

NOT-FOR-PROFIT INCORPORATION AND THE ARTS

Limiting Liability and Other Benefits of
Incorporation for Volunteer-Run Organizations

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“Isn’t incorporation for really big organizations?”

- ◉ Answer: Incorporation is for anyone who wants the benefits that incorporation may have to offer!

So What are the Potential Benefits?

- ◉ Financial
- ◉ Administrative
- ◉ Limiting Liability

Reason to Incorporate #1

MONEY.

\$

- Not-for-profit incorporation, and compliance with the new *Not-For-Profit Corporations Act* is a requirement of many funders.

Question....

- WHY do funders want us to be incorporated?



Answer.

An **un**incorporated, volunteer run group is just a number of individuals who come together for a common purpose.

It does **not** have a **unique legal identity**, and is not, in and of itself, **accountable** to anyone (-although its members may be).

Legal identity.

- ◉ A corporation has its own legal identity separate from its individual members.
- ◉ Its existence is governed by rules set out in legislation (*i.e.* the *Ontario Business Corporations Act*, and the new *Not-for-Profit Corporations Act*) as well as in the corporation's own constitution and by-laws.

Accountability.



- All funders have qualifying eligibility criteria, which vary from program to program. What all funders share in common is the need to know how granted funding will be used and how it will be managed

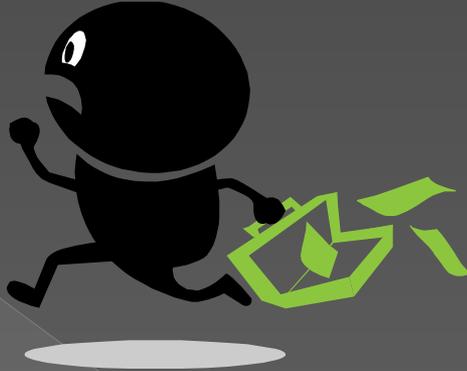
Not-for-Profit Corporations Act

- ◉ Accountability is one of the purposes of the new *Not-For-Profit Incorporations Act*.
 - > Statutory requirement that annual financial statements be prepared. (May be unaudited if annual budget less than <\$100,000.)

Not-for-Profit Corporations Act

- > Funders have greater ability to obtain information about incorporated grant-seekers
- > This allows the funder to better ascertain whether an organization meets their eligibility criteria.





- The organization as a whole – and not just the individual board members - is legally liable to account for their actions and any grant moneys received.

Which leads us to ...

Reason to Incorporate #2

NO ONE'S AROUND
FOREVER.

(EXCEPT

..... A CORPORATION CAN BE.)

Continuity.

People come and go from organizations.



Continuity.

- ◉ Children's organizations are particularly transient....
 - > Tend to be largely parent-run and parent-organized.
 - > Children "outgrow" the age group or audience that an organization may target.
 - > Parents spread too thin with other activities.
 - > Children lose interest

Continuity.

- ◉ All volunteer led organizations face continuity challenges when key players move on or retire.
 - > Record keeping and locations
 - > Reliance on people's memories, private email addresses, contact lists, etc.
 - > Ways things are done historically
 - > Policies
 - > Potential for inconsistency for membership or the public who deal with the organization

Without Continuity.

- This makes it difficult to establish long-standing, reputable organizations.
- New boards/organizers waste time reinventing the wheel.



How Corporations Run Differently.

- ◉ The organization is managed by a board of directors (generally volunteers) who oversee governance.
- ◉ governance relates to consistent management, cohesive policies, guidance, processes and decision-rights for a given area of responsibility



- Officers (*i.e.* President, Secretary, Treasurer) are appointed – usually from the existing directors – who have specific roles in the organization.
- Changes to policies and procedures are proposed by motion and passed by resolution of the board.
- As the board membership changes, the policies and procedures stay in place to ensure consistency in how the organization is run.

Good News!

- Other volunteers and/or paid employees continue to be involved with day-to-day administration, overseeing specific tasks, providing assistance with events, etc.



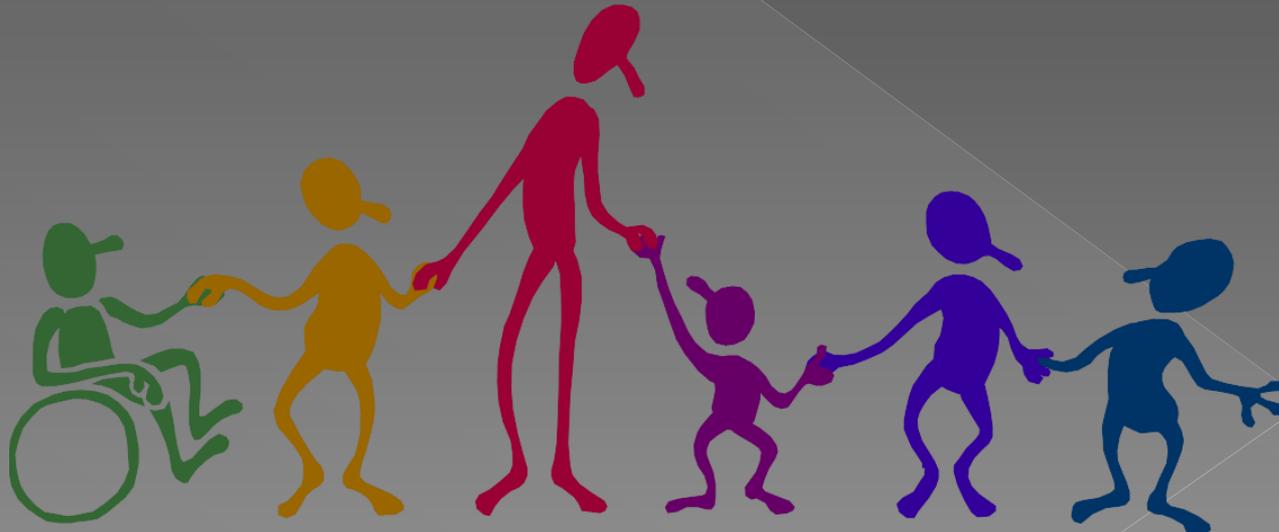
Question...

“I thought we were already a unique legal identity – our organization has a name, a logo, a board of directors – we’re simply not incorporated.

So if we’re not a distinct legal entity – what are we now?”

Answer:

A group of individual people associated by a common interest.

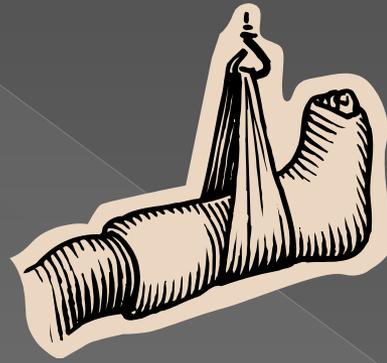


What does this mean for an unincorporated group?

“Things are going fine – we already have secure funding and we already have an executive structure with defined guidelines and policies for how our organization works.

Why can't we continue as we are?”

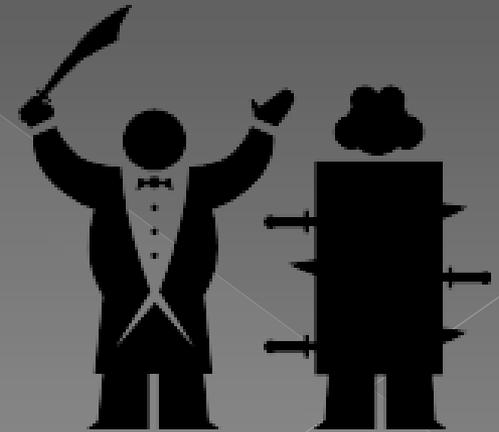
The Bad News.

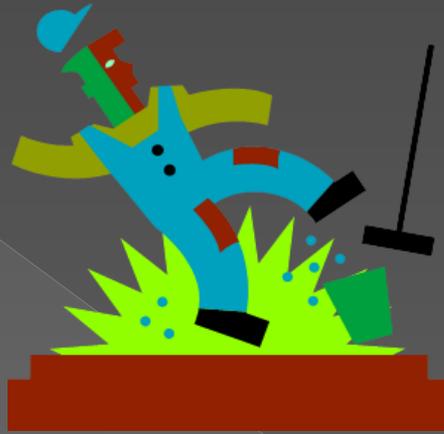


“Break a Leg” isn’t just a cute expression....

Accidents Happen...

- On Stage....





... or off.



And there are additional risks – particularly where youth and other vulnerable persons are involved.

We're all friends until things go wrong.

- ◉ When accidents happen and lawyers get involved, things can get nasty quickly. Law suits may be filed for damages.
- ◉ Defending law suits is expensive and time consuming – even if the court ultimately determines there is no merit to the plaintiff's claim.

Question...

- If your organization is unincorporated, who gets sued?
- (Hint: Not the organization – it doesn't have a distinct legal identity.)

Answer.

◎ EVERYONE GETS SUED!

- Anyone involved with the organization or running of a specific event may find themselves being named as a defendant.



- Individuals may find themselves personally liable for damages to the injured or aggrieved party.

- Personal assets may be seized to satisfy judgment.

“BUT I DON'T WANT TO BE SUED!”

- ◉ So what can you do to avoid personal liability?

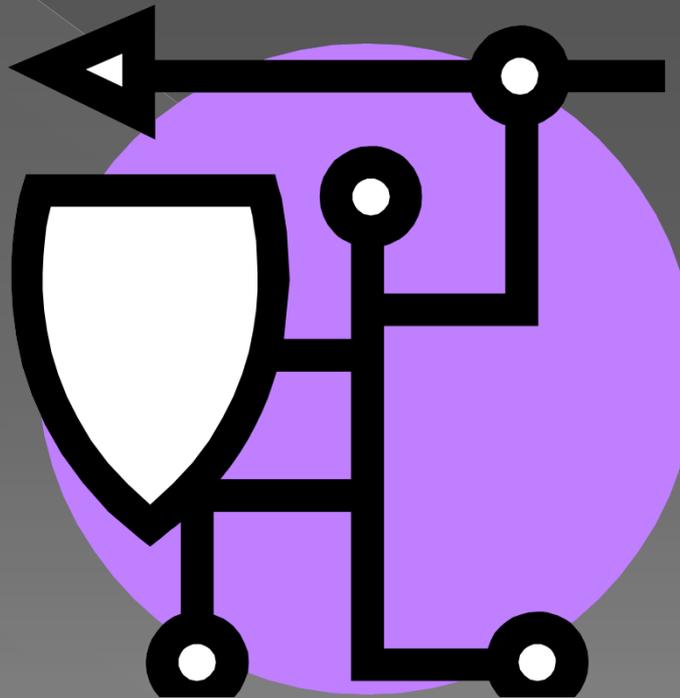
Reason to Incorporate #3

LIMITING LIABILITY

Limiting liability.

- You'll recall, a corporation is a distinct legal entity.
- Is considered an "individual" under Canadian law – has most of the rights and obligations that people have, including the ability to enter into legal contracts, to sue or be sued.

The “Corporate Shield”



Limiting liability.

- Once incorporated, the officers and directors of the organization may limit personal liability.
- This means that it is the Corporation itself – not the individual directors or officers – who would generally be liable to third parties for corporation-related activities.

Limiting liability.

- The Corporation is responsible for the actions of its officers, directors, volunteers and employees, and particularly in the case of negligence.
- If only the Corporation is found liable, then only the Corporation's assets are susceptible to satisfy judgment.

Limiting Liability.

- Note – Limited liability protection is only extended to individuals acting within the boundaries of their authority or job description within the organization – otherwise they may still be found personally liable.
- In certain circumstance (*i.e.* if someone is using a Corporation intentionally to hide a personal motive or agenda, the court may “pierce the Corporate veil” and find the individual liable in any event.)

Limiting Liability.

- Note: Incorporation will not protect someone from intentional wrongdoing or criminal acts.



Question ...

- “Isn’t incorporating difficult and expensive?”



Answer.

- On most not-for-profit organizations' budgets any expenditure may seem like a lot.
- The costs however are limited, and should be considered by each organization on a cost-benefit analysis.

Costs of Incorporation

- Cost to incorporate:

- > Legal fees = *approx. \$ 750
- > Registration fee = \$ 155
- > Name search fee = \$ 30

One time cost = less than \$1000.

* Note – you may incorporate without the assistance of a lawyer; however this should only be attempted with great care, as there are other steps such as passing initial resolutions, adopting by-laws, and other administrative matters required to comply with the statutory requirements for any corporation.

Question

- “But aren’t there all kinds of ongoing costs? And what about the hassle of annual corporate ‘filings’?”

Answer.

- The Corporation must file an annual “*Corporations Information Act Annual Return*” (a document that provides information about current directors and officers of the Corporation) along with an annual tax return.
- Most not-for-profits only have to file a T2 *Short* return – a relatively simple, short-form tax return.

Answer.

- The Corporation must also prepare annual financial statements; however, this is just good basic housekeeping for any organization, incorporated or otherwise. They are usually prepared by the Treasurer.
- The annual financial statements only need to be audited by an accountant in certain circumstances – *i.e.* where the Corporation's annual budget is greater than \$100,000.

Resources

- The Ministry of Government Services and Ministry of the Attorney General both have websites with lots of great information available to the public about not-for-profit incorporation.
- *i.e.*
<http://www.attorneygeneral.jus.gov.on.ca/english/family/pgt/nfpinc/>

As an aside...

- ◉ There are other ways that directors/officers/organizers/volunteers of an organization may limit their personal or collective liability....

(Ideally in conjunction with incorporating).



Other ways to limit liability.



1. ESTABLISH RISK-REDUCING POLICIES AND PROCEDURES.

Examples.

- No single adult is ever alone with a child or children.
- Mandatory criminal background checks on people working with young people.
- Volunteers using vehicles must provide proof of insurance and license.

Examples.

- All structures will be built in accordance with the *Building Code*.
- All defective equipment/materials must be reported/de-commissioned immediately.

Of note...

Policies and procedures are only effective if they are understood, followed and enforced.

It is wise to ensure that policies and procedures are reviewed annually by the Board of Directors, as well as by all new members where applicable to the membership.

Other ways to limit liability.

2. BE CAREFUL!



Examples.

- Clean and maintain equipment and environment to prevent accidents.
- Ensure that volunteers and members are appropriately trained and supervised for the activity they're involved with.
- Have people on-site at events who are trained and current in first aid and WHMIS. Have first-aid kits and fire extinguishers handy.

Examples.

- Use signage to keep the public out of restricted-access areas.
- Use only reputable performers/acts.
- Have checks and balances on finances – *i.e.* two signatures on cheques; monthly board meetings with review of monthly financial statement.

Other ways to limit liability.



3. Obtain signed liability waivers from participants in activities (or their parents).

Other ways to limit liability.

Note- waivers are legal documents and should always be prepared or reviewed by a lawyer.

Also note- they rarely provide complete protection. Don't rely on waivers alone!

Other ways to limit liability.

4. Ensure you have adequate insurance coverage.



For the organization:

- Talk to your insurance broker – ensure he or she has a solid understanding of the activities the organization undertakes.
- Pay a little extra for increased coverage-
i.e. increase liability coverage from \$1M to \$5M. The price difference is generally small.

For the individual:

- ◉ Talk to your personal insurance broker to ensure that your personal liability coverage (in your home-owners or excess liability policy) covers your activities as a volunteer director/officer.
- ◉ Same goes for your vehicle insurance – are you covered for incidents that happen during your work as a volunteer?

NOT – FOR – PROFITS VS. REGISTERED CHARITIES

- Not-for-Profit corporations are not the same thing as Registered Charities.

- Registered charities are a sub-class of not-for-profit corporations.
- Registered Charities serve specific public purposes, and may issue tax-receipts.
- The record keeping and annual filing requirements for charities are much more onerous than for not-for-profits.

THE RECAP

Incorporating as a not-for-profit organization can have many benefits:

- ◉ Access to funding
- ◉ Perpetual existence and administrative structure
- ◉ Limited liability

The down sides are limited:

- ◉ Upfront Cost
- ◉ Annual filing requirements
- ◉ Record keeping

The benefits can make it worthwhile:

- Attracting new directors by establishing clear governance and limiting personal liability; and,
- Provides a mechanism to move forward and replace directors who can no longer contribute to the organization.

Still not sure if incorporating is a good idea for your organization?

Take the time to conduct research in order to make informed decisions. Consult with other incorporated not-for-profits, related arts service organizations, or a lawyer knowledgeable in the field of not-for-profit law.