

Notes: Incorporation of Not-For Profit & Charitable Corporations

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Background Information

- 1 Being a “not-for-profit” (“NFP”) is not the same as having a “charity” status – “not-for-profit” status is a matter of provincial corporate law - being a “charity” is a matter of federal income tax law – you can be a not-for-profit without being a charity (e.g. a sports club)
- 2 Requirements are less onerous if not going for full charitable status [*indicated to some extent by notes in square brackets*]

Benefits of incorporating not-for-profit

- 3 Benefits of incorporating not-for-profit:
 - (a) Separate legal entity
 - (b) Limited liability for members
 - (c) Indefinite duration of existence
 - (d) Coming or going or members does not affect corporation
 - (e) Power to contract and own property in its own name
 - (f) Ability to engage volunteer support
 - (g) Opportunity for government and other not-for-profit or charitable funding
 - (h) Not-for-profits can still employ people, purchase and lease assets, and do other business-like activities as long as it is not doing so with a view to profit its members and any surplus cash flow is put to charitable or altruistic purposes

Benefits of having charitable status

- 4 Additional benefits of having charitable status:
 - (a) Pay no income tax on surplus revenues [*not true unless have charity status*]
 - (b) Able to give out charitable receipt [*not true unless have charity status*]
- 5 Potential disadvantages:
 - (a) Some cost to set up
 - (b) Some cost to maintain
 - (c) Some accountability to government offices [*less if not a charity*]
 - (d) Directors very accountable for administration and management [*less not a charity*]

Corporations Act Issues – Creating a Not-For Profit

- 6 Incorporated under Part III of the *Corporations Act*, not the *Business Corporations Act*
- 7 Done by way of Letters Patent
- 8 Must make sure name is available and does not conflict with anyone else – can not suggest government connection – are other limitations
- 9 Name should indicate a charitable purpose [*not necessary if not a charity*]
- 10 Must have a “head office”
- 11 Original incorporators (must be at least three) become the first members
- 12 Objects must be set out in Letters Patent– statement of objects will limit what the Corporation can do – objects must be carefully drafted – must be concise and clear enough for certainty but broad enough for flexibility
- 13 Objects must be exclusively and wholly charitable in nature (relief of poverty, education, advancement of religion, some other purpose beneficial to the community) and be of a public benefit (i.e. sufficiently large segment of community that not of a private benefit only) [*usually not necessary if NFP but not a charity*]
- 14 There are pre-drafted objects which have been pre-approved by the Public Guardian & Trustee – see website noted below – if those clauses are used no pre-approval of the Public Guardian & Trustee is required – if custom clauses are used, pre-approval of the Public Guardian & Trustee is required [*usually not necessary if NFP but not a charity*]
- 15 Letters Patent must comply with certain special provisions and deal with some important issues other than the objects, including:
 - (a) Corporation will not be carried on for the purpose of gain for its members and no profits will be distributed to its members
 - (b) Corporation will be subject to *Charities Accounting Act* and *Charitable Gifts Act* [*usually not necessary if NFP but not a charity*]
 - (c) Minister may authorize inquiry under those Acts and may cancel Letters Patent if finds violations [*usually not necessary if NFP but not a charity*]
 - (d) Directors shall serve without remuneration and without sharing any profits
 - (e) Limited borrowing power of directors must be addressed
 - (f) Confirm investments will be held pursuant to *Trustee Act* [*usually not necessary if NFP but not a charity*]

- (g) Confirm that on wind up of corporation, any remaining assets after paying all debts are applied for a charitable purpose and are not returned to the members
 - (h) Often set out broad and detailed powers from standard and recommended clauses
 - (i) Membership qualification should be addressed in Letters Patent – can be a difficult issue – membership issues must be carefully drafted – can have different classes of members with different voting rights, dues and similar issues of some importance – “control” is important
 - (j) Can be other technical issues to address – e.g. if you want the right to hold meetings outside of Ontario, you must say so in the Letters Patent
- 16 Letters Patent must be approved by the Public Guardian and Trustee before they go to Companies Branch, unless the pre-approved objects are used – can take many weeks
- 17 After approved by Public Guardian and Trustee, Letters Patent are sent to the Ministry for approval – not automatically filed like a business corporation – can take 6 to 8 weeks
- 18 After Letters Patent filed you organize the corporation with its initial members, board, officers, etc. and do initial by-laws – however, best if by-laws drafted at same time as Letters Patent to ensure that all fits together properly
- 19 Also, file an Initial Return with Companies Branch of all officers and directors

Charity Issues

- 20 Must notify Public Guardian and Trustee under *Charities Accounting Act* within one month after incorporation [*usually not necessary if NFP but not a charity*]
- 21 Can then apply to CCRA and *Income Tax Act* for charitable status [*does not apply if NFP but not a charity*]

Some Practical Suggestions

- 22 Allow lots of time
- 23 Decide if you need charity status under the *Income Tax Act* to do what you want to do – if not necessary, do not bother with the extra time, expense or operating limitations
- 24 Get Letters Patent and By-Laws drafted at the same time so everything fits together
- 25 Use pre-approved objects where possible – draft objects very carefully
- 26 Draft membership classes very carefully – consider potential political disputes and end-runs – do not make it too broad and unwieldy – allow for sustainability in the long run
- 27 Draft directorship provisions very carefully – same concerns

- 28 Have an experienced lawyer and accountant involved in the process
- 29 Typical professional fees of lawyer and accountant combined – anywhere from a \$3,500 to \$7,500 – plus filing fees, disbursements and GST
- 30 These notes are for setting up the NFP/charity only – running it on a day-to-day basis, annual meetings, annual reporting, etc. are not covered in these notes –good professional advisors and the time to do it in are essential

Useful Websites:

- 31 E-Version of Not-For-Profit Incorporator’s Handbook - <http://www.attorneygeneral.jus.gov.on.ca/english/family/pgt/nfpinc/default.asp>
- 32 Companies Branch Application Form with instructions - <http://www.forms.ssb.gov.on.ca/mbs/ssb/forms/ssbforms.nsf/FormDetail?openform&ENV=WWE&NO=007-07109>
- 33 Corporate Maintenance Section from Not-For-Profit Incorporator’s Handbook – <http://www.attorneygeneral.jus.gov.on.ca/english/family/pgt/nfpinc/corpmaintain.asp>
- 34 Office of the Public Guardian and Trustee – Ontario - <http://www.attorneygeneral.jus.gov.on.ca/english/family/pgt/>
- 35 Incorporating a Charity - Public Guardian and Trustee - Charities Bulletin #2 <http://www.attorneygeneral.jus.gov.on.ca/english/family/pgt/charbullet/bullet2.asp>
- 36 Directors’ Duties Etc. – Public Guardian and Trustee – Charities Bulletin #3 - <http://www.attorneygeneral.jus.gov.on.ca/english/family/pgt/charbullet/bullet3.asp>
- 37 CCRA Charities Page - <http://www.ccra-adrc.gc.ca/tax/charities/menu-e.html>
- 38 CCRA – Becoming a Registered Charity – http://www.ccra-adrc.gc.ca/tax/charities/publications_list-e.html#Becoming%20a%20Registered%20Charity
- 39 CCRA – Keeping Your Registered Status - <http://www.ccra-adrc.gc.ca/tax/charities/keeping-e.html>
- 40 *Corporations Act* – only Part III is relevant - http://www.e-laws.gov.on.ca/DBLaws/Statutes/English/90c38_e.htm#P1688_180598
- 41 *Charities Accounting Act* - http://www.e-laws.gov.on.ca/DBLaws/Statutes/English/90c10_e.htm
- 42 *Charitable Gifts Act* - http://www.e-laws.gov.on.ca/DBLaws/Statutes/English/90c08_e.htm