

SOCIAL ENTERPRISE:
WHICH LEGAL STRUCTURE SHOULD I CHOOSE?
A LEGAL STRUCTURES GUIDE
FOR SOCIAL ENTREPRENEURS IN CANADA



REUTERS/ Chris Wattie



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PART I: FOREWORD

The Thomson Reuters Foundation is the corporate foundation of Thomson Reuters, the global news and information services company. As an independent charity, we work to promote independent media, access to the law, and responsible business practices. We use the combined power of journalism, the law and data intelligence to build global awareness of critical issues faced by humanity, inspire collective leadership, and help shape a prosperous world where no one is left behind.

TrustLaw is the pro bono global service of Thomson Reuters Foundation. We connect high-impact civil society organizations and social enterprises working to create social and environmental changes with free legal assistance from the best law firms and in-house legal teams. We facilitate pro bono legal support to a community of more than 6,500 organizations in over 180 countries.

One third of our TrustLaw membership consists of social enterprises. In addition to connecting them to legal support from legal teams across the world, we have spent more than a decade working globally with key actors from the social entrepreneurship and impact-investment sectors with the aim of developing guides, resources and innovative trainings that enable social entrepreneurs to achieve their goals.

Social entrepreneurship continues to flourish globally. Organizations are increasingly adopting a market-based approach to find sustainable solutions and drive positive social impact. Canada is no exception. As In 2022, the Global Entrepreneurship Monitor listed Canada as among the 15 best countries in the world to be an entrepreneur. The Canadian social enterprise ecosystem possesses tremendous talent, motivation, and ingenuity – among the very best in the world.

How a social enterprise is legally structured can greatly influence the types of capital available to it and how the organization can operate and grow. We hope that this guide contributes to assisting entrepreneurs in Canada in navigating any challenges they may face with respect to the legal structures available to them – unlocking their next idea to the benefit of the Canadian and global social economy.

We are immensely grateful to McInnes Cooper who led this work, to Tory's LLP who oversaw the case studies, and to Miller Thomson LLP and Thomson Reuters, who lent their time and expertise to complete this guide. We hope that the guide serves as an additional resource to further bolster Canada's social enterprise and social finance ecosystems, filling in a gap in existing regional resources.

Carolina Henriquez-Schmitz
Director, TrustLaw
The Thomson Reuters Foundation

PART II INTRODUCTION



FINANCIAL DISTRICT
Bay St &
Front St W

↑ Brookfield Place
Toronto-Dominion Centre
First Canadian Place



PART II: INTRODUCTION

1. SOCIAL ENTERPRISE IN THE CANADIAN CONTEXT

Canada is a diverse country, whether evaluated through the lens of geography, culture, language, or demographics.

The legal, economic, and cultural context that shapes social enterprise in Canada mirrors the diversity of the country at large. Four levels of government exercise both distinct and overlapping jurisdiction over select aspects of social enterprise, including the federal government, provincial/territorial governments, Indigenous governments/band councils, and municipal governments. Differences in socio-economic development trends and demographics inform the needs that social enterprises respond to, and the approaches relied on to address those needs. Differences in culture, language, and experience across Anglophone, Francophone, Indigenous and immigrant communities inform different perspectives, practices, and priorities regarding the role of business in addressing social issues.

This diversity means that it is neither possible nor desirable to recommend a single legal structure for “social enterprise” in Canada.

Definition of Social Enterprise

In this guide, we do not attempt to select a single, all-encompassing definition of social enterprise. Instead, our focus is on: (a) introducing the primary legal structures used for social enterprises, and social purpose business in Canada (terms we use interchangeably throughout this guide), and (b) helping social entrepreneurs to understand the attributes of those legal structures to gain a preliminary understanding of the legal structure best suited to their mission, vision, and values.

As context for this guide, we refer to the *EMES International Research Network* and adapted by the *International Comparative Social Enterprise Models (ICSEM) Project*.¹

The EMES definition possesses three elements and supporting indicia that speak to the economic, social, and participatory governance related aspects of social enterprise. best suited to their mission, vision, and values.

¹ J J McMurtry, F Brouard, P Elson, P Hall, D Lionais, & M Vieta, “Social Enterprise in Canada: Context, Models and Institutions” (2015), ICSEM Working Papers, No. 04, Liege: The International Comparative Social Enterprise Models (ICSEM) Project at 16 [McMurtry, Brouard, et al].

Definition of Social Enterprise

Economic & Entrepreneurial

- A continuous activity producing goods and/or selling services
- A significant level of economic risk
- A minimum amount of paid work

Social

- An explicit aim to benefit the community
- An initiative launched by a group of citizens or civil society organizations
- A limited profit distribution

Participatory Governance

- A high degree of autonomy
- A decision-making power not based on capital ownership
- A participatory nature, which involves various parties affected by the activity

Not every legal structure in this guide will satisfy all elements and indicia described above. However, they illustrate how a legal structure can be incorporated and organized to align with one legal definition of “social enterprise”.

Please note that the content above is taken directly from an *International Comparative Social Enterprise Models (ICSEM) Project* authored by J.J. McMurtry, F. Brouard, P.R. Elson, among others.²

² *Ibid* at 16.

2. INTRODUCTION TO THE PRIMARY LEGAL STRUCTURES USED FOR SOCIAL ENTERPRISE IN CANADA

A vibrant social economy has developed in the context of a diverse, dynamic Canadian society. Today, social enterprises operate across all facets of the economy and at all scales, from grassroots community organizations to multinational corporations. Social enterprises operate under a variety of legal structures that span the social enterprise spectrum and that are rooted in Federal, Provincial/ Territorial, and Indigenous legal and cultural frameworks.

Against this backdrop, it is impossible to pinpoint a single legal structure specific to “social enterprise”. However, accepting that social enterprise combines entrepreneurial or commercial activities with the pursuit of a social mission, we can identify several legal structures successfully leveraged by Canadian social entrepreneurs. The table below introduces the most common legal structures, each possessing unique attributes concerning their ability to accommodate and balance for-profit and social purposes as will be explored in this guide.

Category	Legal Structure	Description
For Profit Legal Structures	<i>Sole Proprietorship</i>	A sole proprietorship is one person carrying on business independently, with a view to profit. There is no separate legal entity for the business. The taxable income of the business becomes the taxable income of the sole proprietor. The rights, obligations and liabilities of the business become the rights, obligations, and liabilities of the sole proprietor.
	<i>General Partnership</i>	A general partnership is two or more persons carrying on business in common with a view to profit. Like a sole proprietorship, there is no separate legal entity for the business. The taxable income of the partnership becomes the taxable income of the partners. The rights, obligations, and liabilities of the partnership become the rights, obligations, and liabilities of the partners. Without a written partnership agreement, provincial laws usually imply certain rights, obligations, and liabilities on the individual partners in a general partnership.

Category	Legal Structure	Description
	<i>Business Corporation</i>	A business corporation (or company) is an artificial legal “person” created by provincial or federal legislation. Shareholders own the business corporation. Directors/officers manage it. Historically, a business corporation’s primary purpose is to generate profit for its shareholders by engaging in “business” activities. A contemporary shift away from “shareholder” capitalism to “stakeholder” capitalism business models have seen a growing number of business corporations blending commercial activities with social purpose and sustainability.
Hybrid Legal Structures	<i>Community Interest Company / Community Contribution Company</i>	A community interest company or community contribution company is a hybrid corporate structure combining elements of a for-profit business corporation, share capital, with elements of a non-profit structure, a social or “community” purpose and restrictions on asset/revenue use.
	<i>Co-operative Corporation</i>	A co-operative corporation is a membership corporation, owned and democratically controlled by its members, who enjoy exclusive rights to benefit from the co-operative’s goods and services and share in its profits. A co-operative corporation can be established on a for-profit basis or a non-profit basis and, depending on its designation, will possess similar attributes of either a business corporation or a not-for-profit corporation.

Category	Legal Structure	Description
Non-Profit Legal Structures	<i>Incorporated Non-Profit Organization</i>	<p>A non-profit organization is a tax category under the <i>Income Tax Act</i> (Canada) that can apply to a variety of legal structures, including (a) incorporated non-share capital corporations, such as federally incorporated not for profit corporations and provincially incorporated societies; and (b) unincorporated organizations, including unincorporated associations or community groups.</p> <p>To be a non-profit organization, an organization must be: (a) established for social welfare, civic improvement, pleasure, recreation, or any other non-profit purpose; (b) cannot be established for the pursuit of profit; (c) cannot be a registered charity; and (d) no part of its income can be available for the personal benefit of its owners/ members.</p>
	<i>Registered Charity</i>	<p>A registered charity is an organization that has been granted charitable status under the <i>Income Tax Act</i> (Canada) by the Canada Revenue Agency. Not-for-profit corporations, incorporated societies, unincorporated associations, and charitable trusts are permitted to apply for charitable status.</p> <p>To be a registered charity, an organization must: (a) apply to and be granted charitable status by the Canada Revenue Agency Charities Directorate; (b) be organized exclusively for purposes recognized as charitable, i.e. poverty relief, education, religion, and/or purposes beneficial to the community; and (c) comply with the comprehensive set of operational, financial, legal and tax related laws and policies applicable to registered charities.</p> <p>Upon registration, a registered charity is designated by the Canada Revenue Agency as a charitable organization, a public foundation, or a private foundation.</p>

3. OVERVIEW OF LEGAL STRUCTURING GUIDE

Given the variety of legal structures available, aspiring social entrepreneurs are faced with a significant decision at a relatively early stage: *choosing the best legal structure to employ in carrying out a particular social enterprise*. The decision is a significant one as a legal structure may enhance or inhibit an organization's ability to achieve its chosen mission. This guide seeks to equip aspiring social entrepreneurs/enterprises with the tools to identify the best legal structure for carrying out a social enterprise.

Following this introduction (Part II), the guide is organized under the following headings:

Part III: Exploring what structure is right for a particular social enterprise. This section reviews a series of preliminary considerations to be undertaken after an aspiring social entrepreneur decides to establish a social enterprise but before selecting a particular legal structure. The section engages with a series of questions designed to assist aspiring social enterprises to explore and better understand their organizational identity, including their fundamental mission and the business or programming activities they anticipate undertaking to fulfil that mission.³

Part IV: Introduction to the Canadian Legal System. This section provides a brief introduction to Canada's federalist legal system as it applies to social enterprises. This section is not intended to comprehensively summarize Canada's legal system. Rather, it provides a basic overview of Canada's federalist legal system as context for later discussions on corporate structuring.

Part V: Understanding the primary legal structures employed by social enterprise. This section reviews seven of the most commonly used organizational structures available for social enterprises in Canada and explores each structure with reference to the following criteria: (a) overview and organizational structure; (b) establishment costs and process; (c) organizational liabilities and directors' liabilities; (d) taxation; (e) governance and regulatory obligations; and (f) finance and fundraising.

Part VI: Case Studies. This concluding section provides five case studies of notable Canadian social enterprises, as nominated to TrustLaw by peer organizations in Canada.

3 Preliminary considerations are based on the following sources: Jim Fruchterman, "For Love or Lucre" (2011), *Stanford Social Innovation Review*, online: <https://ssir.org/articles/entry/for_love_or_lucre> [For Love or Lucre]; and, Susan M Manwaring & Andrew Valentine, "Social Enterprise in Canada: Structural Options" (2011), *MaRS White Paper Series*, online: <https://www.marsdd.com/wp-content/uploads/2012/04/MaRSReport-Social-Enterprise_2012.pdf> [Social Enterprise in Canada: Structural Options].

Readers may also be interested in reviewing Andrew Valentine, "20 Questions Directors of Not-for-Profit Organizations Should Ask About Social Enterprise" (copyright 2014), *Chartered Professional Accountants Canada*, online: <<https://www.cpacanada.ca/-/media/site/r2-docs/20-questions-directors-of-not-for-profit-organizations-should-ask-about-social-enterprise.pdf?la=en&hash=12B-7887696B9C37223D2395E0EF3A17C4A082829>> [20 Questions Directors of Not-for-Profit Organizations Should Ask About Social Enterprise].

A woman in traditional indigenous attire is performing a dance. She wears a black top with white fringe, a grey skirt with silver bells, and a headpiece with a feather. She holds a fan in her right hand. The background shows other people in traditional clothing seated at tables.

PART III:
UNDERSTANDING
WHAT LEGAL
STRUCTURE
IS APPROPRIATE
FOR A
PARTICULAR
SOCIAL
ENTERPRISE



PART III: UNDERSTANDING WHAT LEGAL STRUCTURE IS APPROPRIATE FOR A PARTICULAR SOCIAL ENTERPRISE

1. SECTION OVERVIEW

A legal structure is a tool for accomplishing a social enterprise's mission. To ensure that the legal structure serves the social enterprise's mission – not the other way around – aspiring social entrepreneurs/enterprises must achieve a level of clarity regarding the enterprise's mission, anticipated activities, and anticipated direction of evolution prior to selecting a legal form. A legal structure may enhance or inhibit an organization's ability to fulfil its mission, perform its activities, and evolve in a manner that is consistent with the organization's mission, vision, and values. This underscores the importance of social entrepreneurs achieving a degree of self-understanding before establishing a legal structure.

To ensure that social entrepreneurs considering incorporating a separate legal structure make an informed decision, social enterprise literature recommends that social enterprises engage with the following four questions:

- What is the motivation for starting the enterprise?
- What is the target market?
- How will capital be raised?
- How will the enterprise be controlled or managed?

The sections below lead aspiring social entrepreneurs/enterprises in exploring these questions.

2. MOTIVATION

This question asks what is the enterprise fundamentally intended to accomplish and how will success be defined? Is the enterprise's primary goal to generate private profit for its founders or investors through providing a good or service which also generates a social return? Is the enterprise's primary goal to generate a social return and cover its costs, rather than generate any private profit? Alternatively, is the goal of the enterprise to generate blended financial and social returns? In the latter scenario, what is the relative importance of each component of the return and how will each be measured and prioritized in the event of conflict between social and financial returns? Two primary reasons underscore the importance of clearly articulating an enterprise's motivations.

First, clearly articulating the enterprise's motivations will play a dominant role in influencing the choice of legal structure. If the social mission is determined to be fundamental, legal structures that protect social mission will be preferable. These categories of legal structures include not-for-profit corporations (with the tax designation of either a non-profit organization or a registered charity), community interest companies, and benefit corporations. If financial returns for founders and external investors are determined to be fundamental, legal structures which provide flexibility in raising capital, undertaking business activities, generating profits, and allocating returns, will be preferable. These categories of legal structures include business corporations, benefit corporations or community interest companies. If the enterprise's social mission is fundamentally connected to its profitability - for example a shared-value business which generates economic value in a manner that also produces social value - for-profit business structures will likely be preferable.⁴

Second, as the enterprise develops, advances, pivots, and evolves, returning to the organization's clearly articulated motivation will guide its evolution over time. Empirical research in social enterprise literature indicates that most new enterprises fail. Accordingly, those tasked with assisting an aspiring social enterprise in navigating from start-up to sustainability may return to the organization's mission when called on to answer questions such as how to change an enterprise's activities to improve financial sustainability, how to protect an enterprise's social mission, for how long the enterprise will be operated at a loss, among other questions. This ensures that the organization's mission, vision, and values remain coherent over time or, if it becomes necessary, the organization can pivot and deliberately re-orient and redefine its mission, vision and values.

3. TARGET MARKET

Understanding the target market will influence a social enterprise's choice of legal structure. Even if the enterprise is motivated primarily by social returns, employing market-oriented approaches to identify, understand, and ultimately reach the enterprise's target market will position the enterprise to better understand its operating environment and select the legal structure best suited to that environment.

Who is the customer? What need does the proposed enterprise seek to fill? Is that need economic, social, environmental, cultural, or some combination of those forms of value? What are the characteristics of the community and its members in which the social enterprise will operate? Is that community, or its members, familiar with social enterprise and the diverse structures employed by social enterprises? Are the ultimate customers of the social enterprise organization's goods or services the same people who will be paying for all or part of providing those goods or services? If the customer and the primary funder(s) are different, what will attract funders to contribute to the enterprise and what will attract customers to participate in the enterprise?

Who or what is the competition? Who are the other actors in the target market offering the same or similar good or service that the enterprise intends to provide? Is the primary competition for-profit, non-profit, or government? How do select legal forms work (or fail to work) for the enterprise's competitors? What actors are currently operating in the target market, and how can the new enterprise outcompete or complement

⁴ For discussion on the concept of "shared value businesses", see Michael E Porter and Mark R Kramer, "Creating Shared Value" (January-February 2011), *Harvard Business Review*, online: <<https://hbr.org/2011/01/the-big-idea-creating-shared-value>> [Porter & Kramer].

incumbents? In certain circumstances, the nature of the competition may influence a social enterprise's choice of legal structure. For example, the perception that for-profit businesses are under-serving or exploiting a community may recommend selecting a non-profit form. Alternatively, the perception that a non-profit organization is inadequately responsive to a community's needs may recommend selecting a for-profit form with a greater potential for scale and financial sustainability.

What is your value proposition? Identifying a social enterprise's value proposition involves identifying how the enterprise will differentiate its products or services from those of its competitors. Is the enterprise's value proposition an incremental one, offering marginal improvement to an existing good or service or providing an existing good or service? If the enterprise intends to provide goods or services which are traditionally offered by for-profit businesses, the enterprise may face difficulties in registering as a charity or a tax-exempt organization if deemed to be competing with products or services provided by for-profit businesses. Does the enterprise seek to target an underserved market or provide an existing good or service for below cost? These scenarios may enable the enterprise to structure as a non-profit organization or registered charity more easily. Is the enterprise's value proposition a revolutionary one, offering a significant improvement to an existing product or service or offering an entirely new product or service? If this is the case, a for-profit structure may permit the enterprise to scale both its financial and social impact.

What is the market size/ how profitable would you be serving that market? Ascertaining the size of the target market and potential profitability of an enterprise in serving that market is integral to selecting an appropriate legal structure. Generally, creating a for-profit business is far easier when the market size is large and the business model is scalable. Similarly, creating a for-profit business is far easier when profit margins are high, insulating the enterprise against price fluctuations. Conversely, if the market size is small or local in scope, challenges associated with creating a scalable, sustainable for-profit business may recommend employing a non-profit form. Similarly, low profitability projections may recommend employing a non-profit form to supplement any shortfall in earnings with grants and other funding.

How will social perceptions influence your choice of legal structure? Positive social perceptions of the attributes of registered charity and non-profit organizations within the target market may influence the decision to employ a non-profit legal structure over a for-profit legal structure.

4. FUNDING

Creating and growing a social enterprise requires capital. How much capital and how the enterprise plans to raise that capital plays a vital role in influencing the choice of legal structure. Is the enterprise likely to generate sufficient financial returns such that it can be funded by external investors who expect to be repaid and receive a return on their investment? If yes, a for-profit structure is likely to be the most appropriate. Alternatively, is the enterprise unlikely to generate sufficient financial returns to attract traditional sources of investment? If the enterprise is unlikely to generate sufficient financial returns, it will wish to investigate alternative funding channels, such as member contributions, government grants, corporate donations, or sponsorships. The necessity of integrating non-profit funding channels into a business model favors employing non-profit legal structures.

How much money do you need to launch the enterprise? The initial amount of capital required to launch a social enterprise will influence the level of flexibility that the enterprise's founders enjoy in selecting a legal structure. Enterprises requiring significant initial capital injections will face greater constraints in selecting a legal form, as they will be required to select the legal form with the maximum appeal to their primary sources of funding, such as investors, financial institutions, government funding and other start-up support programming (as for for-profits), or foundations, grants, or donations (as for non-profit organizations or registered charities). Conversely, enterprises requiring lower initial capital contributions, or those which may be piloted on a small-scale and gradually expanded, will enjoy greater flexibility in the choice of legal structure between for-profit and non-profit structures.

How much money do you need to grow the enterprise? The amounts of capital required to bring an enterprise to profitability (for-profit), or sustainability (non-profit) will similarly influence the level of flexibility that the enterprise's founders enjoy in selecting a legal structure. Enterprises requiring larger ongoing capital contributions will face greater constraints in selecting a legal structure. In comparison, enterprises anticipated to require smaller ongoing capital contributions will enjoy greater flexibility in selecting a legal structure.

Do you have assets to borrow against? An enterprise's ability to access loans is a significant consideration in selecting a legal structure. For-profit structures may issue equity as a means of raising capital subject to compliance with securities laws. Conversely, non-profit structures may not issue equity and will usually have to rely on traditional non-profit funding channels to raise capital or debt financing secured by third party guarantors. Enterprises which anticipate relying on debt financing must ask the question whether they have assets they can employ as collateral to access commercial loans (e.g., a housing co-operative which possesses real property or a retail enterprise with accounts receivable which can be pledged as collateral). Enterprises which do not possess such assets but anticipate operating in the non-profit sector must determine what legal structure will best enable them to access traditional non-profit funding channels.

5. CONTROL/ MANAGEMENT

The question of who will control a social enterprise and how they will exercise that control is fundamental to selecting a legal structure. In general terms, privately held for-profit structures may operate with a greater degree of flexibility than non-profit structures, with respect to concentrating control in the hands of an individual director or a comparatively small board of directors, operating with greater confidentiality and limiting the range of interests the organization is required to respond to, among other characteristics.

At a relatively early stage, an enterprise's founders should consider the level of control they wish to exercise over an enterprise or which they believe is most consistent with advancing the enterprise's mission, measuring those needs against the distinct control and governance regimes of for-profit and non-profit legal structures.

Founders may engage with inquiries such as:

- Can you run and fund the enterprise yourself?
- Will you need to share control with other investors?
- How important is confidentiality to your enterprise?
- Will you need or want to share control with the public interest?

The answers to these questions, measured against the distinct control and governance features of for-profit and non-profit structures, will influence founders' decisions in selecting the best legal structure.

For profit corporations are controlled by shareholders, who elect a board of directors to manage the corporation's affairs. The directors of a business corporation have historically been subject to a legal duty to maximize shareholder value. However, more recently, Canadian courts have interpreted this legal duty to enable directors of for-profit corporations to consider a broader class of stakeholders – including shareholders, employees, suppliers, creditors, consumers, governments, and the environment – in determining whether a decision is in the best interests of the corporation.⁵ For-profit corporations may be operated by as few as one director. Privately held for-profit corporations may operate with a relatively high degree of confidentiality. Tax returns, salaries, profits, and business plans remain private.

Incorporated non-profit organizations, which include not-for-profit corporations, incorporated societies, and co-operatives, are typically controlled by members, who do not have any economic interest in the corporation, but who are responsible for electing the corporation's board of directors. Like a business corporation, the board of directors of an incorporated non-profit organization is responsible for managing the corporation's affairs. However, unlike a business corporation, the board of directors of an incorporated non-profit organization will be primarily concerned with ensuring that the organization operates within the scope of its authorized activities, as stated within its articles, memorandum of association, or other governing documents. For this reason, non-profit organization directors are subject to a legal duty to operate the organization in accordance with its stated purpose and may be subject to member intervention if they fail to do so. Most incorporated non-profit organizations require at least three directors.⁶ Unlike a business corporation, tax-exempt non-profit organizations and registered charities are required to complete detailed disclosures regarding the organization's operations and finances on an annual basis.

⁵ *Peoples Department Stores Inc (trustees of) v Wise*, 2004 SCC 68 at para 42, [2004] 3 SCR 461 [*Peoples Department Stores*].

⁶ An exemption to this is a non-soliciting corporation under the *Canada Not-for-profit Corporations Act*, SC 2009, c 23, s 125 [CNCA]. See s. 16 of the *Canada Not-for-profit Corporations Regulations*, SOR/2011-223 for the definition of "soliciting corporation".

PART IV: THE CANADIAN LEGAL SYSTEM



PART IV: THE CANADIAN LEGAL SYSTEM

1. SECTION OVERVIEW

It is essential that any social entrepreneur seeking to operate in Canada have a basic understanding of Canada's legal system. This is especially true when selecting the appropriate legal structure for a social enterprise – an enterprise's legal structure will serve as the vehicle with which the social entrepreneur navigates Canada's legal landscape. The contours of that landscape will influence legal structure selection.

The following paragraphs provide a brief introduction to Canada's federalist legal system as it applies to social enterprises. This section does not comprehensively summarize Canada's legal system. Rather, it provides a basic overview of Canada's federalist legal system as context for later discussions on corporate structuring.

2. FEDERALISM

Canada is a federal parliamentary democracy governed on the national and regional levels. The Canadian federal government (based in Ottawa, Ontario) develops and enforces laws that apply to the entire country. Canada's ten provinces develop and enforce laws that apply within their respective boundaries. Canada also contains three semi-autonomous federal territories (Yukon, Nunavut, and the Northwest Territories) and many Indigenous communities that employ various levels of regional self-government. Canada's cities and towns exercise local authority delegated to them by their provincial governments.

The Canadian Constitution is the source of authority for the federal and provincial governments. The federal government is authorized to make laws regulating matters of national importance (e.g., banking, national defense, interprovincial commerce). Provincial governments are authorized to make laws regulating matters of a more local or regional nature (e.g., use and transfer of property and the provision of healthcare and education in the province). Some subject areas are regulated exclusively by the federal or provincial governments. Others are regulated by both levels of government.

Canadian social enterprises must follow all applicable federal laws and regulations in addition to all applicable laws of the province in which they are based. If a social enterprise conducts activities in multiple provinces or territories, it must follow the applicable laws and regulations in each province or territory where it operates.

3. INDIGENOUS PEOPLES AND CANADIAN FEDERALISM

An important feature of Canada's federal system is the presence and inherent legal rights of Indigenous people, communities, and nations. It is the stated goal of the modern Canadian state to recognize and give effect to the Aboriginal and Treaty Rights possessed by Indigenous peoples and to re-establish peer-to-peer relations with Indigenous nations. To this end, self-government agreements have been negotiated and signed between Canada and Indigenous nations, with the ultimate goal of restoring the right of self-government to Indigenous communities across Canada.

Canadian social entrepreneurs should strive to understand the diverse and vibrant cultures and traditions of Indigenous communities within Canada and the complex and evolving relationship Indigenous peoples have with the Canadian state. The existence and characteristics of self-governing Indigenous communities can have major legal implications for social enterprises, especially if an enterprise plans to conduct some or part of its activities on or near Indigenous lands or for or on behalf of Indigenous people.

4. CORPORATE LEGISLATION

"Corporate statutes" are laws which govern the formation and governance of incorporated organizations.⁷ Each corporate statute sets out, at minimum, (1) a specific process through which an organization can incorporate itself under that statute, and (2) governance rules which organizations must follow if they choose to incorporate under that particular statute. Federal and provincial governments have both adopted corporate statutes. Many of these corporate statutes are designed for for-profit businesses, while others are designed exclusively for non-profit organizations, registered charities, or social enterprises.

The location of a social enterprise and the type of activities it engages in will determine what corporate statutes are available to it. As an example, the *Canada Not-for-Profit Corporations Act* is available for any social enterprise in Canada that intends to conduct activities which are not purely provincial in nature. Nova Scotia's *Co-operative Associations Act* is available for social enterprises based in Nova Scotia that intend to organize and govern themselves as a co-operative.

Federal and provincial governments have enacted a menu of broadly similar types of corporate statutes, designed to facilitate the creation and governance of similar types of incorporated organizations on the federal and provincial levels. However, there are significant differences between the various provincial and federal versions of corporate statutes. Additionally, there are certain types of corporate statutes that are only available in specific provinces (e.g., benefit corporation or community interest company statutes). Social enterprises seeking to incorporate should familiarize themselves with the similarities and differences between the corporate statutes available in each Canadian jurisdiction with a primary focus on the jurisdictions where they intend to conduct the bulk of their operations.

⁷ Examples of incorporated organizations include business corporations, not-for-profit corporations, community interest or benefit corporations, and co-operative associations. These types will be explained in later sections of this guide.

5. TAXATION

Taxation is another area in which the federal and provincial governments share authority. The federal government can enact a variety of taxes, including income tax, whereas each province is limited to taxing income earned within that province and taxing the ownership and transfer of property located in that province. The province in which a social enterprise operates can significantly influence the taxation.

Of particular importance for social enterprises is the availability of the charitable income tax exemption. The federal government, via the Canada Revenue Agency, has assumed primary responsibility for granting charitable tax exemptions to social enterprises in Canada. Whether or not the Canada Revenue Agency classifies the purposes and activities of a social enterprise as “charitable” will play a major role in determining a social enterprise’s tax treatment. Similarly, the Canada Revenue Agency and the federal Income Tax Act will determine whether an enterprise qualifies as a non-profit organization for tax purposes.

6. SECTOR-SPECIFIC LAWS AND REGULATIONS

Federal and provincial governments have each enacted a variety of sector-specific laws and regulations that can apply to a social enterprise depending on the specific activities it conducts, regardless of its legal structure. For example, if a social enterprise manufactures goods to sell or provide to members of the public, it could be subject to a variety of product safety or consumer protection laws at the federal and provincial levels. Or, if a social organization provides healthcare services, it could become subject to provincial laws governing the provision of medical care.

As the scope and variety of a social enterprise’s activities expands, so too will the scope of federal and/or provincial laws and regulations that can apply to that enterprise. It is important for social enterprises to identify the federal and/or provincial laws that govern the specific activities that the enterprise plans to undertake. Sector-specific laws and regulations in force on the federal and provincial levels can have a major influence on the selection of a social enterprise’s location and/or legal structure.

7. CONCLUSION

Canada’s federal system of government combines national uniformity with regional variations. This can create added complexity for social enterprises, especially those who operate in multiple jurisdictions. However, the regional variety of Canada’s federal system also offers social enterprises a level of control over what laws apply to their operations. Furthermore, it should be noted that Canada’s federal system is defined by a high concentration of lawmaking and enforcement power with the federal government and a high degree of legal uniformity amongst the provinces (with the notable exception of Quebec).

PART V: LEGAL STRUCTURES





PART V: LEGAL STRUCTURES

1. SECTION OVERVIEW

After your social enterprise has developed a sense of its organizational identity, with reference to its primary motivations, target market, capital needs and control requirements, it is time to engage with the question: what is the best legal structure to give shape to that identity?

This section provides an in-depth review of seven legal structures commonly used by social enterprises in Canada as described in the table below:

Category	Legal Structure
For Profit Legal Structures	Sole proprietorship
	General Partnership
	Business Corporation
Hybrid Legal Structures	Community Interest or Contribution Company
	Co-operative Corporation
Non-profit	Incorporated Non-Profit Organization
	Registered Charity

This section concludes with a brief reference to some alternative legal structures available to social enterprises, though they are not discussed in depth.

2. SOLE PROPRIETORSHIP

At a Glance

Summary

- **Description:** A sole proprietorship is one person carrying on business independently. A sole proprietorship is an unincorporated legal structure and is not considered a separate legal entity or person.
- **Who is the structure appropriate for:** The sole proprietorship structure is appropriate for: (a) social enterprises led by a single individual, (b) that want maximum flexibility to engage in business activities and generate profits, (c) that do not wish to incur the costs of incorporating a formal legal structure, (d) that will not be engaging in high-risk activities. A sole proprietorship can also be a cost-effective option to evaluate and validate a business idea before incurring the costs to incorporate a formal business structure, among other factors.
- **Corporate governance and management:** A sole proprietorship does not need to establish a board of directors or officers to manage the sole proprietorship. Rather, the sole proprietor will usually be responsible for all governance and management decisions.
- **Tax attributes:** The business income of a sole proprietorship is taxed as the sole proprietor's individual income. Goods and services supplied by a sole proprietor will ordinarily be subject to GST/HST. A sole proprietorship that is a registrant for GST/HST will ordinarily be eligible for input tax credits on eligible expenses used in its commercial activities. If the sole proprietorship engages employees, it will be required to collect and remit mandatory employment related costs ("MERCs") in respect of employee compensation.

Advantages

- **Easy to start up:** Establishing a sole proprietorship is one of the easiest pathways to setting up a business. Establishing a sole proprietorship involves reserving and registering a business name with the relevant provincial registrar, paying the appropriate registration fees, and complying with any business specific licensing requirements.
- **Flexibility in purposes/activities:** There are no restrictions on the types of activities a sole proprietorship may engage in. A sole proprietorship may engage in any legal commercial activities.
- **Unrestricted ability to generate profits:** As a for-profit entity, sole proprietorships are not subject to legal restrictions on their ability to generate a profit.
- **Flexibility in use of assets/ revenue:** A sole proprietorship enjoys complete discretion in how it uses its assets or revenue, including: (a) distributing returns to the sole proprietor, (b) issuing grants to registered charities, or (c) employing revenues/assets to further any social purpose.

At a Glance

Disadvantages

- **No liability protections:** Individual sole proprietors face unlimited personal liability for the debts/liabilities of the sole proprietorship. Although this exposure can be managed with contracts and insurance, this feature makes sole proprietorships unsuitable for high-risk activities.
- **No protection of social purpose:** Sole proprietors have significant flexibility to determine how they will integrate social impact into their business operations. However, the sole proprietorship structure does not confer any legal protection of social purpose. Rather, protection of social purpose is at the individual sole proprietor's discretion.
- **Difficult to secure formal sources of external financing:** Sole proprietorships are ineligible for equity financing. The primary sources of capital for sole proprietorships include debt financing, self-financing, and loans from family and friends. Sole proprietorships may be eligible for grants targeting for-profit businesses. Sole proprietorships are usually ineligible for grants targeting non-profit organizations or registered charities.
- **Marketing challenges:** Other legal structures may be more immediately identifiable as social enterprises (such as a registered charity carrying on a related business, a community interest company, or a co-operative), challenging a sole proprietorship's ability to market itself as a social enterprise.

(a) Overview & Organizational Structure

A sole proprietor is a person carrying on a business independently. The business has no separate legal existence independent from its founder.

A sole proprietor can employ other people in their business. However, in most cases, sole proprietorships are small in scale with few (if any) employees.

While sole proprietorships are simple to establish and administer, they lack the benefits inherent in incorporated legal structures, such as separate legal existence, limited liability, among others.

There are no restrictions on the types of activities a sole proprietorship may engage in. Rather, a sole proprietorship may engage in any legal commercial activities.

A sole proprietorship may voluntarily choose to integrate a social purpose into its activities. However, the decision to do so is entirely discretionary, and the sole proprietorship structure affords no legal protection to social purpose.

(b) Establishment Costs, Process & Documentation

Unlike an incorporated structure, a sole proprietor does not need to fulfill any formal legal requirements to exist. If a sole proprietor wishes to operate under a business name other than their individual name, they can submit and

reserve a business name and register that business name with the relevant provincial government agency in the jurisdiction where they reside. If a sole proprietor does choose to operate under a business name, the fees to do so are modest (usually under \$100).

In many Canadian jurisdictions, if a sole proprietor wishes to operate under their individual name, they can do so without reserving and registering a business name. In this case, the individual sole proprietor's government filing obligations would be a *T2125 Statement of Business and Professional Activities* as a supplement to their personal income tax return.

(c) Organizational Liabilities & Directors' Liabilities

A sole proprietorship does not possess an independent legal personality. Therefore, the sole proprietor will be personally liable for all debts, liabilities and legal obligations of the sole proprietorship. This means that a sole proprietor's home and other personal assets can be seized to satisfy any debts or legal liabilities of the sole proprietorship. Although these types of risks can be managed with insurance and commercial contracts that appropriately limit and allocate risk, this is one of the biggest disadvantages of operating a sole proprietorship. This feature makes the structure inappropriate for high-risk activities.⁸

(d) Taxation

The business income of a sole proprietorship is taxed as the individual sole proprietor's personal income at the relevant federal and provincial personal income tax rate.

A sole proprietor will be required to complete and file with the Canada Revenue Agency a *T2125 Statement of Business and Professional Activities* as a supplement to their personal tax return and any supplemental provincial income tax forms that may be required. This feature of sole proprietorships can be advantageous, especially during the pilot stages of an enterprise when the business is most likely to be operating at a loss. A sole proprietor can use business losses to offset any taxable income they are earning from other sources. However, this same feature can create a tax disadvantage when the enterprise starts to become profitable and progressive personal income tax rates begin to approach and exceed corporate income tax rates.

The goods and services supplied by a sole proprietorship are generally subject to federal and provincial goods and services tax/harmonized sales tax on supplies of goods or services (GST/HST), unless the sole proprietorship is a "Small Supplier," or the supply is GST/HST exempt or otherwise exempted under the *Excise Tax Act* (Canada).⁹

If a sole proprietorship is a GST/HST registrant, it is eligible recover the GST/HST paid or payable on purchases and expenses related to its commercial activities by claiming input tax credits.¹⁰ Generally, if a sole proprietorship has an

⁸ Sole proprietorships do not possess a board of directors or officers so an analysis of directors' or officers' liabilities is not relevant.

⁹ Government of Canada, "When to register for and start charging the GST/HST", online: <<https://www.canada.ca/en/revenue-agency/services/tax/businesses/topics/gst-hst-businesses/when-register-charge.html>>. In general, a "Small Supplier" is a business that generates revenues in excess of \$30,000 in a single calendar quarter. However, please consult Canada Revenue Agency guidance for additional interpretation on when a business is a "Small Supplier".

¹⁰ Government of Canada, "Input tax credits", online: <<https://www.canada.ca/en/revenue-agency/services/tax/businesses/topics/gst-hst-businesses/complete-file-input-tax-credit.html>>.

eligible expense used only in its commercial activities, it can claim and recover input tax credits for the full amount of the GST/HST paid.¹¹

If a sole proprietorship has employees, it will be required to collect and remit MERCs on employee salaries. This category of costs includes federal and provincial contributions paid on payroll costs, including employment insurance, Canada Pension Plan (CPP) contributions, among others.

If a sole proprietorship owns real property, it will be required to pay municipal property taxes.

Sole proprietorships cannot issue official donations receipts for gifts, donations, or grants.

Summary of Tax Attributes	
Obligation to pay income tax?	No – Income of a sole proprietorship is taxed as the personal income of the sole proprietor
Obligation to collect and remit GST/HST?	Yes – Subject to exceptions
Entitlement to Input Tax Credits/Public Service Body Rebate?	Yes – Input Tax Credits
Obligation to collect and remit MERCs?	Yes
Obligation to pay property tax?	Yes
Ability to issue official donation receipts?	No

(e) Corporate Governance & Regulatory Obligations

Operating Requirements

As expressed above, a sole proprietorship is not subject to any legal restrictions in its ability to engage in commercial activities versus social impact activities or transfer funds to or otherwise partner with other commercial partners or non-profit partners. These features afford sole proprietorships significant flexibility in defining and pursuing their social mission. However, the sole proprietorship structure affords few, if any, legal protections for social impact within the business structure.

Sole proprietorships must comply with any business licensing, permitting, or other regulatory requirements applicable to the specific activity the sole proprietorship engages in.

Public Filings

There are few ongoing governance and regulatory requirements associated with operating a sole proprietorship. The primary requirements include:

- registering the business name with the relevant provincial registrar each year;
- the individual sole proprietor completing and filing with the Canada Revenue Agency a *T2125 Statement of Business and Professional Activities* each year; and
- completing any applicable tax filings related to GST/HST, MERCs, or municipal property tax as applicable.

Corporate Governance

A sole proprietorship does not need to establish a board of directors or officers to manage the sole proprietorship. Rather, the sole proprietor will ordinarily be responsible for all management decisions.

(f) Finance & Fundraising

The financing options for a sole proprietorship are limited. Sole proprietors will raise funds by self-financing, loans from family and friends, bank loans, or debt financing. The ability to obtain loans will be limited by whatever assets the sole proprietor can offer as security. A sole proprietorship cannot issue shares, so equity financing is unavailable.

Sole proprietorships are ineligible for funding channels targeting non-profit and registered charities.

In addition, some funding channels targeting for-profit businesses require applicants to be incorporated, limiting the versatility of the sole proprietorship structure for accessing external funding.

3. GENERAL PARTNERSHIP

At a Glance

Summary

- **Description:** A general partnership is a partnership between two or more persons, carrying on a business in common, with a view to profit. A general partnership is an unincorporated legal structure and is not considered a separate legal entity or person.
- **Who is the structure appropriate for:** The general partnership structure is appropriate for: (a) social enterprises led by two or more persons, (b) that want maximum flexibility to engage in business activities and generate profits, (c) that do not wish to incur the costs of incorporating a formal legal structure, (d) that will not be engaging in high-risk activities. A general partnership can also be a cost-effective option to evaluate and validate a business idea before incurring the costs to incorporate a formal business structure.
- **Corporate governance and management:** Without a written partnership agreement, a combination of a provincial partnership legislation and common law will presume certain terms and conditions to apply to the relationship among partners, including equal obligations to contribute capital, to share in profits and losses, and to participate in the general partnership's management. However, partners are free to vary the terms of their relationship to one another in a written partnership agreement and define how they will govern and manage the organization.
- **Tax attributes.** The business income of a general partnership is not subject to tax at the partnership level. However, the income earned by each partner is subject to taxation as either corporate or personal income of each partner. Goods and services supplied by a general partnership will ordinarily be subject to GST/HST. A general partnership that is a registrant for GST/HST will ordinarily be eligible for input tax credits on eligible expenses used in its commercial activities. If the general partnership engages employees, it will be required to collect and remit MERCs in respect of employee compensation.

At a Glance

Advantages

- **Ease of establishment/low start-up costs:** A general partnership can be a low-cost option to establish a business. Establishing a general partnership involves reserving and registering a business name with the relevant provincial registrar, paying the appropriate registration fees, and complying with any business specific licensing requirements. Additional costs may be incurred in drafting a written partnership agreement.
- **Flexibility in purposes/activities:** There are no restrictions on the types of activities a general partnership may engage in. A general partnership may engage in any legal commercial activities.
- **Unrestricted ability to generate profits:** As a for-profit entity, general partnerships are not subject to legal restrictions on their ability to generate a consistent, recurring profit.
- **Flexibility in use of assets/revenue:** A general partnership enjoys complete discretion in how it may use its assets or revenue, including: (a) distributing returns to partners, (b) issuing grants to registered charities, or (c) employing revenues/assets to further any social purpose.

Disadvantages

- **No liability protections:** General partners face unlimited, joint and several personal liability, for the debts/liabilities of the general partnership. Although this exposure can be managed with contracts and insurance, this feature makes general partnerships unsuitable for high-risk activities.
- **No protection of social purpose:** General partnerships have significant flexibility to determine how they will integrate social impact into their business operations. However, without a written partnership agreement, the general partnership structure does not confer any legal protection of social purpose. Rather, protection of social purpose is at the general partners' discretion.
- **Difficult to secure formal sources of external financing:** General partnerships are ineligible for equity financing. The primary sources of capital for general partnerships include debt financing, capital contributions from the partners, and loans from family and friends. General partnerships may be eligible for grants targeting for-profit businesses. General partnerships will not be eligible for grants targeting non-profit organizations or registered charities.
- **Marketing challenges.** Other legal structures may be more immediately identifiable as social enterprises (such as a registered charity carrying on a related business, a community interest company, or a co-operative), challenging a general partnership's ability to market itself as a social enterprise.

(a) Overview & Organizational Structure

The three key elements of a general partnership are:

- two or more persons;
- carrying on business in common;
- with a view to profit.

Stated differently, a general partnership is a group of individuals (or corporate persons) who share in the profits, losses and control of a for-profit enterprise.

Like a sole proprietorship, a general partnership does not have separate legal personality. For this reason, each partner will have joint and unlimited personal liability for any debt or liability incurred on behalf of the partnership. Each partner is an agent of the partnership and can therefore incur debts and liabilities that bind the partnership and each of its individual partners.

To limit the potential for abuse, each partner is legally required to act with loyalty and good faith towards their fellow partners. For this reason, it is critical that there be an elevated level of mutual trust and clearly defined roles, responsibilities, and standards of conduct among the persons forming a general partnership.

The mutual rights and obligations between partners should be defined in a written partnership agreement. Because a partnership is a flexible instrument, the particular structure of a partnership will vary. However, a general partnership can be inferred in the absence of a written agreement if the elements above are present, specifically, two or more persons carrying on business in common with a view to profit.

In circumstances where a general partnership is inferred, provincial legislation will presume certain key provisions to exist unless otherwise varied by the provisions of a written partnership agreement.

Examples of these provisions including the following:

- each partner shares equally in the profits and losses of the partnership business;
- each partner has ability to take part in the management of the partnership business;
- no partner is entitled to a salary for their role in the partnership business; and
- no new partner can be introduced without the unanimous consent of existing partners.

(b) Establishment Costs, Process & Documentation

Like a sole proprietorship, there are few formal legal requirements to establish a general partnership. The existence of a general partnership does not depend on the fulfillment of any formal legal requirements, only the fulfillment of the three criteria listed above. However, like a sole proprietorship, a general partnership usually must submit and reserve a business name and register that business name with the provincial registrar where the partnership carries on business.

Unlike a sole proprietorship, a general partnership involves a close business relationship between two or more persons. It is recommended (although not required) that partners define their mutual rights and obligations in a written partnership agreement. This increases start-up costs compared to a sole proprietorship. However, a partnership agreement is a flexible instrument and need not be any more extensive than circumstances require.

If there is no partnership agreement, the mutual rights and obligations of partners will be defined by any applicable legislation in the jurisdiction(s) where the partnership carries on business.

(c) Organizational Liabilities & Directors' Liabilities

The partners in a general partnership will have joint and unlimited personal liability for any debt or obligation incurred by any partner in the name of the partnership. This allows each partner to exercise substantial autonomy (e.g., by entering contracts on behalf of the partnership), but it also creates a relationship of mutual vulnerability amongst all of the partners who can be held accountable for obligations and liabilities incurred by other partners.

This vulnerability is mitigated by the legal duty of loyalty and good faith, or fiduciary duty, that each partner owes to every other partner. Furthermore, there are some limits to the ability of one partner to bind the partnership. For example, if a partner is doing something outside the normal course of business of the partnership or it is obvious that they have no authority to do a particular activity, the other partners may be able to avoid liability for that partner's actions.

(d) Taxation

Like a sole proprietorship, the income of a general partnership is taxed as the personal (or corporate) income of the partners. This can be advantageous when the partnership is operating at a loss (losses of partnership can "flow through" to offset other sources of taxable income) and disadvantageous when the partnership is profitable (personal income cannot be reduced by retaining profits in the business).

Each individual partner will be required to complete and file with the Canada Revenue Agency a *T2125 Statement of Business and Professional Activities* as a supplement to their personal tax return and any supplemental provincial income tax forms that may be required.

The goods and services supplied by a general partnership are generally subject to federal and provincial goods and services tax/harmonized sales tax on supplies of goods or services (GST/HST), unless the general partnership is a "Small Supplier," or the supply is GST/HST exempt or otherwise exempted under the *Excise Tax Act* (Canada).¹²

If a general partnership is a GST/HST registrant, it is eligible to recover the GST/HST paid or payable on purchases and expenses related to its commercial activities by claiming input tax credits.¹³ Generally, if a general partnership

¹² Government of Canada, "When to register for and start charging the GST/HST", online: <<https://www.canada.ca/en/revenue-agency/services/tax/businesses/topics/gst-hst-businesses/when-register-charge.html>>. In general, a "Small Supplier" is a business that generates revenues in excess of \$30,000 in a single calendar quarter. However, please consult Canada Revenue Agency guidance for additional interpretation on when a business is a "Small Supplier".

¹³ Government of Canada, "Input tax credits", online: <<https://www.canada.ca/en/revenue-agency/services/tax/businesses/topics/gst-hst-businesses/complete-file-input-tax-credit.html>>.

has an eligible expense used only in its commercial activities, it can claim and recover input tax credits for the full amount of the GST/HST paid.¹⁴

If a general partnership has employees, it will be required to collect and remit MERCs on employee salaries. This category of costs includes federal and provincial contributions paid on payroll costs, including employment insurance, Canada Pension Plan (CPP) contributions, among others.

If a general partnership owns real property, it will be required to pay municipal property taxes.

General partnerships cannot issue official donations receipts for gifts, donations, or grants.

Summary of Tax Attributes	
Obligation to pay income tax?	No – Income of a general partnership is taxed as the personal (or corporate) income of the partners
Obligation to collect and remit GST/HST?	Yes – Subject to exceptions
Entitlement to Input Tax Credits/Public Service Body Rebate?	Yes – Input Tax Credits
Obligation to collect and remit MERCs?	Yes
Obligation to pay property tax?	Yes
Ability to issue official donation receipts?	No

(e) Corporate Governance & Regulatory Obligations

Operating Requirements

Like a sole proprietorship, a general partnership is not subject to any legal restrictions in its ability to engage in commercial activities versus social impact activities or transfer funds to or otherwise partner with other commercial partners or non-profit partners. This affords general partnerships significant flexibility in defining and pursuing their social mission. However, the general partnership structure does not confer any legal protection of social purpose. Rather, protection of social purpose is at the general partners' discretion.

¹⁴ *Ibid.*

General partnerships must comply with any business licensing, permitting, or other regulatory requirements applicable to the specific activity the general partnership engages in.

Public Filings

Like a sole proprietorship, there are few ongoing governance and regulatory requirements associated with operating a general partnership. The primary requirements include:

- registering the business name with the relevant provincial registrar each year;
- each individual partner of the general partnership completing and filing with the Canada Revenue Agency a *T2125 Statement of Business and Professional Activities* each year (if the partners are individuals);
- complying with any governance or reporting requirements mandated by the partnership agreement or provincial partnership legislation, as applicable; and
- completing any applicable tax filings related to GST/HST, MERCs, municipal property tax, as applicable.

Corporate Governance

A general partnership does not need to establish a board of directors or officers to manage the general partnership.

In the absence of a written partnership agreement, provincial partnership legislation will usually entitle every partner to participate in the management of the partnership, leaving it up to the partners to determine the specifics of any management structure.

Unlike a sole proprietorship, the presence of more than one individual or person within the business structure means that partners in a general partnership will need to devote time to developing a management structure. Select issues that partners may wish to consider in developing the management structure for a general partnership include:

- authorized business activities;
- articulation of a social purpose;
- capital contribution requirements;
- capital expenditure limits;
- organizational decision-making procedures, approvals, and limitations;
- budgeting and business planning procedures;
- restrictions on the admission of new partners;
- financial reporting requirements;
- insurance requirements;
- among others.

Partners can develop these practices informally during their operations or formally in a written partnership agreement.

(f) Finance & Fundraising

Like a sole proprietorship, a general partnership has limited options when it comes to raising funds, specifically, contributions by new or existing partners, loans from family and friends, bank loans, or debt financing. The ability to obtain loans will be limited by whatever assets the partners can offer as security. A general partnership cannot issue shares, so equity financing is unavailable.

General partnerships are ineligible for funding channels targeting non-profit and registered charities.

In addition, some funding channels targeting for-profit businesses require applicants to be incorporated, limiting the versatility of the general partnership structure for accessing external funding.



4. BUSINESS CORPORATION

At a Glance

Summary

- **Description:** A business corporation (or company) is a separate legal “person” created by federal or provincial legislation. A business corporation’s primary purpose has historically been to generate profits for shareholders by engaging in business activities. Contemporary shifts away from “shareholder” capitalism to “stakeholder” capitalism business models have seen a growing number of business corporations blending commercial activities with social purpose and sustainability.
- **Who is the structure appropriate for:** The business corporation structure is appropriate for (a) social enterprises led by one or more persons, (b) that want maximum flexibility to engage in business activities and generate profits, (c) that can embed social impact in their operations through alternative means (e.g., a shared value business model, B-Corp Certification, or participation in an ESG reporting framework), (d) that require access to conventional corporate finance streams and do not require access to non-profit funding streams, (e) that want to access the liability protections and other benefits afforded by incorporating, among other factors.
- **Corporate governance and management:** A business corporation will be managed by a shareholder-elected board of directors responsible for managing or supervising the management of the corporation’s activities. There are more governance formalities associated with operating a business corporation than there are associated with operating unincorporated structures, such as a sole proprietorship or general partnership.
- **Taxation:** The business income of a business corporation is subject to corporate income tax. Goods and services supplied by a business corporation will ordinarily be subject to GST/HST. A business corporation that is a registrant for GST/HST will ordinarily be eligible for input tax credits on eligible expenses used in its commercial activities. If the business corporation engages employees, it will be required to collect and remit MERCs in respect of employee compensation.

Advantages

- **Liability protections:** Like any incorporated structure, a business corporation’s shareholders, directors, and officers will generally not be personally liable for the debts, obligations, or other liabilities of the business corporation.
- **Unrestricted ability to generate profits:** A business corporation has an unrestricted ability to generate profit.
- **Flexibility in raising capital:** A business corporation may generate capital by issuing shares, debt, and a variety of other corporate finance instruments.

At a Glance

- **Flexibility in purposes/activities:** A business corporation may advance any type of legal purpose and engage in any type of legal activity and is not limited to charitable, social, or non-profit purposes or activities.
- **Flexibility in use of assets/revenue:** A business corporation enjoys complete discretion in how it may use its assets or revenue, including: (a) distributing returns to investors, (b) issuing grants to registered charities, or (c) employing revenues/ assets to further any social purpose.

Disadvantages

- **Comparatively higher start-up costs.** A business corporation will usually be more expensive to incorporate and maintain than unincorporated legal structures.
- **No protection of social purpose:** A business corporation does not have a legal duty to advance a social purpose and integrate positive social impacts into its activities. Canadian law supports the directors' ability to consider the interests of a broader class of corporate "stakeholders" in determining what is in the best interests of the corporation. However, directors' fiduciary duties to generate profits may conflict with the decision to consider stakeholder welfare and prioritize social purpose in corporate decision-making processes.
- **Marketing challenges.** Other legal structures may be more immediately identifiable as social enterprises (such as a registered charity carrying on a related business, a community interest company, or a co-operative), challenging a business corporation's ability to market itself as a social enterprise.

(a) Overview & Organizational Structure

A business corporation is the primary corporate structure used by for-profit enterprises in Canada. A business corporation is defined by its separate and perpetual legal existence (or "legal personality") and by its formalized relationship between various parties, namely shareholders, directors, and officers.

Historically, a business corporation's primary purpose has been to generate profits for its shareholders by engaging in commercial activities. However, contemporary shifts away from "shareholder" capitalism to "stakeholder" capitalism business models have seen business corporations blending commercial and entrepreneurial activities with social purpose. In addition, Canadian law firmly supports the ability of directors to consider the interests of a broader class of stakeholders in corporate decision-making processes, including the community, employees, suppliers, customers, climate, the environment and the biosphere, among other stakeholder groups.¹⁵

Unlike a community interest company, not-for-profit corporation, or registered charity, a business corporation is not required to embed a social purpose in its incorporation documents. However, there are a variety of tools available to embed social impact and sustainability into the operations and strategy of a conventional business corporation, including:

¹⁵ Peoples Department Stores, *Supra* note 5.

- third-party socially responsible business certification (e.g., through the B-Corp certification process administered by B Lab);
- the adoption of an environmental, social and governance or “ESG” framework or standards (e.g., the GRI Global Standards, IFRS/SASB Standards); or
- participation in networks requiring self-reporting on social impact and sustainability impacts (e.g., the United Nations Global Compact Network, among others).

Adopting a socially responsible business certification or ESG reporting framework does not necessarily mean that a business corporation will become a “social enterprise,” as the term is traditionally understood. However, founders should be aware of the tools above as they serve as a means for business corporations to voluntarily adopt social and environmental performance standards to an extent that exceeds the performance standards, if applicable, set out in business corporations’ enabling legislation.

(b) Establishment Costs, Process and Documentation

Business corporations can be incorporated under federal law (e.g., the *Canada Business Corporations Act*) or under provincial law. Although there is significant harmonization in corporate legislation across federal and provincial legislation, there are some differences between jurisdictions employing legislation derived from the federal *Canada Business Corporations Act* (see, e.g., the *Business Corporations Act* (Ontario), among others) and jurisdictions employing legislation derived from the U.K. *Companies Act* (see, e.g., the *Companies Act* (Nova Scotia), among others). Founders should consult with a lawyer in the jurisdiction they are considering incorporating to obtain advice on what legislation to incorporate under.

The table below details the documents required to incorporate and organize a business corporation under the *Canada Business Corporations Act*.

File Initial Incorporation Documents

- [Articles of Incorporation](#) (corporate name, province/ territory, share structure and restrictions on share transfers, number of directors, restrictions on activities, if applicable)
- [Initial Registered Office Address and First Board of Directors](#)
- a NUANs Name Search Report (\$13.80)
- the filing fee (\$200.00)

Next steps

- Provincial/territorial registration (if applicable)
- Obtain business number (identification # for CRA accounts including GST/HST, income tax, import/export duties)
- Permits/licensing requirements (see BizPaL)

First meeting of initial directors

- make by-laws (rules governing the internal organization of a corporation)
- adopt security certificate (share) forms and corporate record forms
- authorize the issuing of shares and other securities
- appoint officers
- appoint or waive the appointment of an interim auditor
- make banking arrangements

First meeting of shareholders

- elect directors
- confirm/modify/reject by-laws
- appoint/waive appointment of auditor

(c) Organizational Liabilities & Directors' Liabilities

Like any incorporated structure, a business corporation's shareholders, directors, and officers will not be personally liable for the debts, obligations, or other liabilities of the business corporation under most circumstances.

A shareholder's liability will be limited to its respective contribution to the business corporation. In other words, if a

shareholder invests \$100,000 in the business corporation by subscribing for shares or by way of a shareholder loan, that shareholder's total exposure to any liability of the business corporation will be limited to the amount of their investment of \$100,000.

Under most circumstances, a business corporation's directors or officers will not be personally liable for the debts, obligations, or other liabilities of the business corporation. However, there are certain circumstances explicitly prescribed by legislation where a director or officer may become personally liable for the debts, obligations, or other liabilities of the corporation, including:

- breach of the common law duty of care or the fiduciary duty of loyalty and good faith;
- liability for unpaid taxes and MERCs under s. 227.1 of the *Income Tax Act* (Canada);¹⁶
- liability for unpaid taxes (GST/HST) under the *Excise Tax Act* (Canada);¹⁷
- liability for failures to comply with anti-SPAM requirements under *Canada's Anti-Spam Legislation*;¹⁸
- among others.

Under most circumstances, proactive corporate governance practices, risk management policies, financial and tax compliance controls, directors' and officers' insurance, and director indemnification agreements will insulate directors or officers against personal liability risks. However, social entrepreneurs should be aware of the potential liabilities associated with serving as a director or officer of an incorporated organization.

(d) Taxation

The income of a business corporation is subject to corporate income tax at the applicable federal and provincial corporate income tax rates.

The goods and services supplied by a business corporation are generally subject to federal and provincial goods and services tax/harmonized sales tax on supplies of goods or services (GST/HST), unless the business corporation is a "Small Supplier," or the supply is GST/HST exempt or otherwise exempted under the *Excise Tax Act* (Canada).¹⁹

If a business corporation is a GST/HST registrant, it is eligible to recover the GST/HST paid or payable on purchases and expenses related to its commercial activities by claiming input tax credits.²⁰ Generally, if a business corporation

¹⁶ *Income Tax Act*, RSC 1985, c 1 (5th Supp), s 227.1 [ITA]; see also *Wheeliker v Canada (sub nom Canada c Corsano)*, [1999] FC 173 (FCA) [Wheeliker].

¹⁷ *Excise Tax Act*, RSC 1985, c E-15, s 96(3) [ETA].

¹⁸ *Canada's Anti-Spam Legislation*, SC 2010, c 23, s 31 [CASL].

¹⁹ Government of Canada, "When to register for and start charging the GST/HST", online: <<https://www.canada.ca/en/revenue-agency/services/tax/businesses/topics/gst-hst-businesses/when-register-charge.html>>. In general, a "Small Supplier" is a business that generates revenues in excess of \$30,000 in a single calendar quarter. However, please consult Canada Revenue Agency guidance for additional interpretation on when a business is a "Small Supplier".

²⁰ Government of Canada, "Input tax credits", online: <<https://www.canada.ca/en/revenue-agency/services/tax/businesses/topics/gst-hst-businesses/complete-file-input-tax-credit.html>>.

has an eligible expense used only in its commercial activities, it can claim and recover input tax credits for the full amount of the GST/HST paid.²¹

If a business corporation has employees, it will generally be required to collect and remit MERCs on employee salaries. This category of costs includes federal and provincial contributions paid on payroll costs, including employment insurance, and Canada Pension Plan (CPP) contributions, among others.

If a business corporation owns real property, it will generally be required to pay municipal property taxes.

Business corporations cannot issue official donations receipts for gifts, donations, or grants. Moreover, unlike a registered charity or a not-for-profit corporation, a business corporation will usually be required to pay corporate income tax on any income that approximates a grant.

Summary of Tax Attributes	
Obligation to pay income tax?	Yes
Obligation to collect and remit GST/HST?	Yes – Subject to exceptions
Entitlement to Input Tax Credits/Public Service Body Rebate?	Yes – Input Tax Credits
Obligation to collect and remit MERCs?	Yes
Obligation to pay property tax?	Yes
Ability to issue official donation receipts?	No

(e) Corporate Governance & Regulatory Obligations

Operating Requirements

A business corporation is not subject to any legal restrictions in its ability to engage in commercial activities versus social impact activities or transfer funds to or otherwise partner with other commercial partners or non-profit partners. These features afford the business corporation structure significant flexibility in defining and pursuing their social mission. However, the business corporation structure affords few, if any, legal protections for social impact within the business structure.

Business corporations must comply with any business licensing, permitting or other regulatory requirements applicable to the specific activity the business corporation engages in.

Public Filings

Unless the business corporation is a public company, it will generally not be subject to any mandatory public financial and operational reporting obligations.

Business corporations are required to prepare annual financial statements in accordance with the accounting standards and at the level (notice to reader, review engagement, audit, etc.) described in the enabling legislation of the business corporation, which will usually be a function of the business corporation's overall revenue. However, unless the business corporation is a public company, its financial statements will generally remain private (unlike community interest companies, not-for-profit corporations, and registered charities).

Business corporations are required to complete and file a *T2 Corporate Income Tax Return* with the Canada Revenue Agency, together with any related tax filings and notices. These filings generally remain private.

Corporate Governance

A business corporation will be managed by a shareholder-elected board of directors responsible for managing or supervising the management of the corporation's activities. Shareholders vote for directors in proportion to the number of votes held on a majority basis, unless alternative majority thresholds are dictated in the business corporation's articles of incorporation, by-laws, share terms or shareholders' agreement. The directors become responsible for managing or supervising the management of the corporation's activities. In larger organizations, directors will generally delegate responsibility for day-to-day operational decision-making to officers, managers, or employees. However, ultimately, the corporation's board of directors remains legally responsible for the corporation's management.

Corporations are also required to convene periodic meetings of shareholders and directors in accordance with their by-laws and enabling legislation and to provide shareholders with current reporting on the financial performance.²²

(f) Finance & Fundraising

A business corporation may raise capital through issuing equity (shares), debt (promissory notes), or hybrid financial instruments (convertible debt). These financing mechanisms make the business corporation structure better suited for social entrepreneurs who anticipate relying on private investment to grow and scale their business.

A business corporation will not be eligible for non-profit funding streams targeting registered charities or not-for-profit corporations. However, a business corporation will be eligible for for-profit funding streams targeting for-profit business corporations.

²² See, for example: *Canada Business Corporations Act*, RSC 1985, c 44, s 155.

5. COMMUNITY INTEREST COMPANY

At a Glance

Summary

- Description:** A community interest company (“CIC”) combines elements of a for-profit business corporation – a share capital structure oriented toward generating profit – with elements of a non-profit structure – a social or “community” purpose, restrictions on revenue or asset use, and enhanced public reporting requirements. The use of CICs is relatively established in jurisdictions like the UK. However, CICs are a relatively new addition to the Canadian legal landscape and are available in two Canadian provinces: Nova Scotia and British Columbia.²³
- Who is the structure appropriate for:** The CIC structure is appropriate for social enterprises (a) that are led by more than one person, (b) that want maximum flexibility to engage in business activities and generate profits, (c) that want to embed social impact into their corporate structure by adopting a stated community purposes; (d) that are comfortable with the accompanying social purpose protections, including asset lock provisions, a dividend cap, and obligations to file an annual community interest plan and financial statements; (e) that require access to conventional corporate finance streams and do not require access to non-profit funding streams, (f) that want to access the liability protections and other benefits afforded by incorporating, among other factors.
- Corporate governance and management:** A CIC must have at least three directors (unlike a conventional business corporation, which may operate with as few as one director). Otherwise, a CIC’s governance structure will possess the same governance features as most incorporated structures, allocating decision-making authority between the corporation’s shareholders and its board of directors or officers, with operational decision-making authority vested in the corporation’s board of directors or officers.
- Taxation:** The business income of a CIC is subject to corporate income tax. Goods and services supplied by a CIC will ordinarily be subject to GST/HST. A CIC that is a registrant for GST/HST will ordinarily be eligible for input tax credits on eligible expenses used in its commercial activities. If the CIC engages employees, it will be required to collect and remit MERCs in respect of employee compensation.

Advantages

- Liability protections:** Like any incorporated structure, a CIC’s shareholders, directors, and officers will not be personally liable for the debts, obligations, or other liabilities of the CIC.
- Ability to generate profits:** A CIC has an unrestricted ability to generate profit, so long as it does so in a manner that is consistent with the CIC’s stated community purpose and constating documents.

²³ In British Columbia, CICs are referred to as community contribution companies. In this guide, the term CIC encompasses both community interest companies established in Nova Scotia and community contribution companies established in British Columbia.

At a Glance

- **Flexibility in raising capital:** A CIC may issue equity or debt to raise capital. However, the dividend cap and asset lock restrictions (described below) may make investing in a CIC less attractive to investors motivated by financial rather than social returns.
- **Protection of community purpose:** A CIC must clearly define the community purpose it exists to serve in its constating documents. This requirement preserves and protects the CIC's defined community purpose, ensuring that advancing that purpose remains paramount for the CIC's directors and officers.

Disadvantages

- **Comparatively higher start-up costs.** A CIC will usually be more expensive to incorporate and maintain than an unincorporated legal structure and a conventional business corporation.
- **Restrictions on use of assets/revenue:** A CIC is subject to two restrictions on the use of its assets: (a) a "dividend cap," and (b) an "asset lock."

The dividend cap feature limits the annual profits that can be distributed to shareholders to no more than 40% of distributable annual profits, subject to prescribed exceptions.

The asset lock feature regulates the way the CIC may transfer its assets to other entities, ensuring that the bulk of the CIC's assets are dedicated to fulfilling its community purpose.

Although these features are reported under the "disadvantages" heading, the dividend cap and asset lock features will constitute advantages for social entrepreneurs that place a greater emphasis on advancing a community purpose rather than generating and allocating profit.

- **Reporting requirements:** A CIC must prepare and file an annual community interest report and financial statements with the appropriate corporate registrar. The annual community interest report details how the CIC's activities benefited society or advanced the CIC's community purpose. The annual financial statements detail the CIC's revenues, expenditures, assets, and liabilities. These filings become part of the public record. Although these features are reported under the "disadvantages" heading, enhanced public reporting requirements will constitute advantages for social entrepreneurs placing an emphasis on transparency and accountability.

(a) Overview & Organizational Structure

A CIC is a corporate form available in Nova Scotia and British Columbia (albeit as a "Community Contribution Company" in the latter) that combines the commercial orientation of a business corporation with the social orientation of a not-for-profit corporation or registered charity.

CICs are a relatively new legal form in Nova Scotia,²⁴ but are more established in the U.K. and British Columbia (under the form of a “Community Contribution Company”).²⁵ A company may be newly incorporated as a CIC, or an existing for-profit corporation may apply to be continued as a CIC.

Unlike a conventional business corporation, CICs must be established to advance a “community purpose”, defined as:

*“a purpose beneficial to society at large, or a segment of society that is broader than the group of persons who are related to the community interest company, and includes [...] a purpose of providing health, social, environmental, cultural, educational or other services, but does not include a political purpose or a prescribed purpose”.*²⁶

A CIC’s community purpose must be embedded in the corporation’s constating documents (described below). This requirement ensures that advancing the CIC’s stated community purpose remains the paramount factor for the CIC’s directors and officers to consider in managing the corporation.

The categories of permissible “community purposes” are broad. They overlap with and extend beyond the traditional categories of purposes available to registered charities or other purposes available to not-for-profit corporations. Accordingly, the CIC structure will accommodate social enterprises that advance a broad range of social, environmental, cultural, or other public purposes.

The relevant legislation excludes “political purposes” from the list of allowable “community purposes”. This restriction mirrors the previous restriction that prevented registered charities from engaging in any type of political activity, broadly defined. Notwithstanding the removal of those restrictions and recognition of the permissibility of non-partisan public policy dialogue and development activities as applied to registered charities,²⁷ the restriction appears to hold for CICs, making the structure inappropriate for social entrepreneurship activities with a political orientation.

(b) Establishment Costs, Process & Documentation

The costs to establish a CIC will be like the costs associated with establishing a business corporation, with the potential for some additional costs associated with defining the CIC’s community purpose and developing the CIC’s community interest plan.

The table below details the documents required to incorporate and organize a CIC. Many of these will be standard form documents available from a lawyer or law firm. However, specific documents or content – such as the statement of community purpose or community interest plan – will require introspection and input on the part of the social entrepreneur seeking to establish and organize the CIC.

²⁴ *Community Interest Companies Act*, SNS 2012, c 38 entered into force on June 15, 2016 (“CICA”); *Community Interest Companies Regulations*, NS Reg 121/2016 [CIC Regs].

²⁵ *Business Corporations Act*, SBS 2002, c 57, Part 2.2 [BC Act]; *Community Contribution Company Regulations*, BC Reg 63/2013 [BC Regs].

²⁶ CICA, *Supra* note 26, s 2(1)(c); BC Act, *Supra* note 27 s 51, 91.

²⁷ See *Canada Without Poverty v. AG of Canada*, 2018 ONSC 4147 [Canada Without Poverty]. See also Canada Revenue Agency Charities Directorate, CG-027, “Public policy dialogue and development activities by charities”, January 21, 2019.

Please note that the requirements below describe those associated with incorporating a CIC under the *Community Interest Companies Act* (Nova Scotia), rather than a community interest corporation under the *Business Corporations Act* (British Columbia).

File Initial Incorporation & Designation Documents

- name reservation (\$53.09-66.30);
- cover letter;
- memorandum of association (corporate name, province/territory, share structure and restrictions on share transfers, number of directors, restrictions on activities (if applicable), statement of community purpose;
- articles of association;
- directors' consent notice;
- statutory declaration verifying the accuracy of the incorporation documents;
- community interest plan identifying the CIC's community purpose and activities;
- declaration that the company to be incorporated will not carry-on political activities
- directors' declaration;
- filing fee (\$454.75)

Next steps

- Provincial/territorial registration (if applicable)
- Obtain business number (identification # for CRA accounts including GST/HST, income tax, import/export duties)
- Permits/licensing requirements (see [BizPaL](#))

After receiving a complete application from the initial incorporators, the NS Registry of Joint Stock Companies ("**RJSC**") will issue the original incorporators a certificate of incorporation dated as of the date of filing. After receiving the certificate of incorporation, the initial incorporators may call the initial meeting of the incorporators, shareholders, directors, etc. to complete and file the following documents with the RJSC: notice of registered office;

- notice of recognized agent;
- notice of directors and officers;
- directors and shareholders signing resolutions;
- borrowing resolutions; and,
- register of directors, officers, and shareholders; and share certificates.

(c) Organizational Liabilities & Directors Liabilities

Like any incorporated structure, a CIC's shareholders, directors, and officers will not be personally liable for the debts, obligations or other liabilities of the CIC under most circumstances.

A shareholder's liability will be limited to its respective contribution to the CIC. In other words, if a shareholder invests \$100,000 in the CIC by subscribing for shares or by way of a shareholder loan, that shareholder's total exposure to any liability of the CIC will be limited to the amount of their investment of \$100,000.

Under most circumstances, a CIC's directors or officers will not be personally liable for the debts, obligations, or other liabilities of the CIC. However, there are certain circumstances explicitly prescribed by legislation where a director or officer may become personally liable for the debts, obligations, or other liabilities of the corporation, including:

- breach of the common law duty of care or the fiduciary duty of loyalty and good faith;
- liability for unpaid taxes and MERCs under s. 227.1 of the *Income Tax Act* (Canada);²⁸
- liability for unpaid taxes (GST/HST) under the *Excise Tax Act* (Canada);²⁹
- liability for failures to comply with anti-SPAM requirements under *Canada's Anti-Spam Legislation*;³⁰
- among others.

Under most circumstances, proactive corporate governance practices, risk management policies, financial and tax compliance controls, directors' and officers' insurance, and director indemnification agreements will insulate directors or officers against personal liability risks. However, social entrepreneurs should be aware of the potential liabilities associated with serving as a director or officer of an incorporated organization.

(d) Taxation

In general, CICs are taxed in an identical manner as business corporations.

The income of CICs is subject to corporate income tax at the applicable federal and provincial corporate income tax rates.

The goods and services supplied by a CIC are generally subject to federal and provincial goods and services tax/harmonized sales tax on supplies of goods or services (GST/HST), unless the CIC is a "Small Supplier," or the supply is GST/HST exempt or otherwise exempted under the *Excise Tax Act* (Canada).³¹

²⁸ *ITA*, supra note 18, s 227.1; see also *Wheeliker*, supra note 18.

²⁹ *ETA*, supra note 19, s 96(3).

³⁰ *Canada's Anti-Spam*, supra note 20, s 31.

³¹ Government of Canada, "When to register for and start charging the GST/HST", online: <<https://www.canada.ca/en/revenue-agency/services/tax/businesses/topics/gst-hst-businesses/when-register-charge.html>>. In general, a "Small Supplier" is a business that generates revenues in excess of \$30,000 in a single calendar quarter. However, please consult Canada Revenue Agency guidance for additional interpretation on when a business is a "Small Supplier".

If a CIC is a GST/HST registrant, it is eligible to recover the GST/HST paid or payable on purchases and expenses related to its commercial activities by claiming input tax credits.³² Generally, if a CIC has an eligible expense used only in its commercial activities, it can claim and recover input tax credits for the full amount of the GST/HST paid.³³

If a CIC has employees, it will generally be required to collect and remit MERCs on employee salaries. This category of costs includes federal and provincial contributions paid on payroll costs, including employment insurance, Canada Pension Plan (CPP) contributions, among others.

If a CIC owns real property, it will generally be required to pay municipal property taxes.

CICs cannot issue official donation receipts for gifts, donations, or grants. Moreover, unlike registered charity or a not-for-profit corporation, a CIC will usually be required to pay corporate income tax on any income that approximates a grant.

Summary of Tax Attributes	
Obligation to pay income tax?	Yes
Obligation to collect and remit GST/HST?	Yes – Subject to exceptions
Entitlement to Input Tax Credits/Public Service Body Rebate?	Yes – Input Tax Credits
Obligation to collect and remit MERCs?	Yes
Obligation to pay property tax?	Yes
Ability to issue official donation receipts?	No

(e) Corporate Governance & Regulatory Obligations

Special Operating Requirements

The most distinctive feature of a CIC relative to other structures discussed in this guide are legislative restrictions on the CIC's ability to (a) issue dividends to corporate shareholders (referred to as a "dividend cap") and (b) to transfer the corporation's assets other than for fair-market value (referred to as an "asset lock" feature).

³² Government of Canada, "Input tax credits", online: <<https://www.canada.ca/en/revenue-agency/services/tax/businesses/topics/gst-hst-businesses/complete-file-input-tax-credit.html>>.

³³ *Ibid.*

Dividend Cap

The maximum aggregate dividend a CIC may declare on each of its shares may not exceed 40% of the company's distributable profits, less the amounts of any exempt dividends, defined as dividends declared on a share held by, or on behalf of, a qualified entity, such as non-profit associations, societies, Canadian registered charities, and defined types of non-profit entities.³⁴ In essence, these provisions mean that approximately 60% of the CIC's distributable profits or net income must remain within the CIC. This does not prevent the founder of a CIC from receiving a reasonable wage as employment income. However, it does impact a founder's ability to receive compensation from the corporation's net income.

Asset Lock

A CIC cannot transfer any of the company's assets other than for: (a) fair market value; (b) to qualified entities; (c) to further the CIC's community purpose; or (d) by transfer in accordance with legislation, including by distribution of dividends, distribution upon dissolution, or a reduction of capital. Together, these features are designed to ensure that most of the CIC's income and assets remain within the CIC so that those resources can be used to further the CIC's community purposes.

Operating Requirements

A CIC must comply with any business licensing, permitting or other regulatory requirements applicable to the specific activity the business corporation engages in.

Public Filings

A CIC must publish an annual community interest report describing how the CIC's activities advanced its stated community purpose and delivered a benefit to society.³⁵ This report must annually be provided to the shareholders and to the relevant corporate regulator, and both the financial statements and community interest report become part of the public record.³⁶ Mandatory public reporting requirements enhance public transparency and accountability, making the CIC a good choice for founders seeking to deliver high levels of public disclosure, transparency and accountability as part of their business.

CICs are required to complete and file a *T2 Corporate Income Tax Return* with the Canada Revenue Agency, together with any related tax filings and notices. However, these filings generally remain private.

CICs will be required to complete any annual filings necessary to maintain their corporate status in the jurisdiction where they are incorporated, and any jurisdiction where they are extra-provincially registered.

34 *CIC Regs*, supra note 26, s 5(4).

35 *CICA*, supra note 26, s 21.

36 *Ibid*, s 21(2), 21(4).

Corporate Governance

A CIC will be managed by a shareholder-elected board of directors responsible for managing or supervising the management of the corporation's activities. Shareholders vote for directors in proportion to the number of votes held on a majority basis, unless alternative majority thresholds are dictated in the CIC's articles of association, by-laws, share terms or shareholders' agreement. The directors become responsible for managing or supervising the management of the corporation's activities. In larger organizations, directors will generally delegate responsibility for day-to-day operational decision-making to officers or paid employees. However, ultimately, the CIC's board of directors remains responsible for the CIC's overall management.

Unlike a business corporation, a CIC must have no fewer than three directors, which creates a more horizontal, participatory governance structure relative to a conventional business corporation.³⁷

CICs are also required to convene periodic meetings of shareholders and directors in accordance with their by-laws and their enabling legislation and to provide shareholders with up-to-date reporting on the financial performance of the business, the CIC's progress in furthering its social mission, dividend allocations, among other mandatory reporting items.

(f) Finance and Fundraising

A CIC may raise capital through issuing equity (shares), debt (promissory notes), or hybrid financial instruments (convertible debt). These financing mechanisms make the CIC better suited for social entrepreneurs who anticipate relying on private investment to grow and scale their business.

However, unlike a business corporation, the dividend-cap and asset-lock features described above may deter returns-oriented investors from purchasing equity in a CIC as most of a CIC's value is locked into its corporate structure (rather than liquid and unrestricted in its ability to be bought, sold or distributed to shareholders). Moreover, the regulations applicable to CICs cap the amount of interest that can be paid to investors who invest in the CIC by way of debt.³⁸

A CIC may not be eligible for non-profit funding streams targeting registered charities or non-profit organizations. However, a CIC will be eligible for for-profit funding streams targeting for-profit business corporations.

Because the CIC structure is relatively new in Canada, many federal or provincial government funding agencies are unaware of its existence. For this reason, the funding programs created within those agencies will be targeted to either pure for-profit businesses or pure non-profit organizations or registered charities.

In these circumstances, even if a CIC's community purpose aligns closely with the objectives of a government funding program oriented toward the non-profit sector, the CIC may not be eligible to participate in the funding program independently. For this reason, social entrepreneurs interested in the CIC structure that envision non-profit-oriented government financing as a core part of their initial funding mix should carefully review the eligibility criteria of representative funding streams before choosing the structure.

³⁷ *Ibid*, s 11.

³⁸ *CIC Regs*, *supra* note 26, s 6.

6. CO-OPERATIVE CORPORATION

At a Glance

Summary

- **Description:** A co-operative corporation is a membership corporation, owned and democratically controlled by its members, who enjoy exclusive rights to benefit from the co-operative's goods and services and share in its profits. A co-operative corporation may be organized: (a) on a for-profit basis, in which case it will possess many of the same features as a business corporation as explored in Part V: Section 4, (b) as a non-profit organization, in which case it will possess many of the same features as an incorporated non-profit corporation as explored in Part V: Section 7, or (c) as a registered charity, in which case it will possess many of the same features as a registered charity as explored in Part V: Section 8.
- **Who is the structure appropriate for:** The co-operative corporation structure is appropriate for (a) social enterprises led by more than one person, (b) that wish to create an organizational structure that creates more channels for member participation in governance than conventional corporate structures, (c) that have a clear understanding of whether they wish to operate on a for-profit, a non-profit, or a charitable basis and the implications of that decision on operations, financing, reporting and other requirements, and (d) that want to access the liability protections and other benefits afforded by incorporating, among other factors.
- **Corporate governance and management:** A co-operative corporation is characterized by its unique, democratic governance structure organized in accordance with the following principles: (a) open membership, (b) one member – one vote, (c) no member votes by proxy, (d) limits on interest, (e) limits on dividends (if for-profit), (f) member funded, (g) reinvestment of surplus for social purposes, and (h) co-operative education. Members elect the directors and the directors become responsible for managing or supervising the management of the organization.
- **Taxation:** The tax attributes of a co-operative corporation will vary according to whether the co-operative corporation is organized on a for-profit, non-profit, or charitable basis. Please see subsection (d) of this overview below for further details.

Advantages

- **Liability Protections:** A co-operative corporation's shareholders, directors and officers will generally not be personally liable for the debts, obligations, or other liabilities of the co-operative corporation. The personal liability of a co-operative corporation's members will generally be limited to the extent of the members' contribution or investment in the co-operative corporation.

At a Glance

- **Unrestricted ability to generate profits:** A co-operative corporation can generate profits, so long as activities are conducted on a “co-operative basis” as defined by its enabling legislation (see below). If a co-operative corporation is organized on a non-profit or charitable basis, it will face the same restrictions on profit generation as apply to each respective tax designation.
- **Flexibility in purposes/activities:** A co-operative corporation may advance any type of legal purpose and engage in any type of legal activity so long as it does so on a “co-operative basis” as defined by its enabling legislation (see below).
- **Protection of social purpose:** Regardless of whether a co-operative corporation is organized as a for-profit or non-profit organization, the co-operative structure affords a greater degree of legal protection to social purpose than a conventional business corporation structure.
- **Member engagement:** A co-operative corporation’s unique governance structure can create strong member engagement and participation opportunities, where the individuals or organizations that benefit from the co-operative corporation’s activities are afforded the opportunity to participate in and shape the co-operative corporation’s governance.

Disadvantages

- **Comparatively higher start-up costs.** The democratically controlled nature of a co-operative corporation’s governance structure can create unique advantages, including member engagement and participatory governance. However, administering those governance formalities can be more complex, expensive, and require greater coordination, cooperation, and compromise than some of the other legal structures explored in this guide.
- **Restrictions on profit distribution/raising capital.** Restrictions contained in the enabling legislation of co-operative corporations on how profits are distributed and how capital is raised can create challenges in securing external financing, if required.

(a) Overview & Organizational Structure

A co-operative corporation is one of the most popular legal structures used by social enterprises in Canada.

Co-operative corporations may be small or medium sized enterprises, consisting in worker, purchaser, or consumer owned co-operatives that coordinate the production, purchase and sale of goods and services in a manner beneficial to the co-operative’s members. Alternatively, co-operative corporations may be large, multinational corporations, and include banks, credit unions, insurance companies, and other institutions.

A co-operative corporation is a specialized corporate structure established under federal or provincial legislation. Like other incorporated structures, co-operative corporations enjoy the benefits of perpetual existence, separate legal personality, and limited liability of members, directors, and officers.

Unlike a conventional business corporation, a co-operative corporation is democratically controlled by members who benefit from the co-operative's goods or services and participate in the co-operative's governance on a "one member one vote basis." Contrast this voting structure with that of a conventional business corporation, where voting power is a function of percentage ownership of the corporation. In addition, co-operative corporations are required to operate on a "co-operative basis" designed to facilitate the collective ownership, management, financing, and reinvestment of profit in the co-operative corporation's social mission.

A co-operative corporation may be organized on a for-profit basis as a share capital corporation.

Alternatively, a co-operative corporation may be organized on a non-profit basis, as a non-share capital corporation and as a "non-profit organization" or a "registered charity." If a co-operative corporation is organized as a "non-profit organization" or a "registered charity", it will be subject to the requirements that apply to each of those tax designations, including the requirement to include a stated non-profit or charitable purpose, the obligation to devote the organization's resources to fulfilling the stated non-profit or charitable purposes, and prohibitions on distributing profits or surplus revenues to members.

(b) Establishment Costs, Process and Documentation

Co-operative corporations can be incorporated under federal law (e.g., the *Canada Cooperatives Act*) or under provincial law. Although there is significant harmonization in corporate legislation across federal and provincial legislation with respect to obligations to operate on a "co-operative basis," there are nuanced differences between jurisdictions. Founders should therefore consult with a lawyer in the jurisdiction where they are considering incorporating to obtain advice on what legislation to incorporate under.

The table below details the documents required to incorporate and organize a co-operative corporation under the federal *Canada Cooperatives Act*.



REUTERS/
Jesse
Winter

File Initial Incorporation Documents

- a cover letter including contact information for the person filing the application;
- a completed and signed copy of [Form 3001 – Articles of Incorporation](#);
- a completed and signed copy of [Form 3003 – Notice of Registered Office or Notice of Change of Registered Office](#);
- a completed and signed copy of [Form 3006 – Notice of Directors or Notice of Change of Directors](#);
- a [NUANs Name Search Report](#) (\$13.80);
- a [Statutory Declaration](#);
- the filing fee (\$250.00)

Next steps

- Provincial/ territorial registration (if applicable)
- Obtain business number (identification # for CRA accounts including GST/HST, income tax, import/export duties)
- Permits/licensing requirements (see [BizPaL](#))

First meeting of initial directors

- adopt forms of security certificates and of co-operative records;
- admit persons to membership in the co-operative and issue or authorize the issuance of membership shares and member loan certificates;
- appoint officers;
- appoint an auditor to hold office until the first meeting of members;
- plan with an appropriate financial institution; and
- transact any other business necessary to organize the co-operative.

First meeting of members

After incorporating, the co-operative's directors are required to hold a member's meeting to make the by-laws for the co-operative.³⁹ A co-operative's by-laws define the rights and obligations of each member of the co-operative, and will generally include provisions addressing:

- *the co-operative's mission and its fields of activity;*
- *requirements for becoming a member (including the number of co-op shares) and for terminating membership (withdrawal or expulsion);*
- *the procedure for calling the annual general meeting, special general meetings, and meetings of the board of directors;*
- *the powers and responsibilities of the board of directors, the executive committee, and other committees and boards; and,*
- *the powers and responsibilities of the chief executive officer/executive director.⁴⁰*

(c) Organizational Liabilities & Directors' Liabilities

Like any incorporated structure, a co-operative corporation's members, shareholders, directors, and officers will not be personally liable for the debts, obligations, or other liabilities of the co-operative corporation under most circumstances.

A member's liability will be limited to its respective contribution to the co-operative corporation. In other words, if a member contributes \$100,000 to the co-operative corporation, that member's total exposure to any liability of the co-operative corporation will be limited to the amount of their contribution of \$100,000.

Under most circumstances, a co-operative corporation's directors or officers will not be personally liable for the debts, obligations, or other liabilities of the co-operative corporation. However, there are certain circumstances explicitly prescribed by legislation where a director or officer may become personally liable for the debts, obligations, or other liabilities of the corporation, including:

- breach of the common law duty of care or the fiduciary duty of loyalty and good faith;
- liability for unpaid taxes and MERCs under s. 227.1 of the *Income Tax Act* (Canada);⁴¹
- liability for unpaid taxes (GST/HST) under the *Excise Tax Act* (Canada);⁴²

³⁹ *CICA*, *supra* note 26, s 14-15.

⁴⁰ Industry Canada, "Information Guide on Co-operatives", online: <https://ised-isde.canada.ca/site/cooperatives-canada/en/information-guide-co-operatives>

⁴¹ *ITA*, *supra* note 18, s 227.1; see also *Wheeler* *supra* note 18.

⁴² *ETA*, *supra* note 19, s 96(3).

- liability for failures to comply with anti-SPAM requirements under *Canada's Anti-Spam Legislation*;⁴³
- among others.

Under most circumstances, proactive corporate governance practices, risk management policies, financial and tax compliance controls, directors' and officers' insurance, and director indemnification agreements will insulate directors or officers against personal liability risks. However, social entrepreneurs should be aware of the potential liabilities associated with serving as a director or officer of an incorporated organization.

(d) Taxation

The tax treatment of a co-operative corporation will depend on whether it is organized as a for-profit corporation, a non-profit organization, or a registered charity. The table below provides a high-level summary of the tax attributes of a co-operative corporation depending on its tax designation. However, we encourage you to review the relevant sections of this guide elaborating on the tax treatment of each designation.

Summary of Tax Attributes	For-profit Corporation	Non-profit Organization	Registered Charity
Obligation to pay income tax?	Yes	No	No
Obligation to collect and remit GST/HST?	Yes – Subject to exceptions	Yes – Subject to exceptions	No – Subject to exceptions
Entitlement to Input Tax Credits/Public Service Body Rebate?	Yes – Input Tax Credits	Yes – Public Service Body Rebate	Yes – Public Service Body Rebate
Obligation to collect and remit MERCs?	Yes	Yes	Yes
Obligation to pay property tax?	Yes	Yes	Yes
Ability to issue official donation receipts?	No	No	Yes

⁴³ CASL, *supra* note 20, s 31.

(e) Corporate Governance & Regulatory Obligations

Operating Requirements

Subject to compliance with the provisions of its enabling legislation and the *Income Tax Act* (Canada), as it relates to the co-operative corporation's tax designation, a co-operative corporation is not subject to any legal restrictions in its ability to engage in commercial activities versus social impact activities or transfer funds to or otherwise partner with other commercial partners or non-profit partners. These features afford the co-operative corporation structure significant flexibility in defining and pursuing its social mission.

Co-operative corporations must comply with any business licensing, permitting or other regulatory requirements applicable to the specific activity the co-operative corporation engages in.

Public Filings

The specific public reporting obligations of a co-operative corporation will depend on whether the co-operative corporation is organized as either a private for-profit corporation, a public for-profit corporation, a non-profit organization, or a registered charity.

Co-operative corporations are required to prepare annual financial statements in accordance with the accounting standards and at the level (notice to reader, review engagement, audit, etc.) described in the enabling legislation of the co-operative corporation, which will usually be a function of the co-operative corporation's overall revenue. Financial statements will generally remain private if the co-operative corporation is a private for-profit corporation. Otherwise, financial statements will generally be public if the co-operative corporation is a public for-profit corporation, a non-profit organization, or a registered charity.

Co-operative corporations organized as either a private for-profit corporation, a public for-profit corporation, or a non-profit organization are required to complete and file a *T2 Corporate Income Tax Return* with the Canada Revenue Agency, together with any related tax filings and notices. However, these filings generally remain private. If the co-operative corporation is organized as a registered charity, it will be required to file a *T3010 Annual Information Return* with the Canada Revenue Agency.

Co-operative corporations will be required to complete any annual filings necessary to maintain their corporate status in the jurisdiction where they are incorporated, and any jurisdiction where they are extra-provincially registered.

Corporate Governance

A co-operative corporation will be managed by a member-elected board of directors responsible for managing or supervising the management of the corporation's activities. Members vote for directors on a "one-member one-vote" basis. The directors become responsible for managing or supervising the management of the corporation's activities. In larger organizations, directors will generally delegate responsibility for day-to-day operational decision-making to officers or paid employees. However, ultimately, the corporation's board of directors remains responsible for the co-operative corporation's overall management.

A co-operative corporation's enabling legislation will usually dictate that the organization be operated on a "co-operative basis".⁴⁴ The statutory requirements for operating on a co-operative basis include:⁴⁵

Open membership: Membership in the co-operative is open, in a non-discriminatory manner, to persons who can use the services of the co-operative and who are willing and able to accept the responsibilities of membership.

One member – one vote: Each member or delegate has only one vote.

No member votes by proxy: No member or delegate may vote by proxy.

Limits on interest: Interest on any member loan is limited to a maximum percentage fixed in the articles.

Limits on dividends: Dividends on any membership share are limited to the maximum percentage fixed in the articles.

Member funded: To the extent feasible, members provide the capital required by the co-operative, with the return paid on member capital not to exceed the maximum percentage specified in the articles.

Reinvestment of surplus for social purposes: Surplus funds arising from the co-operative's operations are used (a) to develop its business, (b) to provide or improve common services to members, (c) to provide for reserves or the payment of interest on member loans or dividends on membership shares and investment shares, (d) *for community welfare or the propagation of co-operative enterprises*, or (e) as a distribution among its members as a patronage return.

Co-operative Education: It educates its members, officers, employees and the public on the principles and techniques of co-operative enterprise.⁴⁶

Co-operative corporations are also required to convene periodic meetings of members, shareholders, and directors in accordance with their by-laws and their enabling legislation and to provide members and shareholders with up-to-date reporting on the financial performance of the business.

(f) Finance and Fundraising

A co-operative must obtain its funding from its members "to the extent feasible."⁴⁷ However, a co-operative may issue investment shares or loans to external investors. An "investment share" is defined as any share that does not confer membership rights.⁴⁸ A co-operative's ability to pay dividends on external shares or interest on loans will be limited in accordance with its enabling legislation, articles and by-laws. These restrictions may deter returns-oriented investors, making the co-operative a comparatively less attractive vehicle for raising capital from conventional investors relative to a conventional business corporation.

The specific funding programs a co-operative corporation is eligible for will depend on the co-operative corporation's tax designation as either a for-profit, non-profit, or registered charity.

⁴⁴ *CICA*, *supra* note 26, s 11(g).

⁴⁵ *Ibid*, s 7(1).

⁴⁶ *Ibid*, s 718.

⁴⁷ *Ibid*, s 7(1)(f).

⁴⁸ *Ibid*, s 2(1) and 6.

7. INCORPORATED NON-PROFIT ORGANIZATION

At a Glance

Overview

- **Description:** A non-profit organization is a designation under the *Income Tax Act* (Canada) that can apply to a variety of legal structures, including (a) an incorporated non-share capital corporation, such as federal not-for-profit corporations and provincially incorporated societies, and (b) unincorporated organizations, such as unincorporated associations or community groups. To be a non-profit organization, an organization must be: (a) established for social welfare, civic improvement, pleasure, recreation, or any other non-profit purpose; (b) cannot be operated for the pursuit of profit; (c) cannot be a charity; and (d) no part of its income can be available for the personal benefit of its owners or members.
- **Who is the structure appropriate for:** The non-profit organization structure is appropriate for (a) social enterprises led by more than one person, (b) that anticipate engaging in limited business activities, that do not anticipate generating a consistent, recurring profit, or where the non-profit activity itself possesses a commercial or entrepreneurial character, (c) that want to embed social impact into their corporate structure; (d) that are comfortable with the accompanying social purpose protections, including restrictions on the ability to distribute profits to members; (e) that are targeting and/or relying on non-profit funding streams to partially fund their operations, (f) that want to access the liability protections and other benefits afforded by incorporating, among other factors. It should not be understated that the considerations (b) and (d) above may limit the usefulness of the non-profit organization structure for a social enterprise whose model relies on generating substantial profits. Please consult the “Disadvantages” section below for more details.
- **Corporate governance and management:** Depending on its underlying corporate structure, an incorporated non-profit organization will usually require at least three directors (unlike a conventional business corporation, which may operate with as few as one director). Otherwise, an incorporated non-profit organization’s governance structure will possess the same governance features as most incorporated structures, allocating decision-making authority between the corporation’s members and its board of directors or officers, with operational decision-making authority vested in the corporation’s board of directors or officers.
- **Taxation:** The income of a non-profit organization is ordinarily not subject to corporate income tax. Goods and services supplied by a non-profit organization will ordinarily be subject to GST/HST, subject to defined exceptions. A non-profit organization that is a registrant for GST/HST will ordinarily be eligible for a public service body rebate on GST/HST. If the non-profit organization engages employees, it will be required to collect and remit MERCs in respect of employee compensation.

At a Glance

Advantages

- **Flexibility in structure:** As a tax designation, non-profit organization status is available to a variety of legal structures. This offers flexibility to social entrepreneurs to organize under an unincorporated structure, such as an unincorporated association or trust, or an incorporated structure, such as a not-for-profit corporation or an incorporated society. If a non-profit organization is incorporated, it will enjoy the general advantages of incorporation, including (a) being organized as a separate legal entity, (b) limitation of liability for members, directors, and officers, (c) organizational continuity, among others.
- **Flexibility in purposes/activities.** Subject to compliance with the non-profit organization's enabling legislation, a non-profit organization may be organized and operated for any social, environmental, community or any other non-profit purpose, provided (a) it does not do so for-profit, and (b) no part of the non-profit organization's income is available for its members. This flexibility permits non-profit organizations to pursue a far broader range of purposes/activities than registered charities. However, restrictions on the ability of non-profit organizations to generate recurring profits limit the structure's utility for profit-oriented social enterprises.
- **Protection of social purpose:** A non-profit organization must embed non-profit purpose, such as social welfare, civic improvement, pleasure, or recreation, in its constating documents, conferring a high degree of legal protection on the pursuit of a social purpose.

Disadvantages

- **Restrictions on generation of profit.** A non-profit organization is generally restricted in its ability to intentionally generate a consistent, recurring profit, making the structure inappropriate for profit-oriented social enterprises.
- **Inability to issue official donation receipts:** Unlike registered charities, non-profit organizations cannot issue official donation receipts to individual or corporate donors, rendering them ineligible for funding streams that require recipients to be registered charities.
- **Reduced entitlement to grants/funding relative to registered charities:** A non-profit organization is generally eligible for government and non-profit funding streams. However, a non-profit organization will not be eligible for funding from public or private foundations or other programs that require recipients to be registered charities. A non-profit organization will not be eligible for conventional for-profit funding and financing streams, such as equity investments.

(a) Overview & Organizational Structure

A non-profit organization is a tax designation that can apply to a variety of legal structures, including (a) an incorporated non-share capital corporation, such as a federal not-for-profit corporation or provincially incorporated

society; and (b) unincorporated organizations, such as unincorporated associations, community groups, or trusts. In this section, we will generally focus on an incorporated non-profit-organization established under the *Canada Not-for-profit Corporations Act*.

To be eligible to receive non-profit organization designation under subsection 149(1)(l) of the *Income Tax Act* (Canada), an organization must:

- be established for a social welfare, civic improvement, pleasure, recreation, or any other non-profit purpose;
- cannot be operated for the pursuit of profit;
- cannot be a charity; and
- no part of its income can be available for the personal benefit of its owners/ members.⁴⁹

Unlike a registered charity, a non-share capital corporation will be automatically deemed to be a “non-profit organization” provided it satisfies the elements of the legal definition under subsection 149(1)(l) of the *Income Tax Act* (Canada). The designation will automatically apply upon the formation of the underlying legal structure. Non-profit organizations self-identify as such when filing their annual tax returns.

Once established, an incorporated non-profit organization provides a corporate vehicle that can enable individuals and groups to come together to advance a defined non-profit purpose. Although those persons may participate in the governance of the incorporated non-profit organization as members, directors, or officers, they do not have an economic interest in the corporation in the same way as shareholders of a business corporation and are prohibited from receiving distributions of any surplus profits or revenues from the non-profit organization.

(b) Establishment Costs, Process & Documentation

The requirements (and costs) to establish an incorporated non-profit organization will depend on the jurisdiction where the underlying legal structure is incorporated. Most provinces make it possible for founders to incorporate non-share capital corporations under provincial legislation, including as incorporated societies, companies limited by guarantee, or non-profit corporations. At the federal level, Corporations Canada allows founders to establish an incorporated non-profit organization under the *Canada Not-for-profit Corporations Act*. Given the diversity of legal structures available, founders should consult with a lawyer in the jurisdiction where they are considering operating to discuss the advantages or disadvantages of incorporating federally or provincially.

The table below details the documents required to incorporate and organize an incorporated non-profit organization under the federal *Canada Not-for-profit Corporations Act*.

⁴⁹ *ITA*, *supra* note 18, s 149(1)(l). See also Canada Revenue Agency, “Income Tax Guide to the Non-Profit Organization (NPO) Information Return”, T4117 (E) Rev. 14, online: <<https://www.canada.ca/en/revenue-agency/services/forms-publications/publications/t4117/income-tax-guide-non-profit-organization-information-return.html>>.

File Initial Incorporation Documents

- [Articles of Incorporation](#) (corporate name, province/territory, statement of non-profit purposes, membership structure, number of directors, restrictions on activities)
- [Initial Registered Office Address and First Board of Directors](#)
- [NUANs Name Search Report](#) (\$13.80)
- Filing fee (\$200.00)

Next steps

- Provincial/territorial registration (if applicable)
- Obtain business number (identification # for CRA accounts including GST/HST, income tax, import/export duties)
- Permits/licensing requirements (see [BizPaL](#))

First meeting of initial directors

- Draft and adopt corporate [by-laws](#)
- Appoint officers, if not elected by the members
- Appoint or waive the appointment of an accountant
- Admit or acknowledge members
- Make banking arrangements

First meeting of members

- Elect directors
- Elect officers, if not appointed by the directors
- Confirm/modify/ reject by-laws
- Appoint/waive appointment of auditor

(c) Organizational Liabilities & Directors' Liabilities

Liabilities will vary depending on the underlying legal structure of the non-profit organization.

If the non-profit organization is unincorporated, such as an unincorporated association or a trust, the individual members, trustees or like officials of the non-profit organization may be subject to unlimited personal liability for the liabilities of the non-profit organization.

If the non-profit organization is incorporated, such as a federal not-for-profit corporation or provincial society, the individual members, directors, officers, or like officials of the non-profit organization will ordinarily not be subject to unlimited personal liability for the liabilities of the non-profit organization.

There are certain circumstances explicitly prescribed by legislation where a director or officer may become personally liable for the debts, obligations, or other liabilities of an incorporated non-profit organization, including:

- breach of the common law duty of care, the fiduciary duty of loyalty and good faith;
- liability for unpaid taxes and MERCs under s. 227.1 of the *Income Tax Act* (Canada);
- liability for unpaid taxes (GST/HST) under the *Excise Tax Act* (Canada);
- liability for failures to comply with anti-SPAM requirements under Canada's Anti-Spam Legislation;
- among others.

Under most circumstances, proactive corporate governance practices, risk management policies, financial and tax compliance controls, directors' and officers' insurance, and director indemnification agreements will insulate directors or officers against personal liability risks. However, social entrepreneurs should be aware of the potential liabilities associated with serving as a director or officer of an incorporated organization.

(d) Taxation

Like a registered charity, the income of a non-profit organization is not subject to corporate income tax. This applies to all income, including income derived from traditional and non-traditional funding channels, including grants, donations, and income from program aligned business activities, among others.

Non-profit organizations are required to collect and remit federal and provincial goods and services tax/harmonized sales tax (GST/HST) if the following conditions are met:

- the non-profit organization is providing a taxable supply of goods or services "made in the course of a commercial activity";
- the non-profit organization is not a small supplier, roughly defined as an organization that earns less than \$50,000 from worldwide taxable supplies in the previous four calendar quarters; and
- the goods or services supplier are not "zero-rated supplies" or "exempt supplies".

In practice, restrictions on a non-profit organization's ability to engage in commercial activities and generate a consistent, recurring profit means that the first requirement for GST/HST will not be satisfied, specifically, the requirement to provide a taxable supply of goods or services "in the course of a commercial activity". However, if a non-profit organization includes a social enterprise offering as part of its programming that is appropriately characterized as a taxable supply of goods or services, that organization may be required to register for, collect and remit GST/HST subject to the other necessary conditions being satisfied. The manner in which the GST/HST rules

apply to non-profit organizations delivering different types of goods and services can be complex. For this reason, founders should obtain appropriate tax and accounting advice as their organizations grow and scale. Equally, GST/HST rules will vary by province and social enterprises should seek tailored, province-specific guidance (especially for jurisdictions with stand-alone provincial sales tax, British Columbia, Saskatchewan and Manitoba, or jurisdictions with distinct tax administration regimes, including Quebec).

In connection with GST/HST, most non-profit organizations will be eligible for a Public Service Body rebate equal to fifty percent of the GST/HST paid on eligible purchases and expenses by the non-profit organization in carrying out its programming.⁵⁰

Non-profit organizations are required to collect and remit mandatory employment related costs on employee salaries. This category of costs includes federal and provincial contributions paid on payroll costs, including employment insurance, Canada Pension Plan (CPP) contributions, among others.

If a non-profit organization owns real property, it will be required to pay municipal property taxes. However, some municipal jurisdictions will offer non-profit organizations individualized property tax rebates or reduced rates.

Unlike registered charities, non-profit organizations cannot issue official donation receipts to individual or corporate donors, rendering them ineligible for funding streams that require recipients to be registered charities.

Summary of Tax Attributes	
Obligation to pay corporate income tax?	No
Obligation to collect and remit GST/HST?	Yes – Subject to exceptions
Entitlement to Public Service Body Rebate?	Yes
Obligation to collect and remit MERCs?	Yes
Obligation to pay property tax?	Yes
Ability to issue official donation receipts?	No

⁵⁰ Canada Revenue Agency, “GST/HST public service bodies’ rebates”, online: <<https://www.canada.ca/en/revenue-agency/services/tax/businesses/topics/gst-hst-businesses/gst-hst-rebates/public-service-bodies.html>> [GST/HST Public Service].

(e) Corporate Governance & Regulatory Obligations

Special Operating Requirements

Restrictions on generation of profits

A non-profit organization may not generate a profit without jeopardizing its tax-exempt status, even if the non-profit organization intends to use that profit to further its social purpose. A 2009 CRA policy statement confirmed that a non-profit organization may not intentionally earn a profit. Rather, a non-profit organization may only “earn a profit as long as that profit is generally unanticipated and incidental to carrying out the entity’s exclusively not-for-profit purposes”.

Courts have permitted non-profit organizations to engage in business activities in limited circumstances. However, some CRA policy statements regarding non-profit organizations’ ability to generate profits have taken less lenient positions. Accordingly, although a non-profit organization may be an effective structure for social enterprises that intend to rely on member fees or service or program fees levied on a cost-recovery basis, a non-profit organization will not be an effective structure for a social enterprise that seeks to generate consistent, recurring revenue through business-like activities.

Restriction on distribution of income

A non-profit organization must use its assets/revenue to further the purpose stated in its articles and is not permitted to engage in activities which do not further its stated purpose. A non-profit organization may not distribute or make available its income to its members. However, a non-profit organization may transfer funds to registered charities, other non-profit organizations, and for-profit corporations provided that doing so is consistent with the non-profit organization’s stated purposes. Provided that a non-profit organization uses its assets/revenue to further its stated purposes, it may do so with greater flexibility than a registered charity.

Operating Requirements

Unlike a business corporation or other for-profit legal structure, a non-profit organization must operate in a manner that advances its stated non-profit purpose. All organizational decisions related to programming, partnerships and projects must be rationally connected to advancing the organization’s non-profit purposes.

Non-profit organizations must comply with any business licensing, permitting or other regulatory requirements applicable to the specific activity the non-profit organization engages in.

Public Filings

A non-profit organization is required to file a *T2 Corporate Income Tax Return* on an annual basis with the Canada Revenue Agency. In addition, a non-profit organization may be required to file a *T1044 Non-Profit Organization (NPO) Information Return* with the Canada Revenue Agency. Within these filings, the non-profit organization will report on income, expenditure, assets, liabilities, and remuneration. Unlike the tax filings applicable to registered charities, those for non-profit organizations generally remain private and not publicly accessible. However, many non-profit organizations are required to file annual financial statements with the relevant corporate registrar that

do become publicly accessible. A non-profit organization may be required to complete additional tax or corporate filings depending on its underlying legal structure and the extent of its activities, including the filings applicable to GST/HST, MERCs, Public Service Body Rebates, among others.

Governance

A non-profit organization's governance structure will be contingent on its underlying legal structure, which may be either a not-for-profit corporation/society, a co-operative, or an unincorporated association. The most common forms of non-profit organization are not-for-profit corporations or incorporated societies. A member-elected board of directors is responsible for managing the affairs of these types of entities. The vertical or horizontal character of the non-profit organization's governance structure and the concentration or diffusion of control will depend on the size of its board of directors and of its membership base, and the allocation of voting rights across that membership base.

Most non-profit organizations require at least three directors. However, a non-profit organization incorporated under the *Canada Not-for-profit Corporations Act* may have only one director provided that it is not a "soliciting corporation," or, in general, one which does not receive more than \$10,000 in government or public funding in a fiscal year.

(f) Finance and Fundraising

A non-profit organization may raise capital through collecting membership fees, through appealing to traditional non-profit funding channels such as grants and donations (not restricted to registered charities), through fee for service business models, and through loans (if available). Unlike a business corporation, CIC or co-operative, a non-profit organization is generally not permitted to raise capital by issuing shares and may be limited in its ability to incur debt.

Unlike registered charities, non-profit organizations may not issue official donation receipts and are generally ineligible for grants from registered charities. Under new qualifying disbursements rules introduced as part of 2022 amendments to the *Income Tax Act* (Canada), non-profit organizations may be eligible for grants from registered charities if they meet defined accountability requirements. Draft guidance circulated by the CRA Charities Directorate in November 2022 suggests that accountability requirements are generally designed to ensure that the grant (a) furthers a charitable purpose; (b) is exclusively applied to charitable activities in furtherance of a charitable purpose of the granting-making charity; and (c) is subject to documentation and record-keeping requirements that are compliant with the standards applicable to registered charities.⁵¹ The new qualifying disbursement rules increase the fundraising versatility of non-profit organizations considering relying on grants from charities as part of their funding mix.

⁵¹ Canada Revenue Agency, "Registered charities making grants to non-qualified donees (draft)", online: <<https://www.canada.ca/en/revenue-agency/services/charities-giving/charities/policies-guidance/charities-making-grants-non-qualified-donees.html#toc0>>.

8. REGISTERED CHARITY

At a Glance

Summary

- **Description:** Charitable status is a tax designation that confers unique advantages, including the ability to issue donation receipts for charitable gifts and to receive funding from other charities. To be eligible for charitable status, an organization must: (a) be established for purposes that are “exclusively and legally charitable”, specifically: (i) relief of poverty; (ii) advancement of education; (iii) advancement of religion; and (iv) other purposes beneficial to the community in a way the law regards as charitable, and (b) the organization’s programming must benefit the public or a sufficient segment of the public. To become a registered charity, an organization must apply to the CRA Charities Directorate for “charitable status.” As part of the application process, an applicant designates whether it wishes to operate in one of the following three sub-categories of registered charity: (a) charitable organization, (b) public foundation, or (c) private foundation (the paragraphs below explain the distinctions between these categories in greater detail). Most social enterprises will be designated as “charitable organizations.” The primary difference between the “charitable organization” designation and the two foundation designations is that charitable organizations deliver the majority of their charitable activities independently, while the foundation designations deliver their charitable activities through making gifts, grants, qualifying disbursements or other lawful transfers to other charities or qualifying organizations.
- **Who is the structure appropriate for:** The registered charity structure is appropriate for (a) social enterprises led by more than one person, (b) that anticipate engaging in business activities falling under the “related business” exception, (c) that want to embed social impact into their corporate structure; (d) that are comfortable with the accompanying social purpose protections; (e) that are targeting relying on non-profit funding streams to partially fund their operations, (f) that want to access the liability protections and other benefits afforded by incorporating, among other factors.
- **Corporate governance and management:** Depending on its underlying corporate structure, a registered charity will usually require at least three directors (unlike a conventional business corporation, which may operate with as few as one director). Otherwise, a registered charity’s governance structure will possess the same governance features as most incorporated structures, allocating decision-making authority between the corporation’s members and its board of directors or officers, with operational decision-making authority vested in the corporation’s board of directors or officers.
- **Taxation:** The income of a registered charity is ordinarily not subject to corporate income tax. Goods and services supplied by a registered charity will not ordinarily be subject to GST/HST, subject to defined exceptions. A registered charity that is a registrant for GST/HST will ordinarily be eligible for a public service body rebate on GST/HST. If the registered charity engages employees, it will be required to collect and remit MERCs in respect of employee compensation.

At a Glance

Advantages

- **Entitlement to grants/funding:** A registered charity is generally eligible for the widest range of funding channels among non-profit entities, including: (a) individual and corporate donations; (b) government grants; and (c) transfers from other charitable organizations and charitable foundations. Registered charities are generally ineligible for grants, funding and technical support focusing on the needs of for-profit entities.
- **Ability to issue official donation receipts:** A registered charity can issue official donation receipts to individual or corporate donors, enabling donors to receive a tax credit or deduction for the eligible amount of their charitable gift.
- **Protection of social purpose:** A registered charity must be organized for at least one of the four recognized categories of charitable purposes. If a registered charity fails to devote its resources to advancing its charitable purpose, it may have its charitable status revoked. This requirement preserves and protects the registered charity's defined charitable purpose, ensuring that advancing that purpose remains paramount for the registered charity's directors and officers.
- **Flexibility in structure:** As a tax designation, charitable status is available to a variety of legal structures. This offers flexibility to social entrepreneurs to organize under an unincorporated structure, such as an unincorporated association or trust, or an incorporated structure, such as a not-for-profit corporation. If a registered charity is incorporated, it will enjoy the general advantages of incorporation, including (a) being organized as a separate legal entity, (b) limitation of liability for members, directors, and officers, (c) organizational continuity, among others.

Disadvantages

- **Restrictions on asset/revenue use:** A registered charity must employ its assets exclusively for charitable purposes. A registered charity is subject to extensive restrictions on how it may use its assets, specifically: (a) disbursement quota restrictions; and (b) asset-lock restrictions. These restrictions offer strong protection to a registered charity's social purpose and, in that sense, are an advantage for social entrepreneurs seeking to prioritize protection of social purpose. However, if an entrepreneurial venture does not strictly align with an organization's charitable purposes, the restrictions inhibit a registered charity's ability to operate an unrelated business to support its overall operations.
- **Restrictions on business activities:** A registered charity is restricted in the types of profit-generating business activities it can carry on. However, profits may be generated if the activity is deemed a "related business". A related business will either be (a) volunteer-driven; and/or (b) linked or subordinate to the registered charity's charitable purpose.
- **Restrictions on purposes/activities:** A registered charity is generally limited to engaging in programming activities that fall within four categories of charitable purposes: (a) poverty relief, (b) education, (c) religion, and (d) other purposes beneficial to the community recognized as charitable by law.

(a) Overview & Organizational Structure

There are currently over 86,000 registered charities in Canada.⁵² Some of those registered charities operate within the traditional conception of what it means to be a charity, for example, by delivering programming to vulnerable populations, relying on external funding from third-party donors to fund that programming. Many rely on a combination of external funding and program fees to fund their operations. Others rely on revenue generated by internal, purpose-aligned related business activities to fund their operations.

A registered charity is not a separate legal structure. Rather, “charitable status” is a tax designation under the *Income Tax Act* (Canada) that an organization must apply to the CRA Charities Directorate to receive. Many different non-profit legal structures can apply for and receive charitable status, ranging from an unincorporated trust to a federally incorporated not-for-profit corporation.

To become a registered charity, an organization must meet two fundamental requirements:

- the organization’s purposes must be “exclusively and legally charitable”; and
- the organization must be established for the benefit of the public or a sufficient segment of the public.

For an organization’s purposes to be “exclusively and legally charitable”, they must fall within one of the following four categories of charitable purposes:

- relief of poverty;
- advancement of education;
- advancement of religion; and
- other purposes beneficial to the community in a way the law regards as charitable.

Most organizations apply to become registered charities to access the unique tax advantages that accompany being awarded charitable status, specifically:

- the ability to issue official donation receipts for the eligible amount of charitable gifts or donations; and
- the ability to receive contributions from other registered charities, including charitable organizations, and private and public foundations.

One reason that motivates many organizations to apply for charitable status is that many of the largest funders in Canada’s philanthropic and social impact sector require organizations to be registered charities as a pre-condition to being eligible for funding. This requirement may be moderated somewhat by the introduction of new “qualifying

⁵² Government of Canada, “Briefing for the Minister of National Revenue: Charitable Sector” (February 2, 2022), online: <<https://www.canada.ca/en/revenue-agency/corporate/about-canada-revenue-agency-cra/ministerial-transition-2021/issues/charitable-sector.html>>.

disbursement” rules under 2022 amendments to the *Income Tax Act* (Canada), which create new channels for Canadian charities to transfer funds to non-charities provided certain program alignment, accountability and reporting requirements are satisfied. However, notwithstanding the introduction of these rules, charitable status confers significant advantages in terms of breadth of access to funders targeting the non-profit and charitable sectors.

As a corollary to their unique tax advantages, registered charities are subject to stringent regulations across all facets of their legal, financial, and practical operations, including:

- purposes/ activities;⁵³
- business activities;⁵⁴
- investments and investment returns;⁵⁵
- public policy dialogue and development activities; and⁵⁶
- the entities to which they may transfer resources.

An organization seeking charitable status may be designated by CRA as a charitable organization, a public foundation or a private foundation depending on its governance structure and the extent to which the organization carries on its own activities or funds other registered charities. The table below provides a brief overview of the different types of registered charity.⁵⁷

53 Canada Revenue Agency, “Charitable purposes”, online: <<https://www.canada.ca/en/revenue-agency/services/charities-giving/charities/applying-registration/charitable-purposes.html>>.

54 Canada Revenue Agency, “What is a Related Business”, CPS-019, March 31 2003, online: <<https://www.canada.ca/en/revenue-agency/services/charities-giving/charities/policies-guidance/policy-statement-019-what-a-related-business.html>> [CPS-019].

55 Canada Revenue Agency, “Non-qualified investments”, online: <<https://www.canada.ca/en/revenue-agency/services/charities-giving/charities/operating-a-registered-charity/issuing-receipts/non-qualified-investments.html>>; Canada Revenue Agency, “Non-Qualified Investment – Tax Liability”, CG-009, August 15 2011, online: <<https://www.canada.ca/en/revenue-agency/services/charities-giving/charities/policies-guidance/non-qualified-investment-tax-liability.html>>; Canada Revenue Agency, “Private Foundations and Investment Portfolios”, CPC-023, August 1, 2002, online: <<https://www.canada.ca/en/revenue-agency/services/charities-giving/charities/policies-guidance/policy-commentary-023-private-foundations-investment-portfolios.html>>.

56 Canada Revenue Agency, “Public policy dialogue and development activities by charities”, CG-027, January 21, 2019 (Revised November 27, 2020), online: <<https://www.canada.ca/en/revenue-agency/services/charities-giving/charities/policies-guidance/public-policy-dialogue-development-activities.html>>.

57 For more on the different types of registered charities designations, see Canada Revenue Agency, “Types of registered charities (designations)”, online: <<https://www.canada.ca/en/revenue-agency/services/charities-giving/charities/registering-charitable-qualified-donnee-status/apply-become-registered-charity/establishing/types-registered-charities-designations.html>>.

Registered Charity Type		Attribute
1	Charitable Organization	<ul style="list-style-type: none"> • Structured as a corporation, trust, or unincorporated association • Established exclusively for charitable purposes • Conducts its own activities (e.g., more than 50%) independently • Managed by a board of directors, trustees, or similar officials, more than 50% of which deal at arm's length from one another • Usually funded by many arms' length donors
2	Public Foundation	<ul style="list-style-type: none"> • Structured as a corporation, trust, or unincorporated association • Established exclusively for charitable purposes • Generally gives more than 50% of annual income to other qualified donees, but may carry out some charitable activities independently • Managed by a board of directors, trustees, or similar officials, more than 50% of which deal at arm's length from one another • Usually funded by many arms' length donors
3	Private Foundation	<ul style="list-style-type: none"> • Structured as a corporation, trust, or unincorporated association • Established exclusively for charitable purposes • Generally gives more than 50% of annual income to other qualified donees, but may conduct some charitable activities independently • Managed by a board of directors, trustees, or similar officials, more than 50% of which do not deal at arm's length from one another • Usually funded by a few donors who are not at arm's length from the registered charity (i.e., who control the registered charity in some manner)

(b) Establishment Costs, Process & Documentation

The requirements (and costs) to establish the legal entity applying for charitable registration depends on the requirements applicable to the underlying legal entity, i.e., whether it is an unincorporated association, a co-operative, a not-for-profit corporation, or a society.

Once an organization's underlying legal structure is established, that organization is required to apply for charitable status with the CRA Charities Directorate. Since June 2019, the CRA Charities Directorate has encouraged most organizations applying for charitable status to do so online through "My Business Account": an online portal that enables individuals, organizations, and businesses to interact electronically with the CRA.

To access "My Business Account," an applicant must:

- obtain or apply for a nine-digit federal business number;
- register for "My Business Account" online;
- apply for a pending charitable program account number; and
- complete the online application form accessed via the organization's "My Business Account" portal.⁵⁸

The charitable registration application will require applicants to supply detailed information about the applicant organization and its charitable purposes and activities, encompassing:

- organizational structure;
- governing documents;
- directors, trustees and like officials;
- designation (e.g., whether as a charitable organization or as a public or private foundation);
- charitable purposes and activities;
- gifts and other income generating activities;
- financial transactions with the organization's officials;
- real property;
- financial information;
- assets and liabilities;
- supporting documents (e.g., incorporation documents, financial statements, program information, letters of support, etc.)

⁵⁸ Canada Revenue Agency, "Submit your application", online: <<https://www.canada.ca/en/revenue-agency/services/charities-giving/charities/registering-charitable-qualified-donee-status/apply-become-registered-charity/apply/submit-application.html>>.

The information requested by the charitable registration application is comprehensive. The CRA Charities Directorate has specific expectations regarding how applicants present the information. For example, in describing the activities an applicant will carry out to advance its charitable purposes, the CRA Charities Directorate requests information on the following:

- Who are the beneficiaries of the activity and how does the applicant select those beneficiaries?
- What does the activity seek to accomplish?
- Where will the activity take place?
- When has (or will) the activity take place? What is the frequency and length of the activity?
- How does the applicant carry out the activity?
- Does the applicant charge fees to activity participants or beneficiaries?
- Does the applicant engage employees or volunteers in carrying out the activity?
- Does the application partner with other organizations to deliver the activity? If yes, how does the applicant maintain direction and control over the delivery of the activity?
- How much does the activity cost (or what percentage of the applicant's total expenditure does the activity represent)?

It is possible for a well-organized applicant to complete the charitable registration process independently. However, the nature and volume of the information required to prepare a charitable registration and the complexity of applicable laws often necessitates that applicants work with a lawyer and accountant to navigate the application process. The importance of working with professionals is especially true for social enterprises operating related businesses, undertaking community economic development activities, or activities that use entrepreneurship to advance other charitable purposes.

There is no government filing fee associated with submitting a charitable registration application. However, if an applicant chooses to engage a lawyer or accountant to assist with the application process, they may incur the fees charged by those service providers.

The CRA Charities Directorate suggests that its goal is to provide an initial response within six-months of receiving a complete charitable registration application.

(c) Organizational Liabilities & Directors' Liabilities

Liabilities will vary depending on the underlying legal structure of the registered charity.

If the registered charity is unincorporated, such as an unincorporated association or a trust, the individual members, trustees or like officials of the registered charity may be subject to unlimited personal liability for the liabilities of the registered charity.

If the registered charity is incorporated, such as a federal not-for-profit corporation or provincial society, the individual members, directors, officers, or like officials of the registered charity will ordinarily not be subject to unlimited personal liability for the liabilities of the registered charity.

There are certain circumstances explicitly prescribed by legislation where a director or officer may become personally liable for the debts, obligations or other liabilities of an incorporated registered charity, including:

- breach of the common law duty of care, the fiduciary duty of loyalty and good faith;
- breach of high fiduciary duties regarding charitable property;⁵⁹
- liability for unpaid taxes and MERCs under s. 227.1 of the *Income Tax Act* (Canada);
- liability for unpaid taxes (GST/HST) under the *Excise Tax Act* (Canada);
- liability for failures to comply with anti-SPAM requirements under Canada's Anti-Spam Legislation;
- among others.

Under most circumstances, proactive corporate governance practices, risk management policies, financial and tax compliance controls, directors' and officers' insurance, and director indemnification agreements will insulate directors or officers against personal liability risks. However, social entrepreneurs should be aware of the potential liabilities associated with serving as a director or officer of an incorporated organization.

In addition, the directors, officers, trustees or like officials of registered charities are subject to heightened fiduciary obligations like those of trustees of charitable property.⁶⁰

(d) Taxation

Registered charities enjoy some of the most favorable tax treatment of any Canadian legal structure.

The income of registered charities is not subject to corporate income tax. This applies to all income, including income derived from traditional and non-traditional funding channels, including grants, donations, related-business income, among others.

Registered charities are ordinarily exempt from federal and provincial goods and services tax/harmonized sales tax on supplies of goods or services (GST/HST).⁶¹ This means that under most circumstances, registered charities will not be required to register as GST/HST registrants and collect and remit GST/ HST on taxable supplies of goods and services. A registered charity will be required to register as a GST/ HST registrant if it generates gross revenue in excess of \$250,000 in the previous three financial years. However, even if a registered charity is required to register as a GST/HST registrant, it may not need to collect and remit GST/HST if it is providing an "exempt supply" of goods and services. At a high level, most goods and services delivered by registered charities fall within the "exempt

⁵⁹ Jane Burke-Robertson, Terrence S Carter, Theresa LM Man, "Corporate and Practice Manual for Charities and Not-for-profit Corporations" (Thomson Reuters Canada Limited, Toronto, Canada, 2022) at § 9:18.

⁶⁰ *Ibid.*

⁶¹ Canada Revenue Agency, "GST/HST Information for Charities", RC4082(E) Rev. 21, online: <<https://www.canada.ca/en/revenue-agency/services/forms-publications/publications/rc4082/gst-hst-information-charities.html>>.

supply” category. However, the manner in which the GST/HST rules apply to registered charities delivering different types of goods and services is complex. For this reason, founders should obtain appropriate tax and accounting advice as their organizations grow and scale. Equally, GST/HST rules will vary by province and social enterprises should seek tailored, province-specific guidance (especially for jurisdictions with stand-alone provincial sales tax, British Columbia, Saskatchewan and Manitoba, or jurisdictions with distinct tax administration regimes, including Quebec).

In connection with GST/HST, most registered charities will be eligible for a Public Service Body rebate equal to fifty percent of the GST/HST paid on eligible purchases and expenses by the registered charity in carrying out its programming.⁶²

Registered charities are required to collect and remit mandatory employment related costs on employee salaries. This category of costs includes federal and provincial contributions paid on payroll costs, including employment insurance, Canada Pension Plan (CPP) contributions, among others.

If a registered charity owns real property, it will be required to pay municipal property taxes. However, some municipal jurisdictions will offer registered charities individualized property tax rebates or reduced rates.

As expressed above, a major benefit to operating as a registered charity is the ability to issue official donation receipts for the eligible amount of charitable gifts or donations. This means that if an individual or corporation donates funds or services to the registered charity, the registered charity can issue an official donation receipt to that individual or company (generally defined as the amount by which the fair market value of the gifted property exceeds the amount of any advantage received by the donor in respect of the gift.). The individual or corporation can apply the eligible amount as a tax credit or deduction. Because so many individuals and corporations use philanthropy in part as a tax planning tool, the ability to issue official donations receipts can make a dramatic difference in expanding an organization’s access to funding.

Summary of Tax Attributes

Obligation to pay corporate income tax?	No
Obligation to collect and remit GST/HST?	No – Subject to exceptions
Entitlement to Public Service Body Rebate?	Yes
Obligation to collect and remit MERCs?	Yes
Obligation to pay property tax?	Yes
Ability to issue official donation receipts?	Yes

⁶² GST/HST Public Service, *supra* note 52.

(e) Governance & Regulatory Obligations

Special Operating Requirements

As expressed above, registered charities are subject to stringent regulations on their legal, financial and practical operations. The paragraphs below explore a number of those regulations.

Disbursement Quota

A registered charity is subject to an annual spending requirement, or disbursement quota, requiring the organization to spend a minimum amount each year on its own charitable programs or qualifying disbursements, subject to certain exemptions.⁶³ As of January 1, 2023, the annual disbursement quota for registered charities equalled (a) 3.5% of the value of any property not directly employed in the charity's programming with a value up to CAD \$1 million; and (b) 5% of the value of any property not directly employed in the charity's programming with a value in excess of CAD \$1 million.⁶⁴

Asset Lock

Historically, registered charities could only make grants to "qualified donees", a legal definition that includes other registered charities, government bodies, United Nations agencies, among others. However, 2022 amendments to the *Income Tax Act* (Canada) introduced new rules that enabled registered charities to make grants – or "qualifying disbursements" – to organizations that are not qualified donees under the following circumstances:

- if the qualifying disbursement furthers a charitable purpose;
- if the charity ensures the recipient organization uses the qualifying disbursement exclusively for charitable activities that further the relevant charitable purpose; and
- if the charity maintains adequate records to ensure the foregoing requirements are satisfied.

The "qualifying disbursement" rules are new, so registered charities and their advisors are only gradually becoming familiar with their application, administration, and associated reporting. However, the CRA Charities Directorate has offered non-binding policy guidance for charities seeking to make use of the exemption in draft guidance CG-032: *Registered charities making grants to non-qualified donees (Draft)*.⁶⁵

Otherwise, if a registered charity wishes to transfer resources to an organization that is not a qualified donee and it does not rely on the "qualifying disbursement" rules, it can only complete such transfers under structured arrangements that enable the registered charity to maintain "direction and control" over the transferred resources.

63 "The disbursement quota applies only to charitable organizations with unused property exceeding \$100,000 and for public and private foundations with unused property exceeding \$25,000." Source: Canada Revenue Agency, "Backgrounder for Disbursement Quota Consultation", online: <<https://www.canada.ca/en/department-finance/programs/consultations/2021/boosting-charitable-spending-communities/backgrounder-disbursement-quota-consultation.html>>.

64 Canada Revenue Agency, "What's New: February 2023", online: <<https://www.canada.ca/en/revenue-agency/services/charities-giving/charities/whats-new.html>>.

65 Canada Revenue Agency, "Registered charities making grants to non-qualified donees (draft)", CG-032, November 30, 2022, online: <https://www.canada.ca/en/revenue-agency/services/charities-giving/charities/policies-guidance/charities-making-grants-non-qualified-donees.html#toc2>.

These types of transfers can occur under written partnership, joint venture, or collaboration agreements. In addition, these types of arrangements must satisfy core charity law requirements, specifically, that the transfer be made for a purpose and used for activities that are exclusively charitable.

Related Business Restrictions

A registered charity is generally restricted from engaging in business activities that enable it to generate a profit. However, registered charities designated as charitable organizations or public foundations may engage in revenue-generating activity where the Canada Revenue Agency deems that activity to be a “related business”. A charity designated as a private foundation is prohibited from carrying on any business.

Two categories of related businesses exist:

- businesses substantially run by volunteers; and
- businesses that are (i) linked to a charity’s purpose, and (ii) subordinate to that purpose.

The following paragraphs elaborate on the second category of related businesses, specifically, those linked and subordinate to the charity’s primary purposes.

The CRA recognizes four forms of connection or linkage sufficient for a business to be considered linked to the charity’s purpose, specifically:

- a usual and necessary concomitant of a charitable program (e.g., hospital parking lot, museum gift shop, university bookstore);
- an off shoot of a charitable program (e.g., a heritage village which sells the grain which it produces; a church which sells recordings of chorale performances; a youth entrepreneurship education charity that sells the products created by participants to fund the charity’s operations);
- a use of excess capacity (e.g., a university renting dorm rooms during the summer; a church renting parking during the week); or,
- the sale of items that promote the charity (e.g., the sale of promotional items, such as clothing, coffee mugs or posters which clearly promote the charity and its purposes).

The CRA recognizes four factors which it will consider in determining whether a business is subordinate to a charity’s purpose, specifically:

- relative to the charity’s operations as a whole, the business activity receives a minor portion of the charity’s attention and resources;
- the business is integrated into the charity’s operations, rather than acting as a self-contained unit;
- the organization’s charitable goals continue to dominate its decision-making; and,
- the organization continues to operate for an exclusively charitable purpose by, among other things, permitting no element of private benefit to enter in its operations.

It is the above categories of “related businesses” that are most likely to encompass social enterprises carried out in the context of a registered charity. Ensuring that the specific business activity undertaken by the registered charity falls within the “related business” exception is essential to minimizing risks of non-compliance and related penalties, including fees and de-registration.

An “unrelated business” is any business activity by a registered charity which does not fall within the definition of “related business”. An organization which the CRA deems to be operating an “unrelated business” risks either having their application for charitable status denied, if the organization is not yet registered as a charity, or having their charitable status revoked if the organization is registered as a charity.

If a registered charity wishes to operate an unrelated business, they can do so via a wholly owned taxable subsidiary (see Part V: Section 9(b)) for additional commentary on this type of structure.

Operating Requirements

Unlike a business corporation or other for-profit legal structure, a registered charity must operate in a manner that advances its stated charitable purposes. All organizational decisions related to programming, partnerships and projects must be rationally connected to advancing the organization’s charitable purposes.

Registered charities must comply with any business licensing, permitting or other regulatory requirements applicable to the specific activity the non-profit organization engages in.

Public Filings

A registered charity is required to file a *T3010 Annual Information Return* on an annual basis with the CRA Charities Directorate. Within that document, the registered charity will provide detailed information about the organization’s charitable purposes and programming carried out over the previous year. Specifically, the *T3010 Annual Information Return* requires the registered charity to provide detailed information about the organization’s revenues, expenditures, transfers to qualified donees, transfers to non-qualified donees in the form of “qualifying disbursements”, employee and executive compensation, trustees and like officials, and financial statements. Most information contained in the *T3010 Annual Information Return* becomes publicly accessible via the CRA Charities Directorate website and charity list registry. In addition to the *T3010 Annual Information Return*, the registered charity may be required to complete additional tax filings and corporate returns, depending on its underlying legal structure.

Corporate Governance

The governance structure of a registered charity will be contingent on its underlying legal structure, which may be either a not-for-profit corporation/society, a co-operative, an unincorporated association, or a charitable purpose trust. The most common forms of registered charities are not-for-profit corporations or incorporated societies. A member-elected board of directors is responsible for managing the affairs of these types of entities. The vertical or horizontal character of the registered charity’s governance structure and the concentration or diffusion of control will depend on the size of its board of directors and of its membership base, and the allocation of voting rights across that membership base.

(f) Finance & Fundraising

Unlike a business corporation, CIC or co-operative, a registered charity is generally not permitted to raise capital by issuing shares and may be limited in its ability to incur debt.

A charitable organization or public foundation may generate capital from:

- private donations;
- government grants;
- transfers from other registered charities;
- fee for service delivery models;
- related business income;
- among other sources.

A registered charity's ability to attract these traditional sources of funding is enhanced by its ability to issue official donation receipts for eligible gifts, an advantage relative to non-profit organizations.



REUTERS/
Christinne
Muschi

9. ALTERNATIVE LEGAL STRUCTURES OR ARRANGEMENTS

This guide has explored the most popular legal structures among Canadian social enterprises. However, concurrent and overlapping legal systems and diverse socio-economic and cultural contexts make it impossible to cover all legal structures and arrangements in an informational guide like this one.

Select legal structures or arrangements not covered in this guide include but not limited to unincorporated non-profit associations (available in all jurisdictions) and limited partnerships (available in most provincial jurisdictions). Among other alternative structures, the benefit corporation has also attracted attention, and is available in British Columbia (see brief case study below).⁶⁶ The existence of alternative structures underscores the importance of seeking independent legal advice tailored to a social enterprises' unique circumstances.

However, beyond the legal structures considered in this guide, it is also important to flag two circumstances describing how the legal structures explored in this guide have been used to facilitate social enterprise in Canada, specifically: (a) First Nation owned businesses, and (b) use of multiple legal structures.

(a) First Nation Owned Businesses

There are over 630 First Nation communities in Canada, including First Nation, Inuit, and Métis communities.⁶⁷

Many of these communities leverage First Nation owned businesses or business interests to support local economic development, including through funding investments in education, health, recreation, culture and other public infrastructure and services.⁶⁸

First Nation-owned businesses do not constitute a separate legal structure. However, they do constitute a unique use and application of existing legal structures to leverage business to deliver direct and indirect benefits to First Nation communities.

There are countless examples of successful First Nation owned businesses or business interests across Canada, including:

- First Nation majority-owned clean energy projects (see, e.g., the Sukunka Wind and the Zonnebeke Wind Project in Northern British Columbia, Canada);⁶⁹

⁶⁶ British Columbia became the first Canadian province to enact legislation adopting the "Benefit Corporation" or "Benefit Company" on June 30, 2020, under the *Business Corporations Act* (British Columbia). A Benefit Corporation is a for-profit company that, through a "benefit statement" in its notice of articles, commits to (i) conducting its business in a responsible and sustainable manner and (ii) promoting one or more public benefits for a group of people (other than its shareholders), communities, organizations, or the environment. Unlike a traditional company, a Benefit Corporation is accountable to both its shareholders and other stakeholders via its public benefit commitment. Yulu PR was one of the first 30 impact-orientated organizations in British Columbia to register as a Benefit Corporation. Partnering with global brands and socially innovative organizations, Yulu provides holistic communications services to help its clients maximize their social and environmental impact and inspire change. It has committed to promoting economic, cultural, global, environmental and industry benefits and has won multiple awards, including 'CSR Agency of the year 2022' - for the fourth year in a row - for its support of First Nations, Metis and Inuit writers. A key rationale for Yulu's decision to become a Benefit Corporation was the message it sends regarding the human values that are at the core of the organization. For more information, please visit <https://yulupr.com/>.

⁶⁷ Government of Canada, "First Nations", online: <<https://www.rcaanc-cirnac.gc.ca/eng/1100100013791/1535470872302>>.

⁶⁸ *McMurty, Brouard, et al, supra* note 1 at 14.

⁶⁹ Natural Forces, "Sukunka Wind Energy Project", online: <<https://www.naturalforces.ca/sukunka-wind-energy-project.html>>; Natural Forces, "Zonnebeke Wind Energy Project", online: <<https://www.naturalforces.ca/zonnebeke-wind-energy-project.html>>.

- A coalition of Mi'kmaq Nations partnering with a private equity firm to purchase and take private the multinational seafood company Clearwater Seafoods Limited;⁷⁰
- among others.

It is beyond this guide's scope to cover the unique structuring considerations associated with incorporating and maintaining First Nation owned businesses in a manner that is sensitive to the First Nation cultural, socio-economic, and legal context, including the interplay of Aboriginal and Treaty Rights and the unique tax treatment of First Nation communities under the Canadian taxation legislation. However, it is important to flag First Nation owned businesses as being closely aligned with the values of social enterprise given their collective ownership structure and strong focus on First Nation community well-being.

(b) Using Multiple Legal Structures

In some circumstances, new or established social enterprises may decide to use more than one legal structure to accomplish their unique business objectives and strategy.

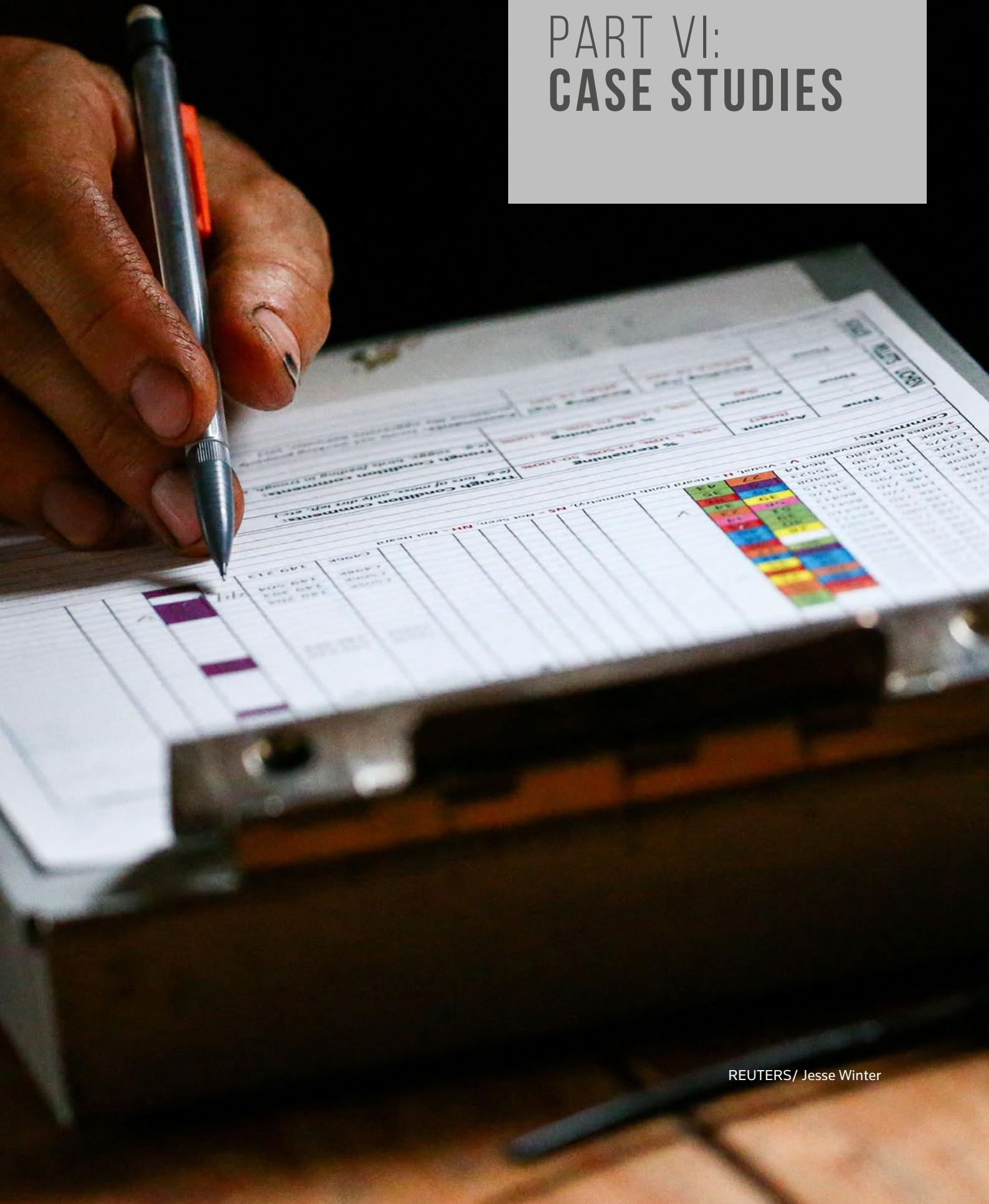
For example, it is a relatively widespread practice for a large business to establish a registered charity as a non-profit subsidiary, and task that organization with responsibility for delivering the chosen philanthropic programs of the business. This type of arrangement does not make a business a "social enterprise." However, it is an example of a dual-structure arrangement being used to integrate social impact into the legal structure of a business.

Alternatively, a registered charity may establish a business corporation as a for-profit subsidiary and conduct "unrelated" business activities through that business corporation. Under this arrangement, the for-profit subsidiary could generate revenue to support the programming of the charitable "parent" organization. The registered charity participating in this arrangement could diversify its funding base, enhancing the organization's financial sustainability and resiliency. The business corporation participating in this arrangement benefits from its affiliation with the registered charity, and the marketing benefits that come from all profits being reinvested in the charitable parent organization's programming.

There are many ways that the legal structures explored in this guide can be used together to create a versatile corporate structure uniquely tailored to the business objectives and strategy of a social enterprise or group of social enterprises working together. Exploring the different combinations of legal arrangements involving more than one corporate structure is outside this guide's scope. However, social entrepreneurs should be aware that establishing and operating a social enterprise using more than one legal structure can be complex, expensive, and create unique compliance risks, as mentioned above. For this reason, it bears repeating that social entrepreneurs considering using more than one legal structure are recommended to consult with a legal and accounting advisor.

⁷⁰ Jake Julian, "How the \$250M Clearwater Seafoods purchase by 7 Mi'kmaw First Nations came to be" CBC News (February 18, 2021) online: <<https://www.cbc.ca/news/canada/nova-scotia/mi-kmaw-clearwater-seafoods-purchase-terry-paul-john-risley-1.5917676>>.

PART VI: CASE STUDIES





PART VI: CASE STUDIES

1. Sole Proprietorship

Jacaranda (<https://www.jacarandaeco.ca/>) is an eco-conscious clothing business that creates yoga clothing, swimwear and loungewear. Jacaranda's mission is to create high quality, sustainable, comfortable clothing, while using natural fibers as much as possible. Jacaranda also supports Peruvian artists and artisans by collaborating with them on unique designs. The business has been certified by the World Fair Trade Organization ("WFTO"), verifying that at the time of review, Jacaranda was a mission-led enterprise fully practicing the WFTO's 10 Principles of Fair Trade across its business and supply chains (read more here: <https://wfto.com/>).

Registered as a sole proprietorship in Alberta, Jacaranda was founded in Canada in May 2019 by Cynthia Navarrete, an industrial engineer originally from Lima, Peru.

Cynthia Navarrete started Jacaranda as a sole proprietorship because it was a small business. In her mind, therefore, this legal structure was the most accessible option. Founding Jacaranda as a sole proprietorship felt like a natural first step on Cynthia's business journey.

Knowing she would try to expand the business as much as she could, she thought that she might adopt a business corporation structure in the future. However, Cynthia found the sole proprietorship option easier to start with, particularly due to the structure's simpler tax requirements (read more about the tax requirements for a sole proprietorship in Part V.2 above).

Sure enough, the business has indeed grown and in January of 2022, Cynthia incorporated Jacaranda as a business corporation under the CBCA. Transitioning her business from a sole proprietorship to a business corporation enabled Cynthia to have access to certain capital and grant opportunities that required incorporation. Furthermore, as is often a chief reason for incorporation, it placed the business into a separate legal entity, thereby providing Cynthia with protection from personal responsibility for the business's debts, legal proceedings or other liabilities.

For more details on the advantages and disadvantages of a sole proprietorship, see Part V.2 of this guide.

2. Business Corporation

Professional Aboriginal Testing Organization Inc. (“**PLATO**”) is a software testing and technology services company serving clients around the world (<https://platotech.com/>).

PLATO was incorporated under the Business Corporations Act of the Province of New Brunswick in 2015 by CEO and Co-Founder, Keith McIntosh. From 2015 to 2022, PLATO operated as a wholly-owned subsidiary of a well-established 25-year-old software testing company, Professional Quality Assurance Ltd. (“**PQA**”). As Denis Carignan (another Co-Founder of PLATO) explains, during PLATO’s formative years, it was effectively “incubated” by PQA. Although it was technically a start-up, it received support from PQA in critical areas such as Sales, Human Resources Management, Finance, IT Infrastructure and Project Management. PLATO was also comprised mostly of junior Indigenous team members and most engagements required senior level resources, which were provided by PQA. This made PLATO’s sales story and project contracting cumbersome at times. It also resulted in all the Indigenous resources being in one company and most of the non-Indigenous resources in another. Over time, this posed a risk of PQA and PLATO becoming competitors, so merging the companies into one company in 2022 and operating PLATO under a single brand name remedied this.

Keith had the idea to develop PLATO as a socially conscious business when speaking with Denis at a conference in Quebec. In conversation, it became clear that every community in Canada, not just in Quebec, was having challenges sourcing talent for technology testing. The Co-Founders determined that PLATO could offer an innovative train-and-employ model for First Nations, Inuit and Metis people, whereby PLATO could train those recruited and then go on to employ them. Keith and Denis recognized that training alone was not enough and that it was the pairing of the training with employment that could remove barriers to entry for Indigenous people in the industry.

While PLATO is a social enterprise, it is also a business corporation in part as a result of its legacy of having merged with the technology company, PQA. Further, PLATO’s Co-Founders also believed that to provide both training and jobs, PLATO needed to be sustainable. As Denis noted, “*to be sustainable,*” PLATO “*had to be profitable.*”

Keith and Denis recognized the advantages PLATO received by being able to leverage the prior success of PQA and having its ‘wrap around’ support in PLATO’s early days. Currently, PLATO provides a service, but also can share with clients, such as Suncor Energy and Ontario Lottery and Gaming Corporation, that they can contribute to a social purpose by directly hiring Indigenous people or by supporting PLATO generally and helping to drive its mission forward. Therefore, Keith believes that evolving PLATO’s structure has helped give Indigenous people more opportunities, plugged a gap in talent and resources in the technology testing industry, and given PLATO a foothold in the competition for talent by creating an environment to attract people to work for the company.

Overall, PLATO has been a strong success. It is now three times the size it was in 2015, and has trained over 300 First Nations, Inuit, and Metis students to date. PLATO recently announced a strategic partnership arrangement with SAP Canada, and the company has announced considerable external financial investments in its Indigenous Training and Apprenticeship Program from Canada's Digital Supercluster and Deloitte Canada.

For more details on the advantages and disadvantages of a business corporation, see Part V.4 of this guide.

3. Cooperative Corporation

L'Enclume (<https://www.enclume.ca/>) is a workers' co-operative where all the members are workers in, and share ownership of, the organization. Located in Montréal, Quebec, L'Enclume is an urban planning business that focuses on regional projects for small municipalities, towns and larger cities, with slightly less than half the projects being for larger cities, such as Montreal. Most of L'Enclume's work is focused on urban planning but it also has sectors addressing issues of heritage, landscape, outdoor tourism and conservationism, including helping communities with planning and creating regional parks.

Karl Dorais Kinkaid and three friends founded L'Enclume in 2011, and Karl is the last of the original co-founders currently remaining with the co-operative.

When they founded the co-operative in 2011, the co-founders wanted to establish a legal organization with an egalitarian structure that was non-hierarchical and aligned with their values of sharing and equality. In other words, the co-founders wanted to create a legal organization whose structure echoed their approach to commissions and the way they believed planning should be done. The members of the co-operative wanted to ensure that their projects were not motivated by the pursuit of profit, but rather by the desire to create collective value for communities. As Karl said, "*We were in it for the spirit.*"

Once the founders chose to prioritize positive social impact over profit, the co-operative structure seemed to be the best fit. In 2011, co-operatives were mostly being used in the agricultural industry and artisanal fields, but L'Enclume was one of the first to use the structure for an urban planning business offering consultant services.

L'Enclume is now in its 12th year and has eleven members. Karl believes a key benefit of the co-operative structure is that it is lightweight and agile, which has allowed its members to make decisions they may have found difficult in a more rigid structure. For example, at the start of their journey, the co-founders worked in a co-working space that enabled them to avoid the substantial fixed cost of an office, which was important when budgets were strained. At that time, co-working spaces were a novelty and L'Enclume saw them as a way to build new relationships and explore new opportunities for collaboration. While the co-operative now has its own office, L'Enclume shares its office with another business to continue to foster this innovative culture.

Further, Karl noted that the co-operative structure is particularly resilient since every member has an engagement in projects. This contributes to a feeling of belonging. As a result, members develop an attachment and strong bond to the business.

Karl shared that one downside to the co-operative structure is that it can take more time to make decisions as all members need to consent to a proposed plan of action. However, it is the trust and bond between the members that means decisions can be made even if some members may not be sure they agree with the proposed outcome.

For more details on the advantages and disadvantages of a co-operative corporation, see Part V.6 of this guide.

4. Incorporated Non-Profit & Registered Charity

Black Creek Community Farm (<https://www.blackcreekfarm.ca/>) is an eco-farm set in the heart of the Jane-Finch Community in North York (Toronto), Ontario. Founded in 2012, Black Creek Community Farm (“BCCF”) is dedicated to addressing the food insecurities that exist in the neighborhood through the production of healthy and sustainable food and the education and empowerment of diverse communities.

Prior to the inception of BCCF, the land on which the farm is now based had been turned into an earlier community farm, Toronto Urban Gardens, which was set up in response to violence and other social issues facing the community. Toronto Urban Gardens was intended as a safe space for Black youth to learn about food production. The land was then transferred back to the Toronto Regional Conservation Authority, and when BCCF was founded in 2012, the focus for BCCF shifted to a broader view of what the community needed, including education and advocacy around sustainable food production.

BCCF has since entered a trustee partnership with FoodShare (<https://foodshare.net/>), a registered Canadian charity. Ohemaa Boateng, Executive Director at BCCF, shared that this partnership with FoodShare forms an important part of BCCF’s operations and has brought multiple benefits. From a logistics perspective, FoodShare supports BCCF with administrative, accounting, legal and human resources support, including allowing BCCF to use FoodShare’s human resources department to help provide support to staff. FoodShare also helps BCCF with professional development training and supports its fundraising.

BCCF itself remains an incorporated non-profit. In Ohemaa’s words, this is the best legal structure for BCCF since its mission is about giving back to those in the community who need access to a safe space and support. Operating BCCF with a for-profit lens – where the focus would be on growing profit margins – would be contrary to BCCF’s ethos. For example, operating as a for-profit organization might require BCCF to make their produce more expensive and inaccessible, undermining BCCF’s efforts to combat systemic issues with high grocery pricing. BCCF currently applies for its own funding to offset produce costs and to ensure staff full salaries and benefits.

In 2023, BCCF plans to explore what is needed to prepare itself for achieving its own charitable status. FoodShare is proactively assisting with this transition, and the terms of their partnership agreement include that FoodShare will support BCCF with such a transition. Oheema highlighted the value of partnering with FoodShare to amplify and grow BCCF's own work, saying that *"FoodShare has been a real model and trailblazer."*

For more details on the advantages and disadvantages of an incorporated non-profit, see Part V.7 of this guide.

For more details on the advantages and disadvantages of a registered charity, see Part V.8 of this guide.

5. Alternative Legal Structure

Shorefast (shorefast.org) was founded by Zita Cobb, alongside her brothers Alan Cobb and Anthony Cobb. Structurally, Shorefast is made up of two distinct legal branches: (1) a registered Canadian charity founded in 2004, Shorefast Foundation; and (2) a for-profit business corporation incorporated in 2015, Shorefast Social Enterprises Inc. ("SSEI"), which operates a series of social enterprises focused on the inherent place-specific cultural assets of the community, including hospitality (Fogo Island Inn), textiles and woodworking (Fogo Island Workshops) and North Atlantic hand-line cod (Fogo Island Fish). Both of Shorefast's legal branches are federally incorporated with operations registered in the Province of Newfoundland and Labrador.

Shorefast was born out of Zita Cobb's passion for place. After years away, she returned home to Fogo Island, Newfoundland and Labrador with the goal of diversifying the local economy which had been severely impacted by the collapse of the cod fishery. After centuries of operating a sustainable inshore cod fishery, Fogo Island saw the arrival of foreign industrial vessels in the 1960's which overfished the stock to near extinction, ultimately resulting in a moratorium on cod fishing in 1992.

The challenges of the 1960's forced the community to come together to find creative solutions to adapt to the changing realities of the fishery. With this, Fogo Island became part of the 'Challenge for Change' project, led by the National Film Board of Canada and Memorial University in Newfoundland. Through an artistic discovery process, a series of conversations were held amongst residents sharing their concerns about Fogo Island's future. These conversations were filmed, and then shared across the distinct communities on Fogo Island, ultimately stimulating collaboration towards residents' shared goal to revitalize the cod fishing industry on Fogo Island. This led to the formation of a fishing co-operative, pooling resources to build larger boats that could fish further offshore and adapting to fishing other species beyond cod: these actions ultimately culminated in the survival of the community's fishing industry.

Before the arrival of industrial fishing, Zita felt that it had been widely understood in the community that nature was needed for survival, and on this principle, it was necessary to never take more from nature than needed. Building on the shared experience of Fogo Islanders, Shorefast established a set of core beliefs that place nature and culture at the centre in its mission to build a resilient economic future for the island.

According to Shorefast CFO Diane Hodgins, Shorefast continues to employ Asset-Based Community Development (“ABCD”) as an engine for economic renewal. Employing the ABCD approach builds on the natural and cultural assets already inherent in the place as a more specific, and in turn more sustainable way to build economic activity. For example, Shorefast used the ABCD approach to conceive of the Fogo Island Inn, rooted in the inherent posture of Newfoundlanders’ genuine hospitality.

Shorefast first started with its business operations in a trust. However, Diane emphasized that there were many limitations to the trust model, particularly with various banks and insurers who did not have a high-level knowledge and understanding of the trust legal structure, creating barriers to entry and growth for Shorefast. After several years of challenges under the trust model, business operations were moved into a for-profit corporation in 2018, with all SSEI’s outstanding shared held by Shorefast Foundation.

The two-pronged legal structure stemmed from concerns that legal charity structures in Canada were restrictive in terms of what business activities they could undertake with an earned income stream. Although legal charity structures are evolving, Shorefast’s leaders did not want to risk a change in law impacting or limiting the potential growth of Shorefast’s social enterprises, which Diane calls their “economic engines”. As a result, leaders of Shorefast keep the organization’s social enterprises functioning within SSEI (the for-profit CBCA Corporation) rather than Shorefast Foundation (the registered charity).

Building on an ethos that all profits generated by Shorefast should feed back into the community, the returns on investment for Shorefast’s for-profit social enterprises needed to go beyond the financial to the environmental and societal. As Diane put it, these social enterprises are “not-just-for-profit” vehicles. The goal of the organization’s business activity is to maximize the economic and cultural returns to the community in tandem, and maintain a place-specific, regenerative cycle of economic activity.

Shorefast sees itself as one entity and operates culturally as such, but a significant level of expertise is needed to maintain the administrative, financial, legal, and organizational complexities required by Shorefast’s two-pronged legal structure. For example, two separate boards are required, as well as two separate tax filings and employment bases. For Shorefast, however, the advantages outweigh the administrative burden. The organization’s work has been featured in media outlets including CBS 60 Minutes, PBS, the New York Times, the Financial Times, the Harvard Business Review, CNN, National Geographic, and more.

For more details on the advantages and disadvantages of an alternative legal structure, see Part V. 9 of this guide.

