
**MOSAIC 2005
CHURCH PLANTING CANADA
NATIONAL CONGRESS**

Toronto – November 17, 2005

LEGAL ISSUES IN STARTING A CHURCH

**Part I – Incorporation and Governance Issues
in Starting a Church**

(Powerpoint Presentation)

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OVERVIEW OF TOPICS

- Introduction
- Considering Incorporation
- The Nuts and Bolts of Incorporation
- Dry Bones: How to Make Your Corporation Live
- Effectively Using the Church Corporation

Note: This presentation is based in part on an article entitled "To Be or Not to Be: Incorporation of Autonomous Churches", available at www.charitylaw.ca

2

A. INTRODUCTION

- Why Incorporate?
 - Churches are looking at the option of incorporation now more than in the past
 - The need to explain the ‘nuts and bolts’ of incorporation of churches
- History
 - Prior to 1828
 - Remedial legislation of 1828 (predecessor to *Religious Organizations Lands Act (ROLA)*)
 - Denominational use of corporations
 - Autonomous churches have remained primarily unincorporated

3

B. CONSIDERING INCORPORATION

- Characteristics of an unincorporated church
 - A voluntary association of individuals has no predetermined structure
 - Real property is held by trustees
 - Not a legal entity and cannot maintain or defend legal actions
 - Trustees, officers & members may be personally liable
 - Church liability insurance is not a complete shield

4

- **Characteristics of incorporated church**
 - Is a separate legal entity
 - Has perpetual existence
 - Provides limited liability for members
 - Allows indemnification for officers and directors
 - Can maintain and defend legal actions
 - Can own assets in its own name

5

- **Advantages of church incorporation**
 - Limited liability protection for members
 - Members cannot be made answerable for the actions of the church simply for being members
 - Perpetual existence
 - An incorporated church has separate existence in and of itself
 - It outlives its members
 - continuity
 - More effective organizational control

6

- Permits indemnification of officers and directors
 - Requires authorization in the by-laws
 - Covers directors' costs if they are sued in their capacity as director
 - Spares directors from making a claim against the church
- Legal action in name of corporation, not trustees
 - Saves embarrassment of trustees or church members being named in a legal action

7

- Facilitates ownership of assets
 - Corporation can own all assets in its own name
 - Corporation can manage its property (buy/sell/lease/mortgage, etc.)
 - However, there are some restrictions on land use for charities (e.g. Ontario *Corporations Act* and *Charities Accounting Act* (Ontario))
- ROLA would not apply

8

- Disadvantages of church incorporation
 - Initial costs
 - Legal fees
 - Filing fees
 - Costs associated with changes to by-laws of letters patent
 - Corporate filings
 - Required for change of directors, officers or head office
 - Maintaining corporate records
 - Proper minutes of meetings of members and directors need to be kept

9

- Drafting corporate by-law
 - Can be a challenge to meet statutory requirements and also reflect character of the church
- Leasing land restrictions
 - Restriction on charities leasing land under *Charities Accounting Act* (Ontario)
- Objection to perceived government control
 - Concern about possible changes in government policy limiting church's freedom

10

- Should be an equal or greater concern for unincorporated churches
- Is not a defence for members against possible liability
- When is incorporation appropriate?
 - At any time, but is particularly appropriate in certain situations as follows:

11

- Building programs or other expansion
 - Risk related to debt, negligence, third party or volunteer involvement as contractors
 - Obligations and possible liability under employment legislation
- Incurring debt
 - Free individual members from liability for church's debt
- Entrenchment of biblical beliefs through Statement of Faith and Policy Statements, particularly in dealing with same sex issues

12

- Ministries involving liability exposure
 - Programs directed at youth (schools, camps, children's clubs, missions trips)
 - Counseling ministries
- Wrongful dismissal actions
 - Can expose members and leadership to personal liability
- Church discipline problems
 - Disgruntled members or adherents might decide to sue
- No one-size-fits-all solution
 - Evaluate the church's needs and exposure
 - Seek legal counsel for advice

13

C. THE NUTS AND BOLTS OF INCORPORATION

- **Preparation**
 - **Do it right or not at all**
 - **Could leave church worse off if done improperly**
 - **Confusing duplicate church structures**
 - **Confusion in authority and operations**
 - **Potential for church splits**
 - **High cost of repairing poor incorporation often the fact**
 - **Exposure of membership to liability**

14

- **Designate small committee or one individual to co-ordinate incorporation**
- **Obtain congregational approval to proceed with incorporation**
- **If incorporating a brand new church, better to obtain charitable registration number after incorporation**
 - **Organize unincorporated church effective as of first meeting of new church**
 - **Obtain charitable registration number for unincorporated church**

15

- **After incorporation of church, transfer charitable registration number to incorporated church**
- **Choice of jurisdiction**
 - **Federal vs. Provincial incorporation**
 - **Advantages of federal incorporation**
 - **Approval required only for basic corporate requirements**
 - **Standardized by-law requirements**

16

- **General flexibility for by-law provisions under federal legislation**
- **No involvement of Public Trustee or Companies Branch in Ontario**
- **Fast processing**
- **Name protection across Canada**
- **However, new Canada *Not-for-Profit Corporation Act* could be problematic**
- **Documentation**
 - **Form must follow substance**
 - **Incorporation documentation must reflect church personality**
 - **“Boiler-plate” form of by-law is inadequate**

17

- **Consult with denominational head office, if applicable**
 - **Denominations may be able to provide sample documentation**
 - **May need to consent to incorporation and/or subsequent transfer of assets from denomination to church corporation**
- **Prepare draft application for letters patent to include:**
 - **Names of applicants for incorporation**
 - **Objects**

18

- **Statement of faith**
- **Qualification requirements for directors and officers, if applicable**
- **Investment powers and other power clauses**
- **Distribution of assets on dissolution**
- **Prepare draft general operating by-law to include:**
 - **Definitions – i.e., deacons or elders are deemed to be directors of corporation**

19

- **Membership – essential to establish authority of church**
- **Adherents – not recommended unless they submit to authority of the church**
- **Withdrawal and removal from membership**
- **Resolution of church disputes**
- **Procedure for discipline of members**
- **Procedure for members meetings**
- **Definition of controlling board (i.e. deacons or elders as directors)**
- **Prohibition on remuneration of board members, elders or directors as for any other purposes**

20

- **Number of directors – establish variable number**
- **Rotating board of directors**
- **Conflict of interest for board members**
- **Confidentiality for board members**
- **Term and removal of board members**
- **Procedure for board meeting**
- **Definition and procedure for church elders (if applicable)**
- **Definition and duties of minister**
- **Definition and duties of officers and term**
- **Indemnification of directors and officers**

21

- **Nominating committee**
 - **Finance committee and audit committee**
 - **Standing and special committees**
 - **Policy Statements – e.g. children’s ministries, lifestyle, or conduct statements**
 - **General corporate provisions, e.g. execution of documents**
 - **Amendment provisions for letters patent and by-laws**
- **Submit draft incorporation documents to Canada Revenue Agency (CRA) for pre-approval (optional)**

22

- Obtain formal congregational approval for application for letters patent and general operating by-law
- Confirm availability of corporate name, which may require approval of the denomination
- Submit signed documentation to Industry Canada with checklist
- Issuance of letters patent and choosing implementation date for transfer of assets and liabilities

23

- D. DRY BONES: HOW TO MAKE YOUR CHURCH CORPORATION LIVE**
- Overview
 - Getting incorporated only first step
 - Second and equally important step is initial transfer of assets and liabilities from unincorporated church and dissolution of unincorporated church
 - Choosing effective date of transfer of assets and liabilities
 - Calendar year end date ideal
 - CPP and EI considerations
 - Disbursement quota considerations under the *Income Tax Act*

24

- Initial meetings of directors and members of church corporation
 - Convene meetings of initial directors to:
 - Adopt by-laws (general operating by-law)
 - Approve acceptance of members, charitable numbers and assets and liabilities of unincorporated church
 - Approve indemnification of unincorporated church
 - Convene a meeting of initial members to:
 - Approve by-laws

25

- **Confirm directors elect officers**
- **Appoint auditor**
- **Convene final meeting of members of unincorporated church to:**
 - **Advise the congregation that incorporation is complete and church operations will be transferred as of effective date**
 - **Authorize transfer of members, charitable numbers and assets and liabilities**
 - **Authorize dissolution of unincorporated church**

26

- **Transfer of membership to incorporated church**
 - **Temporary “deemed” membership**
 - **Existing members agree to be under the authority of the church corporation**
 - **Membership application for new members**
- **Transfer of charitable registration number to incorporated church**
 - **Send letter to CRA with corporate documents**
 - **Usually granted as a matter of course, but an updated statement of activities may be requested**

27

- **Transfer of assets to incorporated church**
 - **Ensure that transfer conforms to terms in trust documents with regard to religious doctrine, religious practice and usage of property**
 - **Conveyance required for real property and bill of sale for chattels**
 - **Real property**
 - **Land**
 - **Building (s)**

28

- Necessary unless the church plans to keep the unincorporated church with a parallel structure in order to take advantage of the *ROLA* provisions
- Otherwise need to prepare lease arrangements for incorporated church
- **Chattels**
 - Furniture
 - Equipment
 - Books
 - Bank accounts

29

- **Assumption of debt by church corporation and indemnification of unincorporated church**
 - In return for the transfer of assets, all debts and obligations of the unincorporated church are assumed by the incorporated church
 - Incorporated church agrees to indemnify the unincorporated church in case of legal action arising out of the debts and liabilities
 - Notify any secured creditors of transfer

30

- **New banking documents**
 - Forward letter patent, relevant by-laws, bank resolutions and forms to the church's bank
- **Filing of government forms**
 - Initial reports to federal and provincial governments
 - Initial reports to Public Guardian and Trustee
 - "Annual summary" to federal government

31

- **Dissolution of unincorporated church**
 - Convene a general membership meeting of the unincorporated church after the initial board meeting of the incorporated church but before transfer of assets
 - Purpose:
 - Advise the congregation that incorporation is complete and church operations will be transferred as of effective date
 - Authorize transfer of assets

32

- Authorize transfer of charitable registration number
 - Authorize the dissolution of the unincorporated church
- Obtain final report from legal counsel
 - Providing details of church incorporation
 - Outlining duties and liabilities of directors

33

- E. EFFECTIVELY USING THE CHURCH CORPORATION**
- Proper use of corporate name
 - “Use it or lose it”
 - Inform creditors, suppliers and employees of incorporation in writing and keep a record of correspondence
 - Inform employer
 - Change church publications (stationery, business cards, bulletins, web-site, etc.)
 - Officers should sign documents clearly in their capacity as an officer of the corporation

34

- Proper use and registration of ministry names
 - Independently recognizable operating names of church ministries need to be registered under *Business Names Act* (Ontario)
 - Make necessary change to church publication and statutory
- Protection of corporate and ministry names
 - Trade-mark registration
 - Section 9 official marks no longer available

35

- “Taking care of business”
 - Annual meetings of members
 - Board of directors meetings
- Maintaining corporate records
 - Government filing for changes in head office, directors and by-laws
 - Change head office
 - Change directors
 - Change by-laws

36

- Corporate minute book maintenance
 - Annual meetings
 - Board meetings
- Associated corporations to be considered
 - Parallel foundation
 - Separate corporations for high risk ministries, schools, etc.

37

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