

CHURCH & THE LAW UPDATE - No. 3

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Updating Churches on recent legal developments and risk management considerations.

A. INTRODUCTION

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

B. CHURCH & THE LAW SEMINAR - 1995

The 1995 Annual "Church and the Law" Seminar will be held on **Wednesday, February 8th, 1995, at Queensway Cathedral in Etobicoke, Ontario**. Full details of the program and how to register for the seminar is set out on the back page of this Church and the Law Update.

C. PAID MINISTERS ON CHURCH BOARDS

The Toronto Star recently ran a series of articles on controversies involving the minister of the Unity Church of Truth in Toronto. In addition to allegations of a lavish lifestyle and a number of pending lawsuits against the minister, the Toronto Star reported that the Public Trustee of Ontario had written to the Church requiring that the Church seek Court authorization for any payment made to board members, since the minister was receiving a large salary and other significant benefits while also sitting as a member of the Board of Directors of his church corporation.

The Toronto Star article quotes a representative of the Public Trustee's Office in stating the law as follows:

"Directors of Charities cannot receive remuneration without Court approval. If you are a director of a charity, the law says that you are supposed to act gratuitously. On the other hand if you want to be paid a salary or receive some personal benefit out of a charitable property, the Board cannot approve that".

The article went on to state that "Directors of charities cannot receive remuneration without Court approval, to do so is a breach of trust".

Although the facts involving the Unity Church of Truth is quite different from that normally encountered in most churches, the legal principles referred to by the Public Trustee's Office having equal application to any church which has a salaried minister as a member of the controlling board of the church. As a result, if a minister of a church is receiving a salary from the church and is a member of the controlling board of the church, then the minister should take steps to resign as a member of the controlling board of that church or seek Court approval.

For a more detailed discussion of this issue, reference should be made to the two articles by the author published by the Canadian Council of Christian Charities on "Remuneration of Directors" and "Update on Remuneration of Directors" in that June 1991 issue and August 1993 issues of the CCCC Bulletin. Copies are available by contacting the CCCC office.

The fact that the Toronto Star carried a front page article on this issue is evidence of how serious the breach of trust is when any member of the controlling board of a charity, including a minister of a church, receives any direct or indirect pay, benefit or remuneration from the charity. Both the Public Trustee's Office and the Courts will probably take a very dim view of any directors of a controlling board of a charity who continues to violate the law as enunciated by the courts in recent case law in Ontario.

D. THE NUTS AND BOLTS OF CHURCH INCORPORATION

The author published an article on "The Incorporation of Churches in Ontario" in the July 1993 issue of the CCCC Bulletin. Since that time, there has been considerable discussions in churches concerning incorporation. Although some churches are open to the idea of incorporation in theory in order to obtain liability protection for church members, many of those churches are either confused about or do not know the procedure to be followed to complete the incorporation of their church.

To assist churches in Ontario in completing the mechanical process of church incorporation, the author prepared a further article for the *Law Society of Upper Canada*, which article has now been modified to make it relevant to church audiences and is entitled "To Be or Not To Be, Incorporation of Autonomous Churches in Ontario, together with Precedent Materials". Copies of the article together with an extensive set of precedents that include a draft Letters Patent and a draft General Operating By-Law, as well as copies of other relevant articles that may be of assistance in the incorporation process, are available free of charge from the Canadian Council of Christian Charities other than a nominal charge for the cost of photocopying, binding and postage. For those churches or individuals that would like to receive a copy, the Canadian Council of Christian Charities will forward the one hundred and sixty page article on incorporation of churches for an expense related charge of only \$ ____.

The balance of this Church and the Law Update consists of a portion of that article dealing specifically with the "Nuts and Bolts" involved in the process of the church incorporation. The next Church and the Law Update will explain the steps necessary to initially organize and incorporate a church, as well as the effective use of a church corporation.

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

1. LIAISON WITH 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. OBTAINING 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, 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 of 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 the Religious Organization Lands Act of Ontario, (referred to as 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 and a sample draft General Operating By-law as part of the article entitled "To be or not to be, Incorporation of Autonomous Churches" is available from the CCCC.

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 suffixes such as Inc., Ltd.,

Incorporated, Limited, Corp., Corporation, or Co. The advantage of excluding these suffixes 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 later in this paper.

(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 church 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.

(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 CCCC which were published in the May, 1992 and May, 1993 issues of the CCCC Bulletin. Copies are available by contacting the CCCC office.

(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.

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 abeyance 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.

(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.

(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 referred to above.

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 addition, the draft General Operating By-laws contain 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.

(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.

(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 delineated 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.

(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 published in the June, 1991 and August, 1993 issue of the CCCC Bulletin. Copies of the said articles are available by contacting the CCCC office.

(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.

(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.

(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.

(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".

(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.

(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.

(q) Amendments

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 any application for supplementary Letters Patent.

On the other hand, change to the General Operating By-law will normally 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 amendments to the General Operating By-law needs to be contained within the General Operating By-law.

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 lay persons 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.

E. CONCLUSION

The process of incorporating a church is a complicated procedure for a church but provides worthwhile and long term benefits for the congregation as a whole. Hopefully, this article will help to demystify the process of incorporation somewhat. In the next issue of the "Church and the Law Update" there will be an explanation of the process of initially organizing a church corporation and how to effectively use the corporate structure on behalf of the church.

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