

NOT-FOR-PROFIT ORGANIZATIONS

A LEGAL GUIDE

The purpose of this booklet is to provide information to community groups and organizations, which may be considering incorporating as “Not-For-Profit”, organizations. It outlines some of the reasons a group may find it desirable to incorporate. It explains the responsibilities and obligations that accompany the act of incorporation. It also discusses income tax and HST. We gratefully acknowledge the assistance of the Canada Custom and Revenue Agency in providing the information on income tax and the HST.

This booklet is not intended to contain a complete statement of the law in the area and changes in the law may occur from time to time. This booklet should only be used as an information resource. Anyone needing specific advice on his/her own legal position should consult a lawyer.

“NOT-FOR-PROFIT” ORGANIZATIONS - AN OVERVIEW

What is a “Not-For-Profit” organization?

A “Not-for-Profit” organization is a group, which is organized for the purpose of social, religious, charitable, educational, athletic, literary, political or other such activities.

Although there are many different kinds of “Not-For-Profit” organizations they all have one thing in common. The people involved in the “Not-For-Profit” organization cannot use it to make personal financial gain.

What are some examples of “Not-For-Profit” organizations?

They include, for example, service clubs, sports associations, theatre, dance and music groups, activity clubs, religious fellowships, educational and literary societies and community services associations.

Does “Not-For-Profit” mean the organization can’t make money?

No. “Not-For-Profit” organizations can, and do engage in many activities that result in income or profit. However, the profits that these organizations make must be held in trust for the organization and can only be used in carrying out its goals and objectives.

Can “Not-For-Profit” organizations incorporate?

Yes. Although ‘incorporation’ is often associated with a formal business enterprise, “Not-For-Profit” organizations also can incorporate.

Incorporation simply means that a group of people with a common goal has decided to formalize their relationship according to the requirements set out in the law. The end result is a company/corporation, which is viewed as a separate legal entity. In New Brunswick, the **Business Corporations Act** governs general profit oriented corporations, while “Not-For-Profit” organizations normally incorporate under the **Companies Act**.

Do “Not-for-Profit” organizations have to incorporate?

No. “Not-For-Profit” organizations can be formal (incorporated) or informal (unincorporated).

What should my group consider if it is thinking about incorporating?

You may want to consider some of the following benefits when you are deciding about incorporating:

(1) Distinct Legal Entity

An incorporated organization has a separate legal personality distinct from its members. Generally it can sue and be sued in its own capacity. It provides a formal legal status for those associated with it.

(2) Limited Liability

Members of an incorporated organization are not normally personally liable for its debts and obligations. However, directors may incur personal liability in certain circumstances.

(3) Perpetual Existence

An incorporated organization may go on forever. If the members change, the incorporated body continues to exist and will do so until the organization is dissolved according to the requirements set out in the *Companies Act*.

(4) Ownership of Property

An incorporated organization can own property in its own name. If the members of the organization change, the legal title to the property stays with the incorporated body.

(5) Government Aid

Some government agencies have programs to assist “**Not-For-Profit**” organizations. They often require, however, that the organizations they fund be incorporated.

Why don't all organizations incorporate?

An incorporated “Not-For-Profit” organization has a duty to operate according to rules set out in the Companies Act. This includes keeping records, having annual meetings and so on. Some “Not-For-Profits” may decide they do not want/need to be incorporated.

What are the obligations of incorporated organizations?

The obligations and duties of an incorporated body include:

(a) keep a book known as the “**Company Registry**” which lists all the members of the organization;

(b) file appropriate notice with the Director, Corporate Affairs Branch, Service New Brunswick, of any change in the:

(i) directors; or the

(ii) address of the head office;

(c) hold a general meeting of members at least once a year, where the directors must present to the members a full statement of the affairs and financial position of the organization. This process is governed by the *Companies Act*. The *Companies Act* allows the organization

to establish the time and place of the meeting in its own by-laws.

(d) file an annual return with the Corporate Affairs Branch, Service New Brunswick. Should the organization fail to file its annual return its corporate status may be lost.

What rights accompany incorporation?

The **Companies Act** gives incorporated organizations the legal right to do most of the things that a natural person can do. There are, however, some restrictions, so you should find out the particular details of those rights. Your lawyer can explain your organization's corporate status to you.

Who is responsible for the day to day operation of the incorporated "Not-For-Profit" organization?

The **Companies Act** states that a board of not less than three (3) directors must manage the affairs of the organization. The directors are the mind and will of the organization. They have the right to make by-laws or rules about its operation. These by-laws are normally approved by the members. By-laws should not conflict with anything in the **Companies Act** and may deal with the following:

- membership rules;
- corporate seal;
- location of principal or head office;
- functions, duties, appointment and removal of officers;
- time, place, quorum, and procedures for meetings;
- record keeping arrangements;
- voting procedures;
- name of bank;
- borrowing powers;
- audit of financial records, if applicable;
- fiscal year-end;
- confidentiality clause;
- amendment of by-laws;

Should my group incorporate?

Your group will have to consider the advantages and disadvantages, look at its goals and decide what best suits its purpose. You may want to talk to other "Not-For Profit" organizations and ask them about their reasons for incorporating.

INCORPORATING A "NOT-FOR-PROFIT"

How does a "Not-For-Profit" organization incorporate?

The procedure to incorporate a not-for-profit company under the **Companies Act** is set out in the information kit "Incorporation of a Not-for-Profit Company". This kit is available from the Corporate Affairs Branch of Service New Brunswick.

Corporate Affairs
Service New Brunswick
432 Queen Street
PO Box 1998
Fredericton, NB
E3B 5G4

Tel. (506) 453-2703

Fax (506) 453-2613

www.snb.ca

The kit is also available at Service New Brunswick's Internet site:

<http://www.web11.snb.ca/snb7001/b/1000/CSS-FOL-SNB-45-0007B.pdf> (under Business, click complete listing, then under the heading Business Registration/Corporate Affairs, click on Business Registration - Forms & Information, then click on Forms and go to 'Incorporation of a Not-for-Profit Company')

To incorporate, you need at least three people who are nineteen years of age or older. These people are called the applicants and they will become the provisional directors of the organization. They must file the following documents with the Corporate Affairs Branch of Service New Brunswick:

- **Application for Incorporation** (in duplicate originals)
- **Name Search Report**

What information must be included in the Application for Incorporation?

The **Application for Incorporation**, which is set out in Form 36 of the **Companies Act Regulations**, must provide the following information:

(i) Name of the Organization

Before you prepare an application and complete the documents for incorporation, the proposed name of your organization should be approved by the Corporate Affairs Branch of Service New Brunswick. It must not be objectionable on public policy grounds and it cannot be the same as or similar to the name of any other incorporated or unincorporated business or organization.

The information kit entitled "Selecting A Proposed Name" is available from Corporate Affairs. It sets out the steps, which should be followed in the selection of the proposed name and the approval of it by Corporate Affairs.

The name of a company must include either the word 'Incorporated' or 'Limited' or the abbreviation 'Inc.' or 'Ltd.'. These legal identifiers are usually found at the end of the name.

(ii) Purposes or Objectives

You must state what the organization intends to do. The purposes and objectives must fall within the scope of activities permitted by the **Companies Act** (see sections 16 and 18 of the Act).

(iii) Head Office

You must state the place within New Brunswick that will be the legal home of the organization. Usually this is where all official correspondence is sent, where the corporate seal is kept, and where the books of the organization are available for inspection.

(iv) Capital Stock and Acquisition of Property

Most "**Not-For-Profits**" are incorporated without capital stock and they do not issue any share certificates. A non-share company may acquire real and personal property of an unlimited cost value, unless otherwise specified in the letters patent.

(v) Not-For-Profit Statement

You must state that the organization shall not carry on any business or trade for the profit of its members. Upon dissolving (ending) the corporation, surplus funds are normally given to other non-profit organizations. You should therefore state your particular distribution plans.

(vi) Powers Clause

You must briefly list the powers that the organization is to have. If the organization does something that is outside these powers, that action may be declared invalid.

(vii) Provisional Directors

You must include on the application, the names, addresses and occupations of the persons who are the applicants. There must not be less than three names listed, however, you may include up to 15 names. These persons will be the first directors of the organization. They continue as the directors until replaced.

What is a Name Search Report?

This report is a computerized print out indicating potentially identical or similar names to the proposed name of your company. You should refer to the “**Selecting a Proposed Name**” information kit.

What is the next step?

The Application must be sent in duplicate originals to the Director, Corporate Affairs Branch, Service New Brunswick. Also, the name search report must accompany the Application.

Are there any costs to file an application?

Yes. You will have to pay a filing fee. The exact amount is determined by a sliding scale based on the cost value of the real and personal property that you have set out in your application.

When does the incorporation become effective?

When your application is accepted, you will receive **Letters Patent**. This is a document certifying that your organization is incorporated. Notice of **Letters Patent** must be published in the Royal Gazette. The publishing costs must be paid by the applicants.

Do I need a lawyer to incorporate?

Although a lawyer is not required, most organizations seek professional legal advice. A lawyer will help your group to explore options and decide if incorporation is best for it. A lawyer has the expertise to handle the paperwork involved, to check the organization's choice of name and so on.

Where can I get more information about incorporation?

You can get information about the incorporation process from the Corporate Affairs Branch of Service New Brunswick.

Corporate Affairs
Service New Brunswick
432 Queen Street
PO Box 1998

Fredericton, NB
E3B 5G4

Tel. (506) 453-2703
Fax (506) 453-2613
www.snb.ca

As well, if you wish to obtain a copy of the **Companies Act** and **Regulations**, you can obtain a copy for a small fee from the Queens Printer, Room 117, Centennial Building, King Street, P.O. Box 6000, Fredericton, New Brunswick, E3B 5H1 (453-2520). As well, one may access the **Acts** and **Regulations** at <http://www.gnb.ca/justice/asrlste.htm>

“NOT-FOR PROFIT” ORGANIZATIONS AND TAXES

Do “Not-For-Profits” have to pay income tax?

“**Not-For-Profit**” organizations are distinguished by the Canada Custom and Revenue Agency as **non-profit organizations** and **charities**. They are two separate categories.

Organizations which are **registered charities** are exempt from income tax. An organization which is not considered to be a charity still may qualify for tax-exempt status under the **Income Tax Act** if it qualifies as a **non-profit organization**.

Some non-profit organizations which are exempt from paying income tax still may be subject to tax on property income and on certain taxable capital gains. See the Canada Custom and Revenue Agency’s Interpretation Bulletin IT-83R3 called “**Non-Profit Organizations - Taxation of Income from Property**”.

How does a non-profit organization know if it has tax-exempt status under the Income Tax Act?

The Canada Custom and Revenue Agency can advise you of your organization’s tax status by determining whether your organization is organized and operated solely for social welfare, civic improvement, pleasure, recreation or for any other purpose except profit. No part of the income of the organization, whether current or accumulated, can be payable to, or made available for the personal benefit of any of its members, shareholders, etc. See the Canada Custom and Revenue Agency’s Interpretation Bulletins IT-496 and IT-496SR called “**Non-Profit Organizations**”.

The Canada Custom and Revenue Agency cannot determine your status in advance but only after they review the objects and activities of your organization for that particular taxation year. They must check to see that your organization operated in accordance with the non-profit purposes for which it was created. They will look at things such as your organization’s governing documents, statement of activities, name(s) in which property or assets are registered, names of directing officers and a financial statement for the organization’s fiscal period. For further information or for clarification contact your local Tax Services Office (TSO). A list of TSOs is available on the Internet at www.ccr-aadrc.gc.ca/contact/tso/NB-e.html. You can also call toll-free 1-800-959-5525.

Does a non-profit organization with an income tax exemption have to file a tax return?

A non-profit organization which is income tax-exempt may be required to file an annual income tax return and an annual information return with the Canada Custom and Revenue Agency. You should contact your local Tax Services Office or call 1-800-959-5525 to find out about the filing requirements for your organization.

Regardless of income tax exemptions, “**Not-for-Profits**” must meet other requirements of the

Income Tax Act. For example, they must withhold and remit the amounts required by law where wages and salaries are paid and they must prepare required T4 and other forms.

How does an organization qualify as a charity under the *Income Tax Act*?

To qualify as a charity, an organization must be created for charitable purposes and operate by devoting its resources to charitable activities. It must also make sure that no part of its income goes to the personal benefit of any of its members. For more information see the Canada Custom and Revenue Agency's brochure entitled "**Registering a Charity for Income Tax Purposes**" (Form T4063). Other related brochures are available at the Canada Custom and Revenue Agency's web site www.cca-adrc.gc.ca/charities or at your nearest Tax Services Office.

To be registered as a charity, an organization must devote its activities to one or more of the following:

- relief of poverty;
- advancement of religion;
- advancement of education; and
- certain other purposes that benefit the community in the way the courts have determined to be charitable.

As well, an organization cannot operate for profit or for the private interest of its members.

How will my organization know if its objects and activities are considered charitable?

Organizations must apply to the Canada Custom and Revenue Agency for "registered" charity status. You will be required to submit an Application for Registration (Form T2050) and supporting documentation. You can get the necessary forms, the brochure Form T4063 which outlines the major factors the Canada Custom and Revenue Agency considers in registering an organization, or ask for more information on a particular question by contacting the Canada Custom and Revenue Agency:

Charities Directorate
Canada Custom and Revenue Agency
Ottawa, Ontario
K1A 0L5
Telephone: 1-800-267-2384

Most information concerning charities can be found at the "Charities" section of the Canada Customs and Revenue Agency's web site www.cca-adrc.gc.ca/charities. Your Tax Services Office also has the required documents on hand.

Can all "Not-For-Profit" organizations issue official donation receipts?

No. Only those "**Not-For-Profit**" organizations registered with the Canada Custom and Revenue Agency as charities can issue official donation receipts when they receive contributions. (Note: Every registered charity must, within 6 months after the end of its fiscal year, file an annual information return, form T3010, with the Canada Custom and Revenue Agency.)

Do "Not for Profit" organizations have to pay the Harmonized Sales Tax (HST)? Do "Not-for-Profit" organizations have to charge and remit the HST?

Like everyone else, "**Not-For-Profit**" organizations have to pay the HST when they make purchases from suppliers who are themselves required to charge the tax. However, in some circumstances, "**Not-For-Profit**" organizations are able to claim a refund of this tax. Also, "**Not-**

For-Profit organizations are required to charge and remit HST on the property or services that they sell *if* they choose or are required to register for the tax. Please contact the Canada Custom and Revenue Agency for information about choosing, or being required, to register for the HST. For information in English, please call 1-800-959-5525. For information in French, you may call 1-800-959-7775.

How would a Not-For-Profit group know what course of action is best for it?

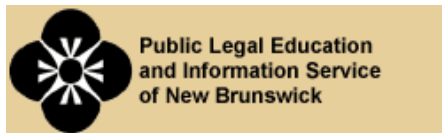
In all circumstances you should make yourself aware of the benefits, obligations and rights that arise from incorporation in the context of your organization. Find out what is required by the Canada Custom and Revenue Agency. Incorporation under the **Companies Act** may not ensure, for example, that your organization's objectives fall within the Canada Custom and Revenue Agency's guidelines for charities or non-profit organizations. Look into any requirements for tax purposes before you incorporate. Your local Tax Services Office can tell you about any income tax implications. It may be wise to have a lawyer explain the various rules for tax exemptions to your organization.

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