provide relief from unnecessary or arbitrary church action.

To avoid expedient resignations by errant members who attempt to avoid church discipline procedures, and to ensure that the remedial ministry involved in church discipline can be completed, consideration should be given to having the church constitution include a provision that a request to withdraw from church membership by a member who is under discipline will not take effect until the discipline proceedings in question are finished. This restriction, though, would not affect a member’s right to unilaterally withdraw from membership at any time if that person was not under church discipline; nor could it be used to perpetually keep a person as a member of a church against his or her will under the guise of continually declaring the member to be under the discipline of the church.

7. Attendance at Public Meetings
Although a church has the authority to discipline and remove a member from membership, termination of membership does not necessarily mean that the individual in question should be barred from attending public worship services. However, as non-members are permitted as members of the public to attend public worship services, the same opportunity should be afforded to a former member.

However, in a situation where the former member has been or is causing a disturbance, a church would be justified in requesting that the former member either cease the offending conduct or depart from the worship service. The latter could be done by giving written notice to the person causing the disturbance pursuant to the Ontario Trespass of Property Act or similar type of legislation in other provinces.

8. Discipline in a Non-church Context
Although a church has the right to discipline a wayward member, the method chosen to implement such discipline must not be extended into a non-church context. In the 1917 decision of Heinrichs v. Wiens, the Saskatchewan Supreme Court dealt with a Mennonite business man who had his membership in his local church revoked because of an unsettled business claim involving another church member. Upon terminating his membership, the members of the church according to their understanding of biblical precepts “shunned and had nothing to do” with the errant member. This resulted in a devastating boycott of his business. The court found that there had been an unlawful conspiracy to boycott resulting in the former member suffering damages.

As such, any attempt to discipline a member by directly or indirectly boycotting the business of a former member may result in a civil action of conspiracy being brought against the church and its members for monetary damages. Any decision concerning church discipline should therefore be limited to correction or if necessary, termination of membership, but should not extend to secondary disciplinary action outside of the church, such as business boycotts or picketing of the former member’s home or business.

9. Apportionment of Church Assets
Can a former member or members of a church who have been disciplined by having their membership in the church terminated make a successful claim for an
apportionment of the assets of the church to allow them to start a new church? This issue might arise where a number of members have been disciplined because of differences in theological doctrine. The Supreme Court of Canada dealt with this issue in the case of Hoffer v. Hoffer. In that case, a number of Hutterites became affiliated with the World Wide Church of God resulting in their ex-communication from the local Hutterite church. Since the doctrine of Hutteritism denies any private ownership of property, the net effect of the ex-communication was that the former members were denied any share in the co-operative farming operations of the Hutterite community in addition to exclusion from membership in the church. The court held that since the former members had joined the Hutterite community voluntarily and since the process whereby they had been excluded from church membership was proper and followed principles of natural justice, the former members were not entitled to share in the apportionment of the community’s farming operations.

This decision means that dissenting members of a church who have been “properly” disciplined because of doctrinal differences will not be entitled to receive an apportionment of the assets of the disciplining church to form a new church affiliation.

10. Discipline of Employees
The ability of a church to discipline a member who is also an employee (such as a minister, church secretary, youth worker, etc.) is complicated by the effect of the Ontario Human Rights Code and similar types of codes in other provinces. Section 5(1) of the Ontario Human Rights Code states that “every person has a right to equal treatment in respect of employment without discrimination because of race... creed, sex, marital status, family status or handicap.” Section 24(1)(a) creates a statutory exception to the rights set out in section 5 of the same code where it states that “the equal treatment required by section 5 is not infringed where a religious, philanthropic, educational, fraternal or social institution or organization that is primarily engaged in serving the interests of persons identified by their race, ancestry, place of origin, ethnic origin, creed, sex, marital status or handicap employs only or gives preference in employment to persons similarly identified if the qualification is a reasonable and a bona fides qualification because of the nature of the employment.” The issue therefore, is whether the decision by a church to hire, discipline or fire an employee because of church related requirements is justifiable as being based on reasonable and bona fides qualifications given the circumstances of that particular case.

What constitutes bona fides qualifications depends upon the specific facts of each case. In the 1962 decision of the Supreme Court of Canada in Ontario Human Rights Commission v. Borough of Etobicoke, the court stated that “to be a bona fides occupational qualification and requirement a limitation must be imposed honestly, in good faith and in the sincerely held belief that such limitation is imposed in the interest of the adequate performance of the work involved with all reasonable dispatch, safety and economy, and not for ulterior reasons...and it is reasonably necessary to ensure the efficient and economical performance of the job without endangering the employee, his fellow employees and the general public”.

In the 1984 Supreme Court of Canada decision of Re Caldwell et al. v. Stuart et al., the prohibition against marrying a divorced man in a civil ceremony was considered a bona fides qualification in respect to the position of a Catholic teacher employed in a Catholic school.

In the recent 1991 unreported decision of Garrod v. Rehema Christian School, the Ontario Human Rights Commission dealt with an employee of a Christian school who was fired because of her extramarital sexual relationship. The Commission concluded that the exception in Section 24 of the Ontario Human Rights Code had been met because of the religious nature of the school and the expectation that teachers would comply with the religious standards of the school.

For a church to be entitled to rely on the exemption of Section 24 of the Ontario Human Rights Code in disciplining employees based on religious and moral standards, it is essential that the expectations being imposed on an employee be clearly expressed, be brought to the attention of the employee before employment commences and then be consistently followed and enforced thereafter. In the recent unreported decision of the Human Rights Commission in Kelly Parks et al. v. Christian Horizons, the Commission found that there had been discrimination against two employees who had been let go because of sexual conduct. Although the policy manual of Christian Horizons included a policy prohibiting sexual relationships outside of marriage, the Commission found that the failure of Christian Horizons to specify that moral and sexual lifestyle was a condition of employment in either the initial employment interview or in the employment contract coupled with the acquiescence of Christian Horizons to extra marital sexual relationships by other employees precluded the institution from being entitled to the
exemption under Section 24 of the Human Rights Code.

The Christian Horizon case is similar to the one involving Reverend James Ferry of the Anglican Church, in that part of Reverend Ferry's submissions to the Bishop's Court was his assertion that it would be manifestly unfair for the Anglican Church to require him to abide by a prohibition on homosexual activities when the church was actively turning a blind eye to homosexual relationships by other ministers within the Anglican Church. For this reason, where a church is expecting an employee, whether it be a pastor or church secretary, to maintain a prescribed lifestyle, it is essential that those expectations be articulated in the church constitution and be included in an employment contract with the employee prior to employment being offered. In addition, the policing and enforcement of such requirements must be done diligently and without exception, otherwise a church runs the risk of being criticised for acting in an arbitrary and inconsistent manner in its treatment of employees, and thereby exposing the church to a charge of discrimination under the Ontario Human Rights Code or similar legislation in other provinces.

11. Denominational Discipline of Member Churches

Generally, church denominations in Canada are based on one of two types of structures. The first type are the hierarchical denominations consisting of a single church structure with local churches being members of the larger organization based on either a presbyteral or episcopal polity. The other type of structure are denominations made up of independent local churches based on a congregational polity which co-ordinates through fellowships, associations, federations and so forth.

Within the hierarchical denominations, such as the United Church of Canada or the Anglican Church, the church constitution will normally include a mechanism for disciplining not only church members but local churches as well. However, this is not always the case with a denomination of independent churches. While member churches of such a denomination may have provisions in their constitutions concerning discipline of members, the denomination itself may not have a provision in its constitution to deal with the issue of disciplining of its member churches. Even if there is such a mechanism in the denomination's constitution, the issue of whether or not a church has in fact become a member of the denomination is often unclear, either because of poor historical records or lax formality that failed to properly record if a church did or did not become a member.

The consequences of either a lack of disciplinary procedure within the constitution of a denomination or the failure to properly record that the church is a member of the denomination may mean that the denomination has no ability to discipline or correct a member church. This scenario arose in the 1939 case of Ukrainian Greek Orthodox Church v. Trustees of Ukrainian Greek Orthodox Cathedral of St. Mary's the Protectress et al.26 that came before the Supreme Court of Canada. In that case, the national denomination was unsuccessful in an attempt to restrain the activities of a local church because there was no evidence that the local church ever became part of the denomination, notwithstanding the fact that representatives of the local church had collaborated on various matters with officers and representatives of the national denomination.

As a result, if part of the function of a national denomination of independent churches is to have some measure of control or discipline over its member churches, even if it is limited to simply terminating membership of the offending church in the denomination, then the constitution of the national denomination should include a mechanism for disciplining its members. In addition, the records of the denomination should be reviewed on a regular basis to ensure that all churches that are assumed to be members of the denomination have in fact become members. Otherwise, the denomination will not have any jurisdiction over churches that have never formalized their membership in it.

12. Church Doctrine

While the courts will intervene in matters involving property, civil rights, employment and procedural matters, the courts will not become enmeshed in matters involving purely questions of church doctrine. In the Ontario Court of Appeal decision of Balkou et al v. Gouleff et al 27 the court was asked to determine if part of the doctrine of the church included a principle of whether or not there was a prohibition on contact by the church with communist organizations. The court refused to rule on this question by stating that the relief being requested of the court involved questions of church doctrine which in the court's view was an inappropriate subject for judicial determination.

13. Standards Established by Trust Deeds

If discipline is pursued because there is a deviation from the accepted doctrine of the congregation set out in the church constitution, it is essential to ensure that the church constitution is neither contradicted nor
supplanted by the church doctrine set out in an old trust deed by which the church may have acquired title to its current lands. In the 1929 decision of Wodell v. Potter the court had to deal with a case where certain members of a congregation subscribed to a doctrine that was different from, but did not contradict, the doctrine originally required by members in the trust deed by which the congregation had originally acquired the church lands. The court held that a majority of the members of the congregation could not exclude existing members of the church by changing the doctrinal statement from what was contained in the still current deed of land on which the church had been built. The court held that the doctrine set out in the trust deed took precedent over the new church constitution and that as long as the members in question were able to subscribe to and not contradict the terms of the doctrine in the trust deed, they should not be deprived of membership in the church.

This decision has important consequences for congregations that wish to upgrade or otherwise change the requirements of membership by altering the accepted doctrine of the church from that which may have been set out in the terms of a trust deed that was often written in the last century and which few members, if any, are still familiar with. The anachronism of the trust deed may also pose problems for current church disciplinary procedure, in that a member being disciplined might be able to argue that as long as he or she comports with the normally simple terms of doctrine set out in the trust deed, that person should not be deprived of membership in the church or otherwise disciplined.

The extent to which a trust deed may take precedent over a constitution, if at all, will depend upon factors such as the strength of the wording in the current constitution, the wording of the trust deed and whether or not a member by subscribing to the current constitution, can be said to have waived his or her right to rely on the terms contained in the church trust deed. The potentially latent effect of an old but still applicable trust deed is a further example of the far reaching effect and complexities of church discipline in the functioning of a local congregation.

D. PRACTICAL CONSIDERATIONS
The Supreme Court of Canada has succinctly summarized the impression of both the courts and society generally concerning church disputes that are brought before a secular court. In Ukrainian Greek Orthodox Church v. Trustees of Ukrainian Greek Orthodox Cathedral of St. Mary the Protectness et al. the court stated, "like most church quarrels, there is obviously much bitterness on both sides...". The purpose of this article is to help churches understand the expectations of the court; not so much to better equip the church in litigation but rather to avoid the possibility of the matter ever having to be dealt with by a court proceeding.

Based upon the principles that have been discussed above, there are a number of practical considerations that should be reviewed by churches in an attempt to effectively implement church discipline.

Some of the recommendations that are set out below have been discussed by others in previous publications. The recommendations that are discussed in this article are suggestion only and will need to be modified or expanded as necessary, depending upon the particular circumstances of each church. As such, it is recommended that the following considerations be first reviewed with the church's lawyer before being put into effect.

1. To ensure that the church has an authoritative basis for implementing church discipline, its constitution should clearly set out the biblical references for discipline and dispute resolution amongst its members. The procedure for discipline should not be overly complicated but should reflect principles of natural justice by ensuring that discipline only occurs if

(i) a specific allegation has been made,
(ii) the subject member has received notice of the allegation as well as the place and time at which the relevant church officials will consider the allegation,
(iii) the subject member is provided with an opportunity to be present and respond to the allegation, and
(iv) the subject member is provided with a decision arising out of the hearing with reasons both in relation to the veracity of the allegations as well as the type of discipline that is to be implemented.

2. The constitution should clearly indicate that membership in the local church involves submission to the authority of the church leadership as well as the rights and privileges that are normally associated with membership in a local congregation.

3. If there are policy statements of the church concerning conduct or life-style requirements that are legitimate expectations imposed on church members, those policies must be set out either in the church constitution or incorporated by reference into the constitution by stating that policy statements that are subsequently adopted by the church and approved by the membership are deemed to be part of the church constitution.

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4. At the time of being admitted as a member of the church, a prospective member should be given a copy of the church constitution and asked to read it in detail. The prospective member should then be questioned by a church leader to ensure that the applicant has not only read but understood the consequences of subscribing to the constitution of the church. To evidence agreement in this regard, a prospective member should be required to subscribe in writing for membership to confirm his or her voluntary decision to become part of the local church and be subject to the authority of the church leadership. This document will provide evidentiary proof that the member has agreed to be subject to the church disciplinary process if an issue arises at a later time concerning the ability of the church to initiate discipline proceedings.

5. The constitution should specify that since membership includes a commitment by members to minister to the needs of the church, a request by a member to withdraw from the church while under discipline will not become operative until the discipline proceedings have been completed. Such a provision would permit a healing to occur to both the member and the church as a whole and would also ensure that a member who is being disciplined cannot conveniently avoid the disciplining process by unilaterally terminating his or her membership in an attempt to circumvent the legitimate restorative ministry of the church to that individual.

6. The church constitution should encourage church members as much as possible to settle personal disputes within the context of the church or through a Christian mediation service without relying upon the alternative of referring the matter to the courts. However, it would be both impractical and unenforceable for a constitution to prohibit litigation between members concerning non-church related matters.

To avoid disgruntled members either asking for judicial review of procedural matters or seeking damages against church leaders, the constitution should prohibit action being commenced against the church and its leaders concerning legitimate disciplinary procedures set out in the church constitution. This would, however, not preclude a member from seeking the court’s assistance in the event that the procedures in the constitution had either not been adopted or were being enforced contrary to principles of natural justice.

8. In the event that church discipline is required, it is essential that the leaders of the church familiarize themselves and follow the procedures set out in the constitution without exception to avoid a claim by the disciplined member that the procedure implemented had been conducted improperly, unfairly or prejudicially.

9. Throughout the disciplinary proceedings, the confidentiality of information given to church leaders must be respected. As such, only those persons involved in the disciplinary proceedings should be apprised of the information that is divulged in confidence by the person being disciplined. In the event that the church leadership decides that an announcement concerning the discipline of a member needs to be made to the church, such announcement should be directed to the members of the church and should be given orally from a prepared text. To avoid a claim for breach of privacy, any statement pertaining to the discipline of a member at a public worship service should be avoided. Instead, the matter should be dealt with at a meeting of members only. In addition, by ensuring that the information is given orally, it will avoid the possibility that a written statement is copied and distributed to persons outside of the church. The content of the information given should be limited to information for which the following two part question can be answered in the affirmative, “Does the information need to be disseminated to assure other members that the integrity of the collective ministry of the church is being maintained and can it be reasonably concluded that such information will not unduly embarrass or prejudice the reputation of a member.” For example, in the case of adultery, a statement that a member has been found to be in an adulterous relationship would be appropriate but the details of the relationship would not be.

10. With the exception of a request for transfer of membership, there is little justification, if any, in advising other churches of the disciplinary action taken against a member, even where such churches are within the same denomination. When a request for transfer of membership is received, a simple reference to “John Doe was not a member in good standing at the time of his departure from the church” or “John Doe left the church while under discipline” is all that is necessary. It will then be incumbent upon the other church to make inquiries of the former member concerning the reason for his or her departure from the previous church.

11. With the exception of individuals whose presence is disruptive to public worship or threatening to individual members, a former member who has been disciplined should not be barred from public worship.

12. Any decision concerning discipline should be limited to correction and/or termination of membership and should not extend to secondary
disciplinary action outside of the church, such as boycotts or picketing of a former member’s business or home.

13. To avoid allegations of discrimination contrary to legislation such as the Ontario Human Rights Code arising from discipline of church employees, it is recommended that the following steps be taken:
(a) The church constitution should specify that all employees are to be members of the church, both to fulfill legitimate job qualification and to ensure that all employees will be subject to the same authority and discipline as that which is imposed on all members of the church.
(b) If church employees are expected to comply with life-style or moral conduct requirements, then those requirements should be set out not only in the church constitution but within a separate employment contract that the employee will be required to enter into before commencing his or her employment with the church. These requirements must be clearly brought to the attention of the employee during the interview procedure and should be included in job descriptions and personnel policy manuals.
(c) The church must ensure that life-style or moral conduct requirements are consistently and fairly applied to all employees of the church.

14. For those churches with adherents who are reluctant to become members of the church because of doctrinal differences, a practical alternative is to create two classes of members. One class would be “adherents” who would agree to be subject to the church constitution and the procedures set out therein but who would not be required to subscribe to the statement of faith or doctrine of the church. Although they would not be entitled to vote, they would at least be under the authority of the church. The other class would be “voting members” who would be required to subscribe to the statement of faith or doctrine of the church but who would have the additional benefit of voting rights.

15. For those churches that hold their land pursuant to an old trust deed which includes a statement of doctrine that is different from the one currently used by the church, legal advice should be sought to determine if steps can be taken to free the congregation from the terms of the trust deed. However, this is potentially a very complicated area of the law and should not be undertaken without carefully reviewing all of the legal ramifications that may be involved.

E. SAMPLE PROVISIONS ON MEMBERSHIP
AND DISCIPLINE
Attached as a schedule to this article are excerpts from various church constitutions dealing with membership, discipline and employment. The provisions are not intended to be precedents but rather to provide examples of how the issues raised in this article might be dealt with in reviewing and amending a church constitution.

There are a number of limitations, however, involved with the sample provisions.
1. They are excerpts only and therefore should not be relied upon as a seamless and coherent set of constitutional provisions. For instance, there are many provisions that have not been included because of the lack of space, such as the procedure for admitting a person into church membership.
2. They were drafted in the context of incorporated churches under federal as opposed to provincial legislation.
3. They are intended as provisions for independent local churches. Members of hierarchical denominations such as United Church of Canada and the Anglican Church would not require the provisions contained in the sample provisions, as the church constitution for those churches already deals with procedures on discipline.
4. The sample provisions on discipline do not include procedures on referring deliberations on discipline to the membership of the church. Although this is a legitimate biblical procedure, the provisions required are too long to include as a sample to this article.
5. The provisions presume a church structure that includes both a board of deacons and a board of elders.
6. The pastor has not been included on the board of deacons for reasons discussed in an earlier article by the author entitled “An Analysis of Remuneration of Directors of Charities In Ontario” in CCCB Bulletin No. 3, June 4, 1991.
7. The detail of procedure in the attached sample provision may need to be expanded or simplified depending upon the circumstances of each church. For instance, a church may wish to have its disciplinary procedures follow the more detailed requirements set out in the Ontario Statutory Powers of Procedures Act as it relates to the availability of legal counsel by parties, whereas other churches may understandably wish to ensure that a disciplinary hearing will not escalate into a full blown court battle with lawyers acting for opposite parties.
8. Finally, the samples are for educational purposes and must not be relied upon as clauses that will necessarily be either appropriate or legal for every church. As such, it is essential that any church contemplating using any of the provisions contained in the attached excerpts first review the samples with
their church solicitor.

Notwithstanding the above noted limitations, it is hoped that the sample provisions will be of general assistance to churches as they look at practical ways of coming to terms with church discipline.

F. CONCLUSION

The effects of recent court developments and governmental legislation have had a significant impact on the ability of the church to operate independently of state intervention. In consideration of the growing activism of the court in judicial review of church discipline, the best course of action that a church can take is a preventative one. In this regard, local churches would be well advised to review their constitution to ensure that it provides an effective procedure for church discipline. Such a review will prove to be a wise investment of time and effort in avoiding potential legal ramifications arising out of church discipline both now and in the future.

ENDNOTES

3. Ukrainian Greek Orthodox Church v. Trustees of Ukrainian Greek Orthodox Cathedral of St. Mary's the Protectress et al. (1984) D.L.R. 670 at 671.
6. Re Caldwell et al. and Stuart et al., supra, footnote 4.
7. Ibid.
12. Lindenburger v. United Church of Canada, supra, footnote 8 at 152.
13. Ibid.
23. Re Caldwell et al. and Stuart et al., supra, footnote 4.
26. Ukrainian Greek Orthodox Church v. Trustees of Ukrainian Greek Orthodox Cathedral of St. Mary's the Protectress et al., supra, footnote 3.

APPENDIX

SAMPLE CONSTITUTIONAL PROVISIONS ON MEMBERSHIP, DISCIPLINE AND EMPLOYEES PRIVILEGES, RIGHTS AND DUTIES OF MEMBERSHIP

1. Church membership shall carry the following privileges, rights and duties;
(a) the privilege to attend all public worship services of the church;
(b) the privilege to participate in the sacraments administered by the church;
(c) the right to attend, speak and participate at all meetings of members of the church;
(d) the right to a single vote at all meetings of members of the church;
(e) the duty to minister to one another’s spiritual needs as part of the Body of Christ;
(f) the duty to participate in church activities and services as the Lord directs and personal circumstances permit;
(g) the duty to financially support the work of the church as the Lord directs and personal circumstances permit; and
(h) the duty to respect and submit to the authority and procedures of the church as expressed in the church constitution.

RESOLUTION OF DISPUTES AMONGST MEMBERS

Disputes amongst members of the church should, as much as possible, be resolved in accordance with principles set out in Matthew 18:15-20, Luke 17:3 and Galatians 6:1. Without limiting the generality of the said passages of Scripture, the following procedure

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should be adopted as a dispute occurs amongst members of the church:
(a) A member who believes that he or she has been wronged by another member for whatever reason shall confront such member with an explanation of the wrong which is alleged to have occurred.
(b) If the member so confronted does not listen to the member who has confronted him her or if the matter is not resolved, then the member who is alleged to have been wronged shall confront the member who is alleged to have caused the wrong in the presence of one or two members of the church.
(c) If the member who is alleged to have done the wrong still does not listen to the allegation or if the dispute is not resolved, then the member who is alleged to have been wronged shall refer the matter to the pastor, or in his absence to an elder.
(d) The pastor, or in his absence an elder, shall then confront the member who is alleged to have caused the wrong either on their own or in conjunction with a Christian mediator in an attempt to resolve the dispute, failing which the matter shall be referred to the board of elders pursuant to the procedure for discipline of members set out herein.

RESTORATION THROUGH DISCIPLINE
Christ’s exhortation to watch over one another and to bear one another’s burdens in the spirit of meekness and love shall be foremost in the minds of the church elders and board of deacons who are jointly charged with the responsibility for discipline of members. The primary aim of discipline shall be the restoration of the offender to fellowship with God and with the church. The church maintains not only the right but the duty to practice such discipline in a Christian manner. In administering discipline, care shall be taken to ensure that the members of the church maintain a worthy witness of their faith before the world both for the sake of the spiritual life of each member and for the testimony of the church.

CIRCUMSTANCES GIVING CAUSE FOR DISCIPLINE
A member of the church shall be deemed to be under the discipline of the church if any of the following circumstances occur:
(a) a member has evidenced unethical or immoral conduct or behaviour that in the opinion of the board of elders is unbecoming of a Christian contrary to biblical principles;
(b) a member’s conduct, in the opinion of the board of elders, evidences an unwillingness to either comply with, adhere to or submit to the authority or procedures set out in the church constitution herein or;
(c) a member has wronged another member and has not resolved such wrong through the mechanism for dispute resolution set out above.

PROCEDURE FOR DISCIPLINE
1. No allegation giving rise to disciplinary action against a member pursuant to the preceding paragraph shall be considered by the church unless such allegation is first set out in a signed written statement given to the board of elders indicating the nature of the allegation and providing an explanation of the basis upon which the allegation is made.
2. If the board of elders determines on a preliminary basis that the written allegation is without merit, then the allegation shall be deemed to be invalid and no further disciplinary action against the member shall be proceeded with.
3. If the board of elders determines on a preliminary basis that the written allegation warrants further investigation, then the allegation shall be referred in writing to the board of elders and board of deacons (referred to as the “combined board”) for a hearing and the member against whom the allegation is made (referred to as the “subject member”) shall be deemed to be under the discipline of the church.
4. To ensure that the remedial ministry of church discipline to the subject member and to the congregation is completed, any request or notice of withdrawal from membership in the church by the subject member while under discipline shall not become effective until after the discipline proceedings provided for herein have been finalized.
5. The combined board shall as soon as possible convene a hearing to further consider the allegation. The subject member shall be given fourteen (14) days written notice (which period of time shall include the date of mailing but shall exclude the date of the hearing) by registered and regular mail at his or her last known address, of the date, time and place at which the hearing will be held as well as his or her right to attend such hearing and be heard. The notice shall briefly explain the nature of the allegation and advise the subject member that the allegation will be considered by the combined board at that hearing.
6. The subject member shall be entitled to attend before the hearing to listen to the details of the allegation made and to respond thereto. The hearing shall be conducted as an inquiry by the combined board and the chairperson of the board of deacons shall act as the chairperson of the combined board. The hearing shall not be open to the public nor to members or adherents of the church. However, the subject member shall be entitled to be accompanied at the hearing by two members of the church who may
act as observers during the hearing but who shall not participate.
7. Both the subject member and the combined board may call any witnesses or evidence that is relevant to the allegation being made. No party to the hearing shall be represented by legal counsel.
8. There shall be an equal allocation of time for presentations by both the combined board and the subject member. The combined board may designate a time limitation on the hearing, provided that such limitation is applied equally to the presentation by both the combined board and the subject member and provided further that notice of such limitation of time is given to the subject member in the written notice by which the subject member was given notice of the hearing.
9. All evidence presented before the hearing shall be kept confidential, except such summary facts that the combined board determines needs to be given to the membership of the church at a subsequent meeting of members.
10. At the end of the hearing, the combined board shall convene in private to deliberate on the evidence presented. A two-thirds majority vote by the members of the combined board present at the hearing shall be required to conclude that the allegation is true, failing which the allegation will be deemed not to be proven with the result that the subject member shall no longer be subject to disciplinary proceedings by the church and shall be reinstated as a member of the church in good standing.
11. In the event that the combined board determines that the allegation is true, then the combined board shall determine the appropriate disciplinary action to be implemented pursuant to a two-thirds majority vote. Disciplinary action shall be determined and implemented with the intent of both protecting the integrity of the ministry of the church and restoring the subject member into fellowship pursuant to the principles set out in Luke 17:3 and Galatians 6:1.
12. The combined board may implement any disciplinary action in relation to the subject member that it deems appropriate, including but not limited to the removal of the subject member from positions of leadership or teaching within the church, the prohibition of offending conduct or behaviour, the requirement that an apology be given, the requirement that the subject member evidence an attitude of submission to the authority of the church or a spirit of contrition or the termination of membership.
Termination of membership in the church, however, will be deemed appropriate only where, in the opinion of the combined board, no other reasonable alternative disciplinary action is available.
13. The chairperson of the combined board shall send written notification to the subject member of the decision made by the combined board by registered and regular mail addressed to the subject member at his or her last known address within ten (10) days of a decision having been made together with a succinct summary of the reasons therefore.
14. The decision by the members of the combined board on all matters of discipline shall be final and binding. In the event that the decision of the combined board is to terminate the subject member's membership in the church, then the subject member shall automatically cease to be a member of the church upon the date that the decision by the combined board is made.
15. No pronouncement on matters of discipline by the church shall be made unless given orally from a prepared text at a members meeting and only after careful and sober consideration has been made by the combined board to avoid, as much as possible, undue or unnecessary embarrassment to the subject member or other prejudicial consequences to either the subject member or to the church as a whole.
16. A member of the church who has been disciplined or whose membership has been terminated shall not be barred from public worship services unless his or her presence is disruptive to the peaceful proceedings of the public worship service as determined in the sole opinion of the combined board; in which event such individual agrees that he or she may be removed from such public worship service without the necessity of legal action, whether or not such individual is at that time a member of the church.

WAIVER
Notwithstanding anything else contained herein, membership in the church is given upon the strict condition that disciplinary proceedings or any other proceedings arising out of the church constitution shall not give a member cause for any legal action against either the church, the pastor, any associate pastor, any staff member of the church, any deacon, any elder, any officers, or any member of the church, and the acceptance of membership in the church shall constitute conclusive and absolute evidence of a waiver by the member of all rights of action, causes of action and all claims and demands against the church, the pastor, any associate pastor, any staff member of the church, any deacon, any elder, any officer or any member of the church in relation to disciplinary proceedings or any other proceedings arising out of the church constitution and this provision may be pleaded as a complete estoppel in
the event that such action is commenced in violation thereof.

WITHDRAWAL AND REMOVAL OF MEMBERSHIP
1. Provided that a member is not under the discipline of the church, a member may withdraw at any time from membership in the church. A request or notice of withdrawal from membership by a member who is under discipline shall become effective only after the disciplining proceedings provided for herein have been completed.
2. Every individual withdrawing from membership in the church must do so by notification to the board of deacons in writing together with a written explanation of the reasons for the request for withdrawal from membership.
3. Upon receipt of such request for withdrawal of membership and upon the board of deacons confirming that such individual is not under discipline of the church, such individual shall be removed from the membership roll of the church. If a member is under the discipline of the church, then notwithstanding his or her request for withdrawal from membership, such individual shall continue as a member and be subject to the authority of the church until such time that such individual is no longer under the discipline of the church.
4. In the event that a member for a period of two years is either habitually absent from the church or displays a significant lack of interest in the church, the board of deacons in their sole discretion may place that individual's membership in the church on the inactive role, provided that the board of deacons has first sent written notice by registered and regular mail to such individual prior to that individual's membership being placed on the "inactive" role.
5. A member who is on the inactive role may request that his or her membership in the church be reinstated onto the active role of members, in which event the board of deacons in their sole discretion shall determine whether such request shall be granted.
6. In the event that a member has been on the "inactive" role of members of the church for a period of two (2) years, or more then the board of deacons may in their sole discretion, terminate that individual's membership in the church by a resolution passed by a majority of the deacons present at such meeting, in which event the clerk shall send written notice by regular and registered mail to such inactive member at his or her last known address to advise such individual of their termination of membership in the church. That member's membership in the church shall be deemed to have ceased on the date of such resolution by the board of deacons.

DEFINITIONS AND DUTIES OF THE PASTOR
The pastor is the spiritual overseer of the church and shall be deemed by virtue of his position to be a member of the church and a member of the board of elders. The duties and rights of the pastor shall be as follows:
(a) the duty to provide spiritual leadership to the church and to work in conjunction with the board of elders in implementing such spiritual leadership;
(b) the duty to work in conjunction with the board of elders and the board of deacons in formulating and recommending policy statements to the congregation as may be necessary from time to time;
(c) the duty to exercise general supervisory authority over all staff members of the church, provided that the hiring or removal of staff members including associate pastors, shall require the approval of the board of deacons and/or the members of the church as required herein.
(d) the duty to fulfill the qualifications for a church elder as set out herein and to ensure that his lifestyle does not evidence unethical or immoral conduct or behaviour that is unbecoming of a Christian contrary to biblical principles;
(e) the duty to be in full agreement with, uphold and be subject to the church constitution.
(f) the right to be an ex-officio member of all committees and boards of the church with the exception of the board of deacons; and
(g) the right to receive notification of all meetings of the board of deacons and to be present and fully participate at all such meetings, provided that the pastor shall not be a member of the board of deacons nor have a vote thereon.

DEFINITION AND DUTIES OF ASSOCIATE PASTORS
If the pastor deems it necessary, associate pastors may be called by the church for the purpose of undertaking such ministries as the pastor and the church elders determine are necessary for the church. An associate pastor by virtue of his position shall be deemed to be a member of the church and a member of the board of elders. The duties of an associate pastor shall be as follows:
(a) the duty to fulfill the ministry description established for his or her position;
(b) the duty to fulfill the qualifications for a church elder as set out herein and to ensure that his or her lifestyle and conduct does not evidence unethical or immoral activities or behaviour that is unbecoming of a Christian contrary to biblical principles; and
(c) the duty to be in full agreement, uphold and be subject to the church constitution.

TERMS OF EMPLOYMENT FOR GENERAL STAFF
All general staff members of the church (which shall include all employees of the church except the pastor and associate pastors) shall be required to fulfil and maintain the following qualifications:
(a) the employee must be a member in good standing of the church and be subject to the authority of the church as evidenced by the church constitution;
(b) the employee must be personally committed to Jesus Christ as Saviour and Lord and give evidence of a consistently godly walk;
(c) the employee must be in full agreement, uphold and be subject to the church constitution;
(d) in recognition of the integral part that each employee plays in the overall ministry of the church, each prospective employee must review and sign an employment agreement with the church to ensure that the prospective employee recognizes that employment by the church requires that the employee's lifestyle must not evidence unethical or immoral conduct or behaviour that in the opinion of the board of elders is unbecoming of a Christian contrary to biblical principles.

POLICY STATEMENTS FOR THE CHURCH
1. In consideration of the ongoing need for the church to provide guidelines and directions to its members on practical applications of biblical teachings and Christian conduct, the church may adopt policy statements as are deemed necessary from time to time and such statements upon adoption shall be deemed to be a part of the church constitution.
2. A policy statement may be proposed or amended by either the pastor, the board of elders or the board of deacons, but shall not become operative until first approved by a unanimous vote of the board of elders and the board of deacons and ratified by a 75% vote of the members of the church present at a meeting duly called for that purpose.
A. INTRODUCTION
Since the publication of the earlier article entitled "Legal Analysis of Church Discipline in Canada" in the CCCC Bulletin No. 2, May 25th, 1992, there have been a number of important court decisions that have been released that deal with the issue of church discipline. This update has been prepared to provide a summary and commentary on those cases.

B. PROCEDURAL FAIRNESS
In two recent decisions, the courts have underscored the need for procedural fairness in disciplining both church members and clergy, whether or not the church constitution requires such procedure to be followed.

In the decision of Davis v. United Church of Canada released on March 18th, 1992, two United Church ministers applied for a judicial review of the procedures which had been followed by the United Church in dealing with allegations of sexual harassment made against the respective ministers. In one case, the minister was suspended pending the outcome of a formal hearing; however, he was never provided with copies of the written charges that were made against him until a number of months after the suspension.

In the other case, a resolution was reached, an apology was given and the local church forgave the offending minister. Notwithstanding the resolution, an appeal was launched which resulted in the minister being suspended. The minister, however, was not given a copy of the notice of appeal, or made aware of the grounds of the appeal, nor was he given an opportunity to be present at the appeal hearing.

Not surprisingly, the court found that the "two United Church ministers were not well served by the United Church of Canada . . . in that the rules of natural justice were sorely breached by [the church] in the treatment of these two ministers". As a result, the court reinstated both ministers to their former pastoral positions but stated that such an order did not preclude the church from subsequently proceeding on the merits of the matter, provided the proper procedures as set out in the church manual were followed.

What is clear from the case is that although the court will not become entangled in reviewing the appropriateness of the disciplinary decision that is made, it will actively intervene if the procedure is either contrary to the procedural requirements of the church's own constitution or is contrary to the principles of natural justice.

What constitutes natural justice in a church discipline context has now been definitively enunciated by the Supreme Court of Canada. In Lakeside Colony of Hutterian Brethren v. Hoffer, the Supreme Court reviewed the decision of the Manitoba Court of Appeal which had confirmed a trial court decision upholding the expulsion of Daniel Hoffer and others from the Lakeside Colony of Hutterian Brethren.

The facts leading up to the trial and the subsequent appeal have already been summarized in CCCC Bulletin No. 2, May 25th, 1992. However, for ease of reference, the important facts of the case are summarized here. A dispute arose between Mr. Hoffer, his supporters and the leaders of the Hutterite community on a question of patent infringement resulting in Mr. Hoffer and his followers refusing to obey the leadership of the colony. The matter was discussed at a general meeting of the colony. During the meeting it was determined that Mr. Hoffer should be "shunned" at meals and during worship. Mr. Hoffer refused to accept the punishment proposed. He was then told that he was expelling himself because he refused to subject himself to the discipline of the colony. The expulsion meant that Mr. Hoffer was no longer a member of the church. However, no formal vote on the expulsion by the colony was taken. This unusual result occurred because the colony collectively made decisions on a basis of consensus of those that were at meetings as opposed to a formal vote. A subsequent meeting of the colony was held to determine if Mr. Hoffer would repent and apply for re-admission to the colony. Although Mr. Hoffer had been informed of the meeting, he decided not to attend.

The decision to expel Mr. Hoffer was subsequently reviewed by a "higher court" of the colony which included the local minister. Mr. Hoffer decided not to attend. The colony then decided that they could no longer tolerate Mr. Hoffer and his followers in the colony and instructed their legal counsel to commence legal proceedings to have Mr. Hoffer and his followers physically removed from the colony. However, the lawyer's letter informing them that they had been expelled from the colony required that they vacate by a date which was before the date set for the hearing by the higher church court.

At the outset of the decision, the Supreme Court confirmed that although courts are generally reluctant to exercise jurisdiction over questions of membership in voluntary associations, particularly churches, it would exercise jurisdiction where issues of property or civil rights are affected by a person's membership in
the association. In the case at hand, the Supreme Court found that it had jurisdiction because the loss of membership by Mr. Hoffer and his followers had a profound impact upon their property rights. This was because members of the Hutterite colony do not own any property personally. Instead they hold it on a collective basis. When Mr. Hoffer and his followers lost their membership in the colony, they also lost the rights to use and enjoy the property of the colony which they had contributed to during their lifetime.

Although the Supreme Court found that it had jurisdiction, the jurisdiction did not extend to a review of the merits of the decision to expel Mr. Hoffer and his followers. Rather the judicial jurisdiction was limited to a review of the decision to determine if (i) the purported expulsion was carried out according to the applicable rules of the colony; (ii) whether those rules were enforced according to the principles of natural justice; and (iii) whether the procedure followed was done without mala fides, i.e. without bad intent.

The approach of the Supreme Court in this case is consistent with the earlier decision of Davis v. United Church of Canada.

Like the Davis decision, the Supreme Court of Canada required that the procedures of the church pertaining to the matters of discipline be followed and that those procedures be done in accordance with principles of natural justice.

In relation to the requirement that the member be able to attend to make representation, it is obvious that unless a person is able to be present during the hearing and respond to the allegations being made, the results of the decision will be suspect by failing to consider both sides of the charge.

Concerning the requirement that there be an unbiased tribunal, the Supreme Court was reluctant to address the issue in a definitive manner since the appropriate standard of an unbiased tribunal in the context of a voluntary association was not argued by the parties before the court. However, the Supreme Court did recognize the fact that given the close relationship amongst members of a voluntary association, it is likely that members of the tribunal hearing the discipline matter will have had some previous knowledge of the issue in question. As such, since it is virtually inevitable that the members of the tribunal will have some prior knowledge of the relevant facts, the requirement of an unbiased tribunal does not necessarily mean that the church leaders who ultimately make the decision concerning whether a fellow church member is to be disciplined must be totally uninterested in or unassociated with the facts of the case at hand. This is not to suggest that there will not be times where members should exclude themselves from the decision making process where there is a clear conflict of interest. However, just because a church leader is aware of the facts giving rise to the discipline process does not in itself necessitate the exclusion of that person from the decision making body.

In the case at hand, the Supreme Court was of the opinion that proper principles of natural justice had not been followed since Mr. Hopper and his followers had not been given enough notice of the church meeting to be present and properly represent themselves. As such, the decision of the colony to expel Mr. Hoffer and his followers was overturned. More importantly, the principles enunciated by the Supreme Court in reaching its decision will now have a far reaching impact upon decisions by churches and other voluntary organizations in dealing with matters of internal discipline of its members.

C. INVASION OF PRIVACY

As discussed in the earlier article on "Legal Analysis of Church Discipline in Canada", even if a church has followed procedural steps that reflect the basic elements of natural justice, the courts may still intervene if they detect that an individual's privacy has been jeopardized. Although there are few Canadian cases which have dealt with invasion of privacy, there have been a number of recent court decisions in the United States that have dealt with this issue and have evidenced a pro-active approach by the courts to intervene if an individual's privacy is jeopardized by the exercise of discipline over a church member.

One Canadian case which has addressed the issue of invasion of privacy is the unreported 1984 Quebec Court of Appeal decision of Eglise Evangelique Libre de la Province de Quebec v. Vermel. In that case a minister brought an application for an injunction and damages against his church denomination based upon an alleged invasion of his private life. The minister had been involved in an adulterous relationship with a member of his congregation for a number of years, with the last year and one half of the relationship being prolonged by threats by the minister. After the elders of the church began to investigate, the minister offered his resignation but advised that he would continue in his teachings in the community and coupled such statements with threats to tear the church apart and form a new church. In response, the governing body of the church decided to exclude the minister from fellowship, stating that he was guilty of adultery and making threats. The resolution was read orally at the annual general meeting of the denomination and a
copy of the resolution was sent to each of the five local churches in the denomination.

In dismissing the application, the court held that the minister was in a special class of profession with special obligations and as such a private resignation was not sufficient. Withdrawal from the profession could, at the discretion of the governing body, be made as public as entry into the profession, as for example was the case of disbarment notices distributed by the legal profession when members are struck from rolls for breaches of ethics. The court succinctly summarized a practical approach to the case at bar by stating the following:

“In fact there are certain professions which can only be exercised if those who exercise them are answerable to and guaranteed by respected and respectable authorities. To be a priest, pastor or a rabbi is not the same as to be a vendor of peanuts. The exercise of such professions carries with it the obligation to respect the standards of the religious authorities concerned, failing which one’s credentials may be removed. And it is not sufficient to resign in order to avoid the withdrawal of credentials; the withdrawal of such credentials is just as public as their granting through ordination or otherwise. For example, it is common knowledge that the bar publishes notices of radiation [disbarment] in the case of members of the bar who have contravened the profession’s code of ethics.”

Although the court’s decision addresses the issue of invasion of privacy involving ministers, it does not deal with the more sensitive issue of invasion of a church member’s privacy. As the decision was based on the recognition that a minister is a professional with special obligations that justify public statements on his or her dismissal, a court might not necessarily apply the same rigorous standards if the information disseminated to other churches involves a lay member of the church as opposed to a professional minister. Whether the courts in Canada will adopt a more protective attitude, as has been evidenced in the United States, when dealing with an alleged invasion of privacy of a lay member remains to be seen. However, there is good reason to be cautious in this developing area of the law, particularly in consideration of the increasing judicial recognition of individual rights.

D. STANDARDS ESTABLISHED BY TRUSTEE
In the earlier article on church discipline, a recommendation was made that if discipline is pursued because there is a deviation from the accepted doctrine of the congregation set out in the church constitution, it is essential to ensure that the church constitution is neither contradicted nor supplanted by the church doctrine set out in an old trust deed by which the church may have acquired title to its current lands. This recommendation, though, would not have application in the Province of Quebec, where the limited use of trusts does not extend to acquiring property “in trust”.

E. CONCLUSION
It is hoped that the above summary of recent case law and comments will be of assistance to churches and organizations that are becoming more conscious of the court’s involvement in issues involving church discipline.

ENDNOTES
2. Ibid., pg. 76.
3. Lakeside Colony of Hutterian Brethren v. Hoffer (1997), an unreported decision (as of yet) of the Supreme Court of Canada
   released on October 29th, 1992, on appeal from the Manitoba Court of Appeal (1991), 77 D.L.R. (4th) 202, confirming a decision of the
   Trial Court, (1990), 63 D.L.R. (4th) 473.
4. Davis v. United Church of Canada, supra, endnote 1.
5. Lakeside Colony of Hutterian Brethren v. Hoffer, supra, endnote 3, at pg. 35.
6. Église évangélique Lutte de la Province de Québec et al. v. Vermeil, Quebec Court of Appeal, December 18, 1984, (unreported)
   see 29, A.C.W.S. (2d), 487.
7. Ibid.
APPENDIX IV

REMUNERATION OF DIRECTORS IN ONTARIO

and

UPDATE ON REMUNERATION OF DIRECTORS IN ONTARIO

Reprint of Articles Published in the CCCC Bulletin
Authored by Terrance S. Carter

AN ANALYSIS OF REMUNERATION OF DIRECTORS OF CHARITIES IN ONTARIO

A. INTRODUCTION
The issue concerning remuneration of directors of charities in Ontario has, until the last four years, attracted little attention. Invariably, the salaried chief administrative officer of a charity was a member of its board of directors. For purposes of this paper, “board of directors” is defined as meaning any body or group that controls the operations of the charity whether that group consists of the board of directors, board of governors, board of management or, in the case of an incorporated church, the board of deacons or board of elders.

The paid chief administrative officer of a charity, whether such officer be the executive director or president or, in the case of an incorporated church, the pastor, has generally been entitled to be a member of the board of directors by virtue of his position as the key employee.

The rationale for such an arrangement has generally been to provide the person who was ultimately responsible for the day to day operations of the charity with input into the overall direction of the charity. The fact that the chief administrative officer or pastor, in the case of an incorporated church, was a paid member of the board of directors, was generally not considered to be a conflict of interest, or if it was, it was considered to be of a minor nature. From a practical standpoint, it was thought that other members of the board of directors of the charity would be able to provide an effective accountability group to thwart any attempt by the chief administrative officer to unilaterally run the charity under a monopoly of power.

This was the general status of affairs for a great number of corporatite charities who had salaried chief administrative officers until the release of the landmark Ontario case of Re Toronto Humane Society¹ in 1987. That decision, and two other subsequently reported cases, has clarified the law in Ontario. Charitable corporations now may not pay members of their board any form of remuneration for services rendered without court approval, even though the
services are provided at a reasonable or below market cost. As a result, a chief administrative officer of an Ontario charitable corporation who is a salaried employee of the charity cannot continue to be a member of the board of directors of the charity for which he works.

In addition to providing clarity on the specific question of remuneration, the Ontario cases have raised important collateral questions, which although not answered by the court decisions, are important issues to address.

1. Are there amendments which should be made to the bylaws of a charitable corporation to comply with the recent court decisions? If so, what changes should be made to allow a paid employee to continue to have input into operations of the board?

2. Do the principles that have been enunciated by the courts have any application to unincorporated charities, and in particular, unincorporated churches?

3. Is there a procedure available to obtain approval of payment of a salary to a director other than obtaining court approval?

4. What steps should be taken in respect to reporting payments that have been made to members of a board in the past?

5. Do the recent decisions prohibit a director from receiving compensation for expenses in fulfilling his duties as a director?

In order to explore these and other questions, this paper will attempt to explain the basic issues the courts have had to grapple with, the facts surrounding each case, and the practical implications that result. It should be understood that the information contained in this paper is for general discussion purposes only and is not intended to be relied upon for purposes of a professional opinion. Any persons or charities considering altering their current practice in relation to remuneration of directors should first contact their legal counsel and accountant to discuss these issues further.

B. THE DICHTOMY OF RESPONSIBILITY FOR DIRECTORS OF CORPORATE CHARITIES

If a director of a share capital corporation is permitted to receive a salary from the corporation that he serves, why shouldn’t a director of a corporate charity? To understand this discrepancy it is necessary to examine the dichotomy that has developed in the responsibilities of directors of corporate charities. While a director of a corporate charity is in many ways akin to a director of a share capital corporation, a director of a corporate charity is also subject to the obligations imposed by trust law which place a much higher fiduciary obligation upon him in relation to what he may or may not do with the charity's assets.

On the broader corporate side of the dual role of a director of a corporate charity, there are a number of provisions in the Corporations Act of Ontario which suggest that a director of a charitable corporation should be able to receive remuneration from the corporation in the same manner as the director of a share capital company. Section 274 of the Corporations Act states that a corporation is deemed to have had from its creation the capacity of a natural person. This would suggest that unless otherwise restricted by other sections of the Corporations Act or other legislation, a charitable corporation has the ability to do what ever its board of directors decides. This would include the ability to pay salaries or other remuneration to its directors without such action being ultra vires the jurisdiction granted to the corporation under the provisions of the Corporations Act.

Further, section 126(2) of the Corporations Act specifically states that a director may receive reasonable remuneration and expenses for his services to the corporation as a director and may also receive reasonable remuneration and expenses for his services in any other capacity unless the Letters Patent or bylaws of the corporation otherwise provide. Letters Patent issued by the Province of Ontario in recent years now include such a prohibition. The following is the standard limitation now included in all Ontario Letters Patent.

"The directors shall serve without remuneration and no director shall, directly or indirectly, receive any profits from his position as such; reasonable expenses incurred by any director in the performance of his duty may be paid."

This provision prohibits a director being paid for his services as a director of a corporate charity. However, it is not clear whether such prohibition also precludes a director receiving monies from the corporation as remuneration for services supplied to the charitable corporation in some other capacity other than as a director, as a professional advisor or administrator. Even if the provision does not preclude such payment, the courts have characterized the role of a director of a corporate charity with so many attributes of a trustee that the payment of remuneration to a director would now be considered to be a breach of trust.

The development of the role of a director of a corporate charity as a trustee has evolved generally
through the establishment of case law. However, it has also been referred to indirectly through the provisions of the Charities Accounting Act of Ontario. Section 1(2) of the Charities Accounting Act states that "any corporation, incorporated for religious, educational, charitable or public purpose shall be deemed to be a trustee within the meaning of this Act..." Although the Charities Accounting Act does not specifically state that the director of a corporate charity is a trustee, recent case law has held that if a corporate charity is a trustee of charitable property, then a director of the corporate charity must by implication be considered to be a trustee of the property of the charity. Fortunately, it is not necessary to look at the more difficult and esoteric issue of whether or not a director of a corporate charity is in fact a trustee for all purposes. In the context of remuneration of directors it is only necessary to look at the more limited issue of why the courts consider that the director of a corporate charity has the fiduciary obligations of a trustee concerning the property of the charity and why that results in a prohibition on payment of remuneration to its directors.

C. REVIEW OF CASE LAW ON REMUNERATION OF DIRECTORS

While Ontario courts have dealt with the issue of the trustee-like characteristics of director of charitable corporations only in the past five years, there have been English cases going back almost 100 years which have not only dealt with this issue but now form the basic precedents upon which Ontario case law has developed.

Bray v Ford In the 1896 decision of Bray v Ford, the House of Lords in England was faced with an appeal on a libel action commenced by a solicitor who had received payment from a charity for services rendered by him as a lawyer when at the same time he served on its board of directors. The libel complained of was a letter which had been circulated to members of the charity alleging that the solicitor, while holding the fiduciary position of being a member of the board of directors, had illegally and improperly received payments for his services as a solicitor. In determining whether or not there was a basis for the libel action, the House of Lords had to determine whether or not the action of the solicitor in receiving payment for services was justified. In this regard, the court held that the solicitor was not warranted in making a charge for his professional services when he was also on the board of directors of the charity. The court held at page 51 of the decision that:

"It is an inflexible rule of a court of equity that a person in a fiduciary position, such as the respondent's, is not, unless otherwise expressly provided, entitled to make a profit; he is not allowed to put himself in a position where his interest and duty conflict. ...It is based on the consideration that, human nature being what it is, there is danger, in such circumstances, of the person holding a fiduciary position being swayed by interest rather than by duty, and thus prejudicing those whom he is bound to protect."

Although the House of Lords did not state that a director of a corporate charity was a trustee of charitable property, the fiduciary obligations placed upon such a director not to receive remuneration from the charity was clearly akin to the obligation placed upon a trustee of charitable property.

Re The French Protestant Hospital

The English courts further articulated the position that had been taken in Bray v Ford in the 1951 decision of the Court of Chancery in Re The French Protestant Hospital. In that decision, the court reviewed the Charter of the French Protestant Hospital originally incorporated in 1718. One of the bylaws of the corporation prohibited a director from directly or indirectly being interested in the supply of any goods or any work for the Hospital. For a number of years, a solicitor and a surveyor had both been members of the board of directors and had received remuneration for their services, although at a reduced rate. To accommodate these two directors, the Hospital corporation amended the bylaw that had prohibited payment of monies to directors so that it would not prevent a director receiving compensation for professional services. The issue that the court had to deal with was whether or not the proposed bylaw permitting payment to directors was valid. The court held that it was not. The argument that was presented to the court was that while the Hospital corporation was a trustee of the charitable property, the directors of the corporate charity were not themselves trustees and therefore were entitled to amend the bylaws for the corporation to permit payment to directors who had provided professional services. While the court agreed technically that it is the corporation that holds the charitable property, the court refused to be bound by the usual concepts of corporate law and pierced the corporate veil to examine the actual relationship that was in place between the directors themselves and the charitable property as opposed to simply reviewing what was the responsibility of the corporation to its property. The court held at page 570 of the decision that since it was obvious that a charitable corporation was completely controlled by its board of directors and since a charitable corporation holds its property in trust, the directors of a charity "...are as much in a
fiduciary position as trustees in regard to any acts which are done respecting the corporation and its property." The court went on to state that:

"It is quite plain that it would be entirely illegal if they [the directors] were simply to put the property, or the proceeds of the property of the corporation, into their pockets and make use of it for their own individual purposes or for their purposes as a whole, and not for the purposes of the charitable trust for which the property is held. Therefore, it seems plain that they are, to all intents and purposes, bound by the rules which affect trustees."

In following Bray v Ford, the court concluded that unless there was some provision in the constitution of a charity, the directors of a corporate charity had no right to make any profit or claim remuneration out of the property of a charitable corporation. As there was nothing contained in the Letters Patent of the Hospital or its bylaws which permitted payment of services to directors of the charity, it was improper for the board of directors to pass a bylaw giving authority to the corporation to make payments which had been specifically prohibited under previous provisions of its bylaws.

David Feldman Charitable Foundation
Although the Re Toronto Humane Society decision is often quoted as the first Ontario authority to deal with a director's trustee-like obligation concerning charitable property, there was an earlier decision which established this principle. In the 1987 case of Re David Feldman Charitable Foundation the court had to determine whether the director of a private charitable foundation established by that director was authorized to lend money that had been given to the foundation to the director's own personal company. The court reviewed the terms of the Letters Patent of the foundation and concluded that a charitable trust had been created for maintaining a fund with part or all of the income to be used as donations to recognized Canadian charities. The court recognized that pursuant to section 1(2) of the Charities Accounting Act, the corporation itself was deemed to be a trustee within the meaning of that Act. However, the court went further and stated that the directors were also trustees of the foundation. Based upon the fiduciary obligation arising from the trust relationship, the court held that the decision of the directors to loan monies from the foundation to a limited company of one of its directors was a direct conflict of interest and as such the directors had committed a breach of trust.

Toronto Humane Society
The subsequent 1987 landmark decision of Re Toronto Humane Society involved the Public Trustee of Ontario exercising its jurisdiction under the provisions of the Charities Accounting Act to bring a court application that in part questioned the remuneration paid to an employee who was also a member of the board of directors. In 1986, differences arose amongst the members and directors of the Society about its future direction. The Toronto Humane Society came under the control of the president and those directors who supported an organization dedicated to obtaining legislation which would abolish the statutorily sanctioned practice of removing impounded animals for scientific research purposes. The newly appointed president proposed a restructuring of the board of directors and subsequently arranged to have five directors elected officers of the Society who were friends and associates of the president. Two of the directors later became paid employees of the Society at significant salaries.

Before the court could review the irregularities which were alleged to have taken place within the Society, the court first had to determine whether or not a charitable corporation was a trustee that was subject to the jurisdiction of the court. The court found that the charitable corporation was, at least for the purpose of the property of the charity, a trustee and subject to its review. The court then turned its attention to the status of the directors of the corporation. It could have held that the Society was a charitable corporation created by statute and that as long as the provisions of the statute were appropriately observed, the obligations of the directors were met. The position advocated by the Public Trustee of Ontario, however, was that a charitable corporation is a trustee of its property and since the corporation was without "a body to be kicked or a soul to be damned" its directors must be held to the duties and obligations of a trustee. As such, the Public Trustee argued that a director, in his capacity as a trustee cannot put himself in a position where duty and interest conflict and that therefore there could be no remuneration paid to a trustee in his connections or activities in or about the trust without the approval of the court.

A major consideration was the self serving actions of the board of directors in an attempt to redirect the activities of the Society in a direction not previously taken. The court observed at page 246 of the decision that:

"charitable institutions ... are reasonably easy victims for any small determined group with the intention of taking control. When one couples with it the capacity to pay substantial remuneration there arises a situation which all human experience dictates should be avoided."
The court was not interested in whether a director of a corporate charity was a trustee in the pure sense of the word. Rather, the court concluded that the directors were under a fiduciary obligation to the Society and since the Society was dealing with charitable property, the directors were under a fiduciary obligation in relation to the property of the charity. Since the president and the newly elected directors of the Toronto Humane Society had decided to pay one of its directors a salary, the court had little alternative but to find that there had been a self serving application of the charitable monies to the director in contravention of the fiduciary obligations of the directors. As directors were considered to be imbued with the characteristics of a trustee, the court held that the only proper way in which a director could obtain remuneration would be pursuant to the express provisions in the trust document or by order of the court.

As a caveat, the court suggested that there might be a mechanism that could be arranged to obtain approval for payment of remuneration to directors from the Office of the Public Trustee without having to obtain court approval. However, no explanation of the jurisdiction under which the Public Trustee could exercise this authority was given.

Faith Haven Bible Training Centre
In the 1988 decision of Re Faith Haven Bible Training Centre, the Ontario Surrogate court was asked to review the decisions of the board of directors concerning the distribution of a portion of the money and property of the charity to some of the current directors and past employees as compensation for past services upon the corporation’s decision to cease operations. In 1975 the founders of the charity decided to establish a school dedicated to the provision of Christian education and training. In 1977 the founders of the school applied for and were granted Letters Patent under Part III of the Corporations Act under the name of Faith Haven Bible Training Centre. In 1985, a decision was made to close down the school, sell its assets and dissolve the corporation.

Since 1983, the bylaws of the corporation had been ignored by its officers and directors in that no annual meetings of the membership were held. This meant that the directors simply continued in office without re-election and accordingly the decision to cease operations was made by the directors acting alone without a supporting special resolution by its members. Similarly, the board of directors unilaterally made the decision concerning the distribution of the assets of the charity.

It is worth noting that the Letters Patent of the corporation contained one of the usual restrictions required by the Public Trustee of Ontario that, "upon the dissolution of the corporation and after payment of all debts and liabilities, its remaining property shall be distributed or disposed of to charitable organizations which carry on their work solely in Canada". Why the Board of Directors thought that they had any type of discretion at all concerning the distribution of the assets is not explained in the decision but clearly any payments to the directors or past employees of the charity in its dissolution were in contravention of the specific direction in the letters Patent concerning how the assets were to be distributed on dissolution.

The specific decisions of the Board of Directors which the Public Trustee objected to included (i) a transfer of an automobile to one of the directors and (ii) the payment of approximately $109,000.00 to various past employees of the corporation for past services, which employees included some of the then current members of the board of directors. In reviewing the actions of the board, the court held that the corporation held its net assets as a trustee to be distributed in accordance with the terms set out in the Letters Patent of the corporation. The court held further that whether or not the directors should be designated as trustees or whether they should be classified as fiduciaries bound to see to the execution of the trust was immaterial since the obligations and the end result that should have occurred were the same. Not surprisingly, the court held that the terms of the trust had not been fulfilled and the board of directors had acted in a conflict of interest in authorizing payments of both property and monies to former staff and current members of the board of directors.

The court went further than the earlier decisions and stated that since the breach of trust could not be excused, the directors of the charity should be personally responsible to repay to the corporation the monies and property wrongfully paid out. It was not just the directors who had received benefits that were held personally responsible to repay the monies but all of the members of the board of directors in place at that time. This was so even though one of the directors who received a benefit refrained from voting on the decision to pay monies to himself.

Fortunately for the directors, the Public Trustee provided assistance by suggesting that the court had jurisdiction under section 35 of the Trustee Act to excuse the honorarium that had been paid to past employees. In relation to the vehicle and the cash that had been transferred and/or paid to some of the directors, the Public Trustee also suggested to the court that such payments could be justified pursuant to the jurisdiction given to the court under section 61 of the
Trustee Act that allows the court to grant a fair and reasonable allowance to trustees for their care, pains and trouble and time expended in or about an estate. Although the directors were not required to repay the almost $125,000.00 that had been paid out of the corporation's assets, it is interesting to note that the directors had to rely upon the provisions of the Trustee Act as opposed to the Corporations Act to obtain the necessary jurisdiction for the court to approve the otherwise illegal payments. It is ironic that the Trustee Act governing the high fiduciary responsibilities of trustees was the legislation that had to be used to grant relief for directors of a corporation that had attempted to run its affairs pursuant to the lower standards associated with operating a charity as a corporation as opposed to a charitable trust. The fact that the Trustee Act was invoked by the court in this case is evidence that directors of charitable corporations may very well be subject not only to the remedial provisions of the Trustee Act but to the more onerous obligations established for trustees under the provisions of that legislation.

Harold G. Fox Education Fund v Public Trustee

In the 1989 decision of Harold G. Fox Education Fund the court again dealt with the issue of whether directors of a corporation under Part III of the Ontario Corporations Act have the right to provide for reasonable payment to a director for services rendered in a capacity other than as a director. The case involved a private trust fund which was established in 1966 to provide monies for educational purposes. One of the directors acted in the capacity as executive director of the funds and received compensation from 1972 through to 1986 of approximately $35,000. In 1986, the board of directors passed a resolution to authorize the payment of $1,000 per month to the director as compensation to him for his part time duties as administrator. The monies from the fund were primarily used to allow law students from England to article with Ontario law firms and vice versa.

After the Re Toronto Humane Society decision was released, the directors of the Harold G. Fox Education Fund prudently decided to disclose to the Public Trustee the past payments that had been made. The Public Trustee could have taken such information under advisement and not made the past payments an issue considering the confusion that had existed before the Re Toronto Humane Society case in 1987. However, the Public Trustee alleged that the payments to the executive director could not be justified and as such the past payments could not be ignored. As the Public Trustee would not approve the payments, the directors of the fund felt compelled to make an application to the court pursuant to the provisions of the Charities Accounting Act to obtain a direction concerning whether or not past payments as well as future payments to the executive director were legitimate payments by a charity even though the executive director was and would continue to be a member of the board of directors.

The court was sympathetic to the plight of the directors and their sincerity in wishing to obtain its approval. The court came to the conclusion that the compensation which had been paid was for legitimate services which were required by the charity and would have otherwise required that a special administrator be retained by the charity at a salary in accordance with those requirements. Having established that value had been received by the charity for the payment, the court reviewed the provision of section 126 of the Corporations Act, the limitations contained in the Letters Patent concerning payments to directors and section 61 of the Trustee Act and concluded that in the circumstances the payments were appropriate. However, the court did state that approval of the court should have been obtained before the payments were made.

The application that was before the court requested approval not only for past payments but approval for prospective payments to the executive director. Given the obvious integrity concerning the administration of the fund and the fact that the corporation and the directors would remain under the authority of the Charities Accounting Act, the court held that it would be appropriate to allow a reasonable compensation for future work as presented to the court in the amount of $1,000.00 per month.

The fact that the court approved future payments to directors required that the court go beyond the provisions of section 61 of the Trustee Act which limits court approval to payments for past services. Instead the court was required to invoke its inherent jurisdiction over the operations of charities. Whether or not the court will be prepared to exercise this same type of jurisdiction with every charity that is brought before the court under the provisions of the Charities Accounting Act is not clear. As such, the decision in Harold G. Fox Education Fund should not be relied upon as a guarantee that the court will approve future payment of remuneration to directors in every application.

Given the harshness of the comments contained in the earlier decision of Re Faith Haven Bible Training Centre, it is somewhat surprising that the court was as sympathetic in its comments as it was in the Harold G. Fox Education Fund decision. However, there were two mitigating factors that justify the difference
in approach. Firstly, the directors of the charity reported the past payments that had been made on their own instead of waiting for an audit to be conducted by the Public Trustee. Secondly, when the Public Trustee concluded that the payments to the executive director had not been appropriate, the directors took the initiative to bring an application before the court. By doing so, the directors evidenced an attitude of full disclosure to both the Public Trustee and to the court instead of an attempt to cover up. Charities that have paid remuneration to members of the board of directors in the past may be well advised to consider disclosing such payments to the Public Trustee instead of waiting for an arbitrary audit to reveal any impropriety of payments. This approach would probably only receive sympathetic treatment from either the Public Trustee or the court if it related to payments prior to the 1987 Re Toronto Humane Society decision or for a reasonable period thereafter when the directors first became aware of the effect of the decision. As Donna Campbell in her case comment on "Remuneration of Directors" in the Philanthropist has stated, the comment by the court that approval should have been obtained before any payments were made to directors is “a warning that, in future, directors who make such payments first and then seek approval of their action may do so at their peril”. This is particularly true in light of the critical comments directed towards the directors of the charity in Re Faith Haven Bible Training Centre decision.

D. PRINCIPLES RESULTING FROM CASE LAW
The following is a summary of the principles that can be elicited from the cases discussed above.

1. A charitable corporation in Ontario is considered to be a trustee in relation to its charitable property pursuant to the provisions of the Charities Accounting Act.

2. Whether or not directors of corporate charities are trustees for all purposes or are only imbued with the fiduciary responsibilities of trustees in the limited context of the property of a charity has not been determined definitively. The Re Toronto Humane Society and the Harold G. Fox Education Fund decisions would suggest that the director of a corporate charity is at most charged with the fiduciary obligations of a trustee in relation to the property of a charitable trust. The Re David Feldman Charitable Foundation and the Re Faith Haven Bible Training Centre decisions, however, would suggest that a director is a trustee in the fuller meaning of the term.

Although there remains some judicial confusion concerning whether or not a director is a trustee of a charity for all purposes, there is a consensus among all of the decisions that at the very least a director is charged with the fiduciary obligations of a trustee in relation to the director's dealing with the charitable property. To that extent, there is no doubt that a very high fiduciary obligation has been placed upon directors of charities in dealing with its assets.

3. All of the judicial decisions are consistent in stating that the trustee like fiduciary obligations placed upon directors of corporate charities in relation to charitable property clearly makes it a conflict of interest and a breach of trust for directors to pay any monies of the charity or transfer any of its property to any director as remuneration for any services rendered by the director. The Re Faith Haven Bible Training Centre decision constitutes judicial acceptance of the proposition that payments made in contravention of this restriction will leave each member of the board of directors jointly and severally liable to repay the monies that were illegally paid.

4. Although the Re Toronto Humane Society and the Harold G. Fox Education Fund cases suggested that the Public Trustee might be able to approve both past and future payments to directors of charities, there does not appear to be any legislative authority for the Public Trustee to take on this role. From a practical standpoint, the Public Trustee might review past payments and decide not to make an issue of such payments, subject to the residual right or any other interested person to require a formal passing of accounts under the Charities Accounting Act. This review by the Public Trustee would in effect constitute an indirect approval process for past payments. However, the Public Trustee does not have the ability to either directly or indirectly approve future payments to directors.

5. Since the court in both the decisions of Re Faith Haven Bible Training Centre and Harold G. Fox Education Fund invoked provisions of the Trustee Act to find the necessary authorization to legitimize payments that had been made to directors, it would appear that the Trustee Act as a whole will have application to directors of corporate charities. This will be an important consideration for future directors to consider before becoming directors of charities, as their responsibility for the assets of the charity will be under the same scrutiny as an executor would be on the administration of an estate. I suggest that few directors of corporate charities in Ontario would
consider that their role as members of a board of directors was subject to the same scrutiny of the courts as the executor of an estate. Granted, it is not clear from the judicial decisions whether or not a director of a corporate charity is a trustee at law. However, from a practical standpoint, whether or not a director is a trustee is of little consequence. The net effect of being a director of a corporate charity is that such person will be subject to the provisions of the Trustee Act and will be required to fulfill the same fiduciary duties as a trustee in relation to the assets of the charity.

E. APPLICATION OF PRINCIPLES TO UNINCORPORATED CHURCH ORGANIZATIONS

An important collateral issue raised but not specifically dealt with by any of the cases is whether or not an employee of an unincorporated charitable organization, such as a pastor of a church, is precluded from holding the position as a member of the controlling board in the same way that an employee of a corporate charity is precluded from being a member of the board of directors. Although the Re Toronto Humane Society decision dealt only with the situation of directors of a corporate charity, the principle developed by the court in that decision as well as in the subsequent decisions of Re Faith Haven Bible Training Centre and Harold Fox Education Fund involved the recognition of the trustee-like obligations of directors not to put themselves into a position of a conflict of interest by receiving payments of money or other remuneration. Since an unincorporated church is recognized by Revenue Canada under the provisions of the Income Tax Act\(^6\) (Canada) and by the Province of Ontario under the provisions of the Charities Accounting Act to be a charitable trust, the persons controlling the charitable trust as trustees will be charged with at least the same level of fiduciary obligations to hold the church property in trust as a director of an incorporated charity would be.

This trust relationship is underscored by the provisions of the Religious Organizations' Lands Act\(^2\) of Ontario which states that unincorporated churches may hold, sell, mortgage and lease land on behalf of a church organization by means of at least three trustees duly appointed by the church to hold such property in trust. Even though the three trustees appointed under the provisions of the Religious Organizations' Land Act may be different from the controlling board of the church, there would probably be the same trustee fiduciary obligations imposed upon the members of the controlling board as upon the duly appointed trustees in consideration of the fact that the controlling board is really the body vested with the authority to make decisions in relation to the charitable property, whereas the trustees appointed on behalf of the church are generally intended to act as bare trustees only. This would not relieve the formal trustees from personal liability but rather would expand the group of persons upon whom the fiduciary obligations of a trustee would be imposed to include not only the formal trustees but all members of the controlling board of the church.

Although the application of the Re Toronto Humane Society and subsequent decisions have yet to be specifically applied to the context of an unincorporated church, the position of the Public Trustee's Office of Ontario is that the legal form of the charity is of little consequence, as the Public Trustee considers all persons responsible for the use of charitable property to be akin to trustees whether they are formally recognized as a trustee or are designated with some other title such as director, deacon, elder, or whatever. In other words, the Public Trustee sees all persons in control of a charity to be trustees, if not in name at least in practice and will hold each of the members personally liable for any misuse of the charitable property or breach of trust. As such, an individual such as a pastor who receives his salary from an unincorporated church organization would be in a breach of trust if he was to remain as a member of the controlling board. This is so notwithstanding the fact that he may absent himself for any vote that involves a review of his salary or other benefits that he may be receiving from the unincorporated church. The Re Faith Haven Bible Training Centre decision is authority for the proposition that simply declaring a conflict of interest and not voting on a board decision involving the payment of monies to a director does not excuse the director from personal liability arising from the consequences of a breach of trust.

Since the decision of Re Toronto Humane Society suggested that payment to a director could be authorized if the trust document permitted such payments, suggestions have been made that the constitution of an unincorporated church could be amended to specifically permit a pastor as a member of the controlling board to receive a salary. However, since a church is a charity which holds its property as a public trust, the beneficiaries of which go beyond the immediate members of the church, those members of the church themselves could not authorize an amendment to the constitution of the church to permit payment to members of the controlling board such as a pastor.
F. PRACTICAL CONSEQUENCES FOR THE OPERATION OF CHARITIES IN ONTARIO

Whether or not the courts in other provinces across Canada will adopt the decisions rendered by the Ontario courts is not clear but there is a strong possibility that the reasoning of the Ontario courts as enunciated in the recent court decisions may be followed in other jurisdictions in Canada. As such, both incorporated and unincorporated charities elsewhere in Canada would be wise to heed the warnings that have been given by the Ontario courts. In light of the court decisions, there are a number of practical steps that a charity operating in Ontario should consider, whether or not such charity is incorporated, or is an unincorporated entity such as a church.

1. If a director of a charity has been receiving a salary or other remuneration from the charity and intends to remain as a member of the board of directors, he should immediately cease receiving a salary or any other remuneration.

2. If a member of the board of directors wishes to continue to receive a salary or other remuneration from the charity in consideration of his role as either an employee, executive director or in the case of a church, a pastor, then such person should immediately resign from the controlling board and the bylaws of the charity should be amended to ensure that his position does not entitle him to membership on the board.

3. If, as will probably be the case with most charities, the executive director continues to be employed by the charity and resigns from the board but wishes to continue to have a viable role as a participant in meetings of the controlling board, amendments would have to be made to the bylaws or constitution of the charity to accommodate these changes. This would involve redefining the role of such person in his capacity as an executive director or pastor so that such position provides him with the right to attend and participate at all meetings of the controlling board but not have the right to vote or be recognized as a member of the board. In relation to a church, whether incorporated or not, there is always the fear that a pastor may lose his ability to provide leadership in the church if he is not a voting member of the board. However, from a practical standpoint, if a pastor is not able to exercise influence over the church by virtue of his presence and spiritual leadership, any attempt to rely upon his voting authority on the controlling board would be short lived and more than likely futile. As such, removing a pastor from the controlling board but retaining his position to allow him to have the right to attend and participate but not vote should result in little, if any deterioration in his position and authority.

4. For those churches, whether unincorporated or not, which for theological reasons cannot accept that the pastor of the church would not be a member of the board, there is the alternative of creating a two-board structure. One board would be solely responsible for the spiritual direction of the church, such as a board of elders on which the pastor could be a full member. The other board would be charged exclusively with the responsibility of managing the property and monies of the church, such as a board of deacons. It would be this second board that would function as the trustees or the quasi-trustees of the charitable property of the church. The pastor would not be a member of the second board, although the description of his office could specify that he would have the right to attend and participate but not vote at all meetings of that board.

5. If for whatever reason, the charity decides that the executive director, employee or pastor of the charity must remain as a member of the controlling board of the charity, then the only alternative would be to make an application to the court upon notice to the Public Trustee to request approval for prospective payments as was done in the Harold G. Fox Education Fund case. Although both the Re Toronto Humane Society and the Harold G. Fox Education Fund decisions allude to a procedure whereby the Public Trustee could approve payments to directors before they occurred, there is no legislative framework for the Public Trustee to exercise such authority. Whether or not this will change in the future is yet to be seen.

6. In relation to past payments that have been made to directors or other members of the controlling board of the charity, the prudent course would be to make disclosure to the Public Trustee. Although the Public Trustee does not have authority to approve past payments, the Public Trustee does have authority to review the accounts of all charities by virtue of the jurisdiction granted to it under the Charities Accounting Act. As such it has the statutory authority to require that it be informed of all activities concerning the use of charitable property. Informing the Public Trustee of those payments would allow the Public Trustee to review the actions of the board and make a decision on whether or not to take issue concerning such payments. In those situations where the Public Trustee was satisfied that the payments were reasonable and decided not to take issue with the
payments, it would be unlikely that the Public Trustee would require a formal passing of accounts under the Charities Accounting Act. Any future challenge by the Public Trustee concerning past payments that had already been disclosed could be met with a response to the court that the matter had already been disclosed and had been received without objection by the Public Trustee. Such position would not preclude the Public Trustee from objecting at a later time, but at least the disclosure would likely elicit a more sympathetic reception by the court. As such, it is probably better to disclose to the Public Trustee improper payments that have been made to directors made in a voluntarily basis instead of having the matter discovered by the Public Trustee in an audit initiated under the provisions of the Charities Accounting Act. There is obviously a risk involved with making such a disclosure; in that the Public Trustee might decide, as they did in the Harold G. Fox Education Fund decision, that the payments were not appropriate, thereby requiring the charity to make application to the court under the Charities Accounting Act to obtain the necessary approval. However, for those charities that have acted as bona fides charitable organizations with a board of directors that is arms length from the paid executive director and have made payments to the executive director through ignorance of the law, it is probable that the Public Trustee would take a somewhat sympathetic approach towards such a charity, particularly in consideration of the fact that the charity had initiated making the disclosure. Since there are literally hundreds of charities in Ontario, if not thousands, that have in the past made payments of salaries or other remuneration to directors or other members of the controlling board or contravention of the fiduciary obligations of directors of charities, it would be helpful if the Public Trustee’s Office would issue a formal policy statement that the disclosure of past payments made prior to the 1987 decision in the Toronto Humane Society case or up to such time that the board can reasonably be assumed to have become aware of the decision would not result in formal audits being required under the Charities Accounting Act or charges of breach of trust being made in those situations where the payments were reasonable in the circumstances. In this regard, it is probable that the Public Trustee would want to be satisfied that the charity had received value in return for the payment of services provided by the director, that the board of directors was arms length from the director receiving payments, and that the payments had been made through inadvertence and in ignorance of the state of the law as disclosed by the Toronto Humane Society decision in 1987. As it is impossible to predict what

the responsibility of the Public Trustee will be in every situation it is essential that charities that have made payments in the past to directors or other members of their controlling board consult with their legal counsel and accountant concerning what disclosure, if any, is to be made to the Public Trustee.

7. While there is a clear prohibition upon a director receiving remuneration to fulfil his duties as a director, both section 126 of the Corporations Act as well as the general prohibition provision contained in Letters Patent issued by the Province of Ontario contemplate and approve a director receiving compensation for reasonable expenses incurred by the director in the performance of his duties. For instance, the payment of reasonable mileage charges for the use of a director’s vehicle to attend a board meeting would be a legitimate disbursements of the charity’s monies. However, if the payment to the director was in the form of a car allowance which resulted in more monies being paid to a director than would otherwise be paid out to reimburse a director for mileage costs, then such payment would be a misuse of the authority granted to a charity to allow a director to receive compensation for reasonable expenses. Although it is beyond the scope of this paper, a relevant collateral issue concerns whether the broader ambit of what a director can receive as compensation under a federal incorporation would permit a director to receive employment remuneration as opposed to being limited to simply a repayment of expenses. In this regard, the model bylaw provided by the Minister of Consumer and Corporate Affairs Canada in relation to incorporations of companies without share capital under Part II of the Canada Corporations Act specifically states that nothing in the usual limitation that a director may not receive remuneration to act as a director shall “preclude any director from serving the corporation as an officer or in any other capacity and receive compensation therefore”. The question remains whether this permissive provision in the model bylaw for federal charitable corporations could be relied upon to circumvent the fiduciary duties established by the court in the recent Ontario decisions. If the concept that a director of a charitable corporation is imbued with trustee-like characteristics is accepted by the courts in future decisions involving federal charitable incorporations, then the consequences of applying trust law to charitable corporations incorporated under Part II of the Canada Corporations Act would most likely take precedent over a strict interpretation of a charity’s bylaw under corporate law, notwithstanding that such bylaws may have been approved by the Minister of Consumer and Commercial Affairs for Canada.
G. CONCLUSION
As a result of the 1987 decision rendered in the Re Toronto Humane Society case, followed in the Re Faith Haven Bible Training Centre and Harold G. Fox Education Fund decisions, it is now clear that directors of charitable corporations in Ontario can no longer receive remuneration from the charity on which board they serve in relation to services provided to the charity either in their role as a director or in any other capacity. In addition, the same principle would appear to apply to members of the controlling board of unincorporated charities such as churches. Failure to comply with this restriction will leave the members of the board jointly and severally liable to repay monies improperly paid by the charity during such period of time that they were members of the board whether or not they voted on the resolution to pay such monies. As such, salaried officers of charities, whether incorporated or not, should be removed as members of the controlling board. At the same time, salaried officers of those same organizations can maintain input into the leadership of their organization by amending the bylaws or constitution of their charity to provide that such salaried persons may attend and participate at meetings of the controlling board provided that they do not become members of it or have the right to vote.

In light of the activist role being evidenced by the decisions of the courts in Ontario as well as by the Public Trustee’s Office, it would be prudent for charitable organizations in Ontario to review their bylaws and constitutions to ensure that they comply with the current state of the law in Ontario. Given the number of charities in Ontario that are probably operating in contravention of the law as stated in the Toronto Humane Society decision, there will likely be more litigation pending before the courts. As such, Ontario charities would be wise to ensure that they have taken all steps necessary to avoid being the subject matter of future judicial decisions in the evolution of the law on remuneration of directors.

Footnotes
2. Corporations Act, R.S.O. 1980, c.95 as amended.
5. Re The French Protestant Hospital, [1951] 1 Ch.567
8. Trustee Act, R.S.O. 1980, .512 as amended.
The issue of remuneration of directors of charities in Ontario and in particular its application to ministers who are members of the controlling board of either incorporated or unincorporated churches has been the subject of ongoing discussions since the CCCC Bulletin No. 3 entitled "An Analysis of Remuneration of Directors of Charities in Ontario" was published in June of 1991 (Editor's note: Reprint copies of Bulletin No. 3 are available by contacting the CCCC office and should be referred to in obtaining a full understanding of issues dealt with by this Bulletin.) Specifically, there has been some debate concerning two matters: (i) whether ministers who are members of the controlling board of either incorporated churches or unincorporated churches (as opposed to being members of a board which deals only with spiritual matters), are subject to the same trustee-like fiduciary obligations as directors of non-church corporate charities and as such should not be put in a conflict of interest without court approval where they receive a salary while remaining members of the controlling board that oversees the financial and temporal affairs of their church; and (ii) assuming that the answer to (i) is yes, is there a simplified process of obtaining the requisite court approval or an alternative to securing court approval altogether?

In relation to the first matter, the determinative factor involves identification of the duties that are imposed at law upon a minister by virtue of his or her membership on the controlling board of a church. Since a church is a public charity the property of which is to be used exclusively in the fulfilment of its charitable objectives, a member of the controlling board of that church, whether the member be a lay person or a minister, has a fiduciary obligation not to place himself or herself in a position of a conflict of interest by receiving remuneration from that church. The legal form in which the church operates, i.e., as a corporation or as an unincorporated association, should make little difference, since the church in both situations is a public charity. As such, the individuals who control the property and financial affairs of the church are imbued with these same trustee-like fiduciary obligations, whether those individuals are directors of an incorporated church or members of a board of an unincorporated church association.

While there have been no court decisions which have specifically addressed the issue of whether ministers of churches are subject to the same trustee-like fiduciary obligations as directors of corporate charities, it is quite possible that a court might decide that the same principles should apply in a church context, whether the church be an incorporated entity or not. As a result, it would be prudent that all members of the controlling board of a church avoid receiving any form of remuneration from that church, whether those members be paid ministers or lay members of the church.

It has been suggested that a technique available to circumvent the conflict of interest of ministers remaining on the controlling board of a church while receiving a salary from it is to amend the letters patent or constitution of the church to specifically authorize such payments. This suggestion emanates from the obiter dicta (i.e., the secondary comments of the court not essential to the primary decision) in Re Public Trustee and Toronto Humane Society, (1987), 60 O.R.(2d) 236. At page 247 of the decision, the court stated that a director of a charity, in accordance with his fiduciary obligations, could only receive remuneration either by order of the court or by express provision in the trust document. Although the court in that case did not have to deal with the issue of amending trust documents, the suggestion has been made that where court approval is not pursued for whatever reason, there is still the option of amending the church "trust documents" to authorize payments to ministers who remain members of the controlling board of the church.

However, all charities, whether incorporated or not including churches, are of a public nature, the beneficiaries of which are the public at large as opposed to the individual members of that charity. As a result, unlike a private trust where the beneficiaries and/or the settlor may have the ability to amend the trust document to permit its trustees to receive payments from the trust property, no similar option is available for a public charity like a church. This is particularly so since it is questionable whether the letters patent of an incorporated church or the constitution of an unincorporated church in fact constitute a trust document in any event.

This issue was dealt with in part in the decision of Re French Hospital, [1951], 1 Ch.567. In that case, the French Hospital attempted to pass an amending bylaw to permit payments to some of its directors for professional services, specifically for the legal and surveying services provided by some of its board members. The court held that since the letters patent creating the hospital corporation (in that case issued in 1718) had not authorized the payment of remuneration of directors, it would be contrary to the fiduciary obligations of directors of the charity to permit such payments now. As such, it would be questionable and
probably ineffective for the members of a church to attempt on their own and without court approval to amend the letters patent or constitution of their church to authorize the continuing payment of a salary or other remuneration to their minister while the minister remains a member of the controlling board of the church. Although the courts may eventually determine a different approach in dealing with ministers who are members of the controlling board of a church, until that occurs, the current case law in Ontario suggests that the only option for churches that wish to have their minister remain on the controlling board of their church, (assuming that they do not want to amend the description of the role of the pastor in relation to the controlling board of the church, as discussed in CCCC Bulletin No. 3 in June, 1991), is to obtain court approval. This position is consistent with that enunciated by the Office of the Public Trustee of Ontario.

The continuing need for court approval leads to the second issue, whether there is a simplified process of obtaining court approval or possibly an alternative to having to secure court approval altogether. At the September, 1992 annual conference of the Canadian Council of Christian Charities held in Toronto, the previous Public Trustee, Hugh Paisley, Q.C., suggested an alternative to court approval whereby the Office of the Public Trustee might informally review and approve remuneration paid to an individual on the church board for that person’s services as a church minister, provided that the church could substantiate that there were adequate safeguards and accountability measures in place.

In response to this proposal, the author on behalf of the Canadian Council of Christian Charities, communicated with the office of the Public Trustee and submitted a draft letter for consideration which was intended to form the basis of a precedent to be used by interested churches in Ontario, both incorporated and unincorporated, to obtain informal approval for the payment of remuneration to ministers who remained as members of the controlling board of their churches. However, due to the resignation of Hugh Paisley, Q.C., as Public Trustee of Ontario in December of 1992, a response to the form of the precedent letter was left in abeyance for a number of months. In the response received in June of 1993 from Eric Moore, Director and Legal Counsel of the Charitable Property Division of the Public Trustee’s Office, he regrettably advised that notwithstanding the earlier comments that had been made by the previous Public Trustee, Mr. Hugh Paisley, Q.C., at the CCCC conference in September of 1992, there was no statutory or case law authority that could authorize the Office of the Public Trustee to give approval for informal applications made to its office. The complete text of Mr. Moore’s letter is included at the end of this bulletin as a schedule and should be read in full.

Although Mr. Moore’s letter states that the Office of the Public Trustee is not aware of any case law or legal basis which would exempt ministers from the prohibition of receiving remuneration while remaining members of the controlling board of their church, his letter does suggest that there may be an alternative to formal and costly court application to obtain the requisite court approval. In this regard, the Canadian Council of Christian Charities is currently in the process of consulting with the Office of the Public Trustee to determine how an informal court application can be brought which would be both simple and inexpensive. Although such a procedure would still involve a court application, it is contemplated that the application would be based on a pre-approved precedent form and would not require any attendance by either a lawyer or by anyone else on behalf of the church unless circumstances warranted it.

While the issue of remuneration to ministers who are members of the controlling board of churches has been a difficult subject for many churches, it is a serious issue with the latent potential to be more problematic in the future. As such, it is be prudent to deal with the issue sooner as opposed to later so that the applicable remedial steps can be taken. As a result of the co-operation being received from the Office of the Public Trustee of Ontario, it is hoped that a practical and inexpensive method to address the issue will be available in the near future for those churches that wish to have their ministers remain on the controlling board of their churches. Further information concerning this issue will be published in future CCCC Bulletins.

[See - Schedule A: Letter from the Public Trustee on next page.]
MINISTRY OF THE ATTORNEY GENERAL
OFFICE OF THE PUBLIC TRUSTEE
145 Queen Street West
Toronto, Ontario, M5H 2N8

03 June, 1993

Mr. Terrance S. Carter
Wardlaw, Mullin, Carter & Thwaites
Barristers & Solicitors
235 Broadway
Orangeville, Ontario L9W 2Z5

Dear Mr. Carter:

I am writing further to your correspondence and our telephone discussions regarding churches' board members being remunerated as the churches' ministers and the proposal that the Public Trustee might informally review and approve that remuneration. You have expressed the matter somewhat differently, as churches' paid ministers being on the churches' boards and the Public Trustee approving the paid ministers remaining on the boards, but the Public Trustee's concern is charitable property and, consequently, the remuneration, not board membership.

I apologize for the delay in responding but, as you know, a new Acting Public Trustee assumed her responsibilities only recently and needed some time to consider this issue.

As you know, the Courts have held that persons who are responsible for the administration and management of charitable property (directors of an incorporated charity, trustees of a charitable trust, etc.) may not be directly or indirectly remunerated in any capacity whatsoever without prior Court approval. The Courts have characterized payment of such remuneration without that prior approval as breach of trust, for which the persons responsible for the administration and management of the charitable property presumptively may be held jointly and severally personally liable. When the Courts determine, after the fact, that approval would have been given had it been sought before payment of remuneration, they may excuse what they continue to characterize as the breach of trust of paying the remuneration without prior Court approval, sometimes also making costs Orders adverse to the persons who ought to have requested the approval before the remuneration was paid.

It is this office's understanding of the Courts' decisions and, perhaps, implicit in the express requirement of prior Court approval, that any remuneration of any persons who are responsible for the administration and management of charitable property is to be exceptional rather than usual.

The Courts have not suggested that this law does not apply either to churches and their board members or, more particularly, to churches' board members being remunerated as the churches' ministers. The Courts might make such a legal distinction - although there are reasons why it should not be made - but, until the Courts do enunciate such a distinction, we must assume the general law applies to churches and their board members.

I understand that the Courts' decisions have generated concern in board of churches associated with the Canadian Council of Christian Charities. Apparently, many of these boards have remunerated and continue to remunerate board members for services as the churches' ministers, without Court approval of the remuneration or the Court's excusing the breach of trust in having paid such remuneration without prior Court approval. I should point out that the Courts' decisions apply generally to persons who are responsible for the administration and management of charitable property, not just to churches' board members.
I also understand that this issue was a topic of discussion at the September, 1992 conference of the Canadian Council of Christian Charities, which the previous Public Trustee, Hugh Paisley, Q.C., attended and addressed. I understand that Mr. Paisley suggested that, as an alternative to Court approval, this office might informally review and approve remuneration paid to an individual on a church's board for the individual's services as the churches' minister.

We have examined whether this office can provide these approvals and have concluded that it cannot. The Public Trustee has no apparent jurisdiction to approve remuneration and to incidentally excuse any breach of trust in respect of remuneration previously paid without Court approval. Determination of these issues is exclusively within the Courts' jurisdiction over trusts and charitable property.

The Public Trustee, naturally, has general views as to what the law may require or permit and brings those views to bear on specific charities law matters. For example, if the Public Trustee is satisfied that a charities' board members' application for Court approval of remuneration and to be excused from a breach of trust in paying remuneration without prior Court approval is proper, the Public Trustee usually advised in writing of non-objection, so the expense of legal counsels' attendance before the Court can be avoided. The Public Trustee's views are not determinative, they are the views of a governmental body with standing to enforce charities law, and they are not binding on the Courts. While the Courts have approved of the Public Trustee accommodating proper applications to the Courts for approval, they have never suggested that judicial determination could be dispensed with or that the Public Trustee could determine these issues on his or her own.

Obiter dicta in certain Court decisions, that "on notice to the Public Trustee approval might be given by fiat", appear to be the foundation for this suggestion that the Public Trustee has some undefined jurisdiction to give approvals outside Court. This is a misunderstanding of "fiat", an ancient term of legal practice that has fallen into disuse, which essentially means an uncontested, over-the-counter application to the Court for its formal authorization.

Clearly, there is a very great difference between the Public Trustee having general views on charities law's requirements, even making those general views publicly known, and taking positions on specific matters before the Courts, on the one hand, and purporting to determine specific matters outside of court, in effect as if a court, on the other.

While there may be a case for an alternative to court determination of these issues, I am sure you will appreciate that it may also be thought most undesirable that these issues should be purportedly determined in government officials' offices rather than in public. What is at stake, after all, is charitable property that none of the parties to the issues own except for the purpose of applying that property to charitable purposes.

I am sorry for the confusion caused to you and your colleges and hope that this letter now clarifies the issue for you. I would be pleased to meet with you and representatives of the Canadian Council of Christian Charities to further discuss these issues and how they might be addressed.

Yours truly,

Eric Moore
Director and Legal Counsel
Charitable Property Division