

PATH FORWARD for CHURCH INCORPORATION

1. Reasons to Consider Incorporating (Advantages):

(a) Avoidance of personal liability for congregation members

- members cannot have their personal assets used to satisfy a judgment against the Church simply because they are 'members' of the Church

(b) Increased protection for board members through insurance and indemnification

- special corporate Directors and Officers liability insurance is available
- Directors are put to an 'objective' (reasonable person) test in decision making rather than a 'subjective' test (higher liability for the more educated and skillful)
- Directors and Officers can enter into an agreement with the incorporated Church whereby they are indemnified for most any loss arising to them from decisions made in their leadership roles
- Directors can rely on reports and recommendations of professionals (accountants, lawyers, engineers etc.) in making decisions without having to question such, except in the most blatant cases of advice that most people would know to be in error

(c) Greater and more effective direct control of church assets

- no need to seek direction and/or approval from trustee of Church assets in order to sell or mortgage said assets
- property may be held in the name of the incorporated Church, including vehicle registration

(d) Perpetual existence of Church

- Church corporation is always in existence unless voluntarily ended

(e) Protection for/from high risk ministry (day care, food services, bus services etc.)

- through multiple corporations you can separate off various ministries that carry higher liability risk to the Church

2. Reasons Not to Consider Incorporating (Disadvantages):

(a) Costs and time associated with setting up a church corporation and transferring assets from the unincorporated Church to the incorporated Church

- reasonable legal fees, disbursements and government fees for the average Church holding nominal assets could run from \$2,500.00 to \$7,500.00 (although these fees can be less based on the financial abilities of the church, and depending on legal counsels willingness to reduce fees to accommodate the church's ability to pay). Transfer of Church real property (lands/buildings/mortgages) and mortgages into corporation could add to costs depending on nature of holdings. Need to seek consent from any mortgagee of Church property prior to incorporating in order to obtain their consent to transferring any mortgage(s) to a corporation.

(b) Compliance with acts and regulations respecting corporate activities

- cost of yearly audit requirement if annual revenue exceeds allowable thresholds (see Appendix 'A')

- annual corporate filings (minimal inconvenience) of Form 1 reporting any corporate changes

- need to advise CRA of charitable tax number use by the unincorporated Church and new use by corporation (minimal inconvenience in filing of required documents), or obtain a new tax number for the corporation from the CRA (four to six months delay for processing of the application).

3. Methods of Incorporating and the advantages/disadvantages of each:

(a) Federal Incorporation

- (advantage) allows Church corporation to operate throughout Canada without need to register inter-provincial status (ease of seeking donations nationwide)

- (advantage) allows for a higher annual revenue limit prior to mandatory audit requirements. See Appendix 'A' for a comparison of audit requirements between Federal and Provincial corporations.

- (possible advantage) s.141 of Canada Not-for-Profit Corporations Act S.C. 2009 might allow a Pastor to serve on Church board by permitting them to declare a conflict-of-interest due to their employment contract, which is then accepted by the Church. It is uncertain at this time whether a court would uphold this federal statute over Ontario laws which do not permit paid employees of charities to serve on charitable boards.

- (disadvantage) can be more difficult to have a corporate name approved; need to search name prior to incorporating to ensure it is available for use.

- (disadvantage) yearly annual information return has a nominal government filing fee (presently \$40).

(b) Provincial Incorporation

- (advantage) relatively quick and easy to set up with use of standard object clauses.

- (advantage) Operating By-Law No.1 can be prepared, and approved by the FEB, after incorporation is complete.

- (advantage) no fee for filing the Form 1 notice of corporate changes

- (advantage) less restrictive in approving the corporate name

- (disadvantage) additional fee and delay in incorporating if standard pre-approved object clauses are not used (this will change in late 2012 or early 2013 when the new Ontario Not-for-Profit Corporations Act, 2010 is proclaimed).

- (disadvantage) subject to a mandatory yearly audit requirement if revenues exceed \$100,000.00 per annum. This will change under the new Ontario-Not-for-Profit Corporations Act, 2010, wherein an audit for revenues under \$500,000.00 can be avoided for most churches on consent of 80% of the members.

- (disadvantage) need to carefully consider Pastors role on the board, as the Office of the Public Guardian and Trustee (OPGT) requires that a paid employee to sit on the board of a charity. Possible need to create two boards ('Ecclesiastical Board' chaired by Pastor and a 'Property Board' without direct pastoral involvement), or otherwise limit the Pastors role (i) by having them as a non-voting board officer serving as board chair (as it is only directors who cannot be compensated) or, (ii) seek court approval to Pastors participation on a church board under s.13 of the Charities Accounting Act. However, if the court rules against the application this will have the opposite result, thereby forcing the compliance issue.

NOTE: Historically, many evangelical churches and denominations have not adhered to this requirement of Ontario law regarding a paid employee in the role of a Pastor, primarily because it undermines their tenants of faith concerning the visionary leadership of senior pastors, regional directors and executive officers. To date, no churches have been challenged by the OPGT with respect to the Pastor's role on a church board.

4. Incorporation Process:

- (a)** Set up local Church committee to look into the pros/cons, costs and process of incorporating in order to report to the board with a recommendation
- (b)** Board gives initial approval on moving forward with incorporating, contingent upon receipt of further information/advice from professionals (lawyer, accountant, FEB District Office representative)
- (c)** Board decides on pursuing either a federal or a provincial incorporation
- (d)** [Recommended] Decision to incorporate is taken to congregation for a two-thirds (2/3) majority vote
- (e)** Once decision to incorporate is made, services of a lawyer are engaged
- (f)** Prepare and file Application for Articles of Incorporation (Letters Patent);
- (g)** Draft a By-Law No.1 (effective Church constitution). This is usually done after Letters Patent/Articles of Incorporation are issued, although they can be prepared beforehand.
- (h)** Have 'draft' of By-Law No.1 approved by FEB District Office prior to taking it to Members for acceptance (optional).

5. What To Do Following Incorporation:

(a) Congregation votes to appoint board for the Church corporation (this can be the same board as presently in place for the unincorporated church)

(b) File Reports

(Provincial Corporation) File Form 1 – Initial Report on incorporation with Ministry of Government Services within sixty (60) days of incorporating.

(Federal Corporation) File a copy of the by-laws with Corporations Canada and the CRA Charities Directorate. Also, file an initial report by letter to the Ontario Public Guardian and Trustees Office with information as required:

- Copy of Letters Patent and Operating By-Law No. 1
- list of Directors and Officers

- date the unincorporated Church will cease to exist and all the assets (if any) will be transferred to the incorporated Church (this step can be delayed indefinitely until all matters relating to the unincorporated church have been dealt with).

NOTE: This step is usually done when you are ready to dissolve the unincorporated Church; see Step 5(k) of this `Path Forward`)

(c) Prepare initial organizational by-laws and resolutions

(d) Transfer use of charitable tax number through the CRA Charities Directorate from the unincorporated church to the church corporation (takes a few weeks). Applying for a new charitable tax registration for church plants without present authorization to issue charitable donation receipts can take from four (4) to eight (8) months.

(e) Set up bank account(s) for church corporation (bank will require copy of Letters Patent, Borrowing By-law, and authorizing banking resolutions)

(f) Transfer assets (real property, chattels, mortgages funds), if desired, to Church corporation by registering new title documents in corporations name (services of a lawyer are required)

- approval of Members to be obtained.

(g) Advise creditors and any other contracted parties of operation as a Church corporation (assumption agreements for contracts to be transferred to the corporation may need to be prepared)

(h) File Church name change application for the incorporated Church (if incorporated Church name is different from the unincorporated Church name) with the FEB District Office

(i) Transfer unincorporated Church Membership to corporation

- Church board passes a corporate resolution deeming all Members of the unincorporated Church to be Members of the incorporated church for a period of one (1) year;

- Within the one (1) year, Church Members sign a new application to be Members of the incorporated Church. During this time it should be emphasized that only by becoming formal Members of the incorporated Church will they gain the advantage of corporate protection for Members assets that the unincorporated

Church could not provide, and they will also be able to vote, stand for election to the Church board and otherwise participate with the privileges of Membership in the newly incorporated Church;

- If any pre-existing Member **refuses** to apply to become a Member of the incorporated Church, the Church board could then pass a resolution authorizing an alternate form of gaining corporate membership such as having a Deacon/Elder interview the individual and sign a statement attesting to the persons understanding of the new incorporated Church constitution (By-Law No.1) and their agreement to be a Member of the Church corporation under its authority [this is needed to avoid litigation should the need to discipline -revoke, restrict or suspend membership- the Member ever arise].

(k) Dissolve unincorporated church

- hold a Members meeting to advise Members of the unincorporated Church that the incorporation process has been completed and that the Church operations will be transferred to the incorporated Church as of an 'effective date' to be agreed upon at this meeting (usually the date of the next year end, or at another convenient date within the following few months);
- at this meeting obtain Member approval for the dissolution of the unincorporated church as of the 'effective date', subject to the trustees of the unincorporated Church having a residual authority to execute whatever documents may be subsequently needed to satisfy any outstanding obligations of the unincorporated Church body.

NOTE: Proper corporate resolutions and filings are required to accomplish some of the steps set out.

If you have any questions, please contact:

Sheldon L. Wood B.A., LL.B.
2177 North Routledge Park
London, ON N6G 0J8

Email: Wood_Law @Live.com
Phone: 226-236-1388 (cell)