

FINDING THE RIGHT CORPORATE STRUCTURE TO ENABLE REGENERATION, THE ONTARIO VERSION

Presented by: John Fox, Partner, Robins Appleby LLP

Webinar Series

February 25, 2015



Introduction:

- Welcome to the first 2015 series of SHARE webinars intended to follow up with speakers from the Regeneration Forum to learn and share innovation and information from across the Sector.
- Welcome to John Fox who will be our presenter today.

About SHARE:

Sustainable Housing Asset Resource Exchange

WHAT

Initiative that focuses on key asset renewal issues. A vehicle to share sector innovation, resources, spark ideas, and continue the regeneration dialogue taking place in Ontario, Canada and internationally.

HOW

SHARE Website

- Online Resource Hub**
- EOA Resource Centre
 - Building Capacity
 - Revitalization

Event Series

- Webinars
- Innovation Breakfasts
- Regeneration Forums

Access



SHARE

<http://share.hscorp.ca>

SHARE 2015 Calendar of Events

WEBINARS

- **February 25th**- *Finding the Right Corporate Structure to Enable Regeneration , the Ontario Version (John Fox, Lawyer and Partner at Robins Appleby LLP)*
- **Scheduled topics**- date TBD: *EOA Resource Guide- Ontario Version; Effective Asset Management- Keeping Your BCAs Alive; Mergers and Amalgamations; Strategic Asset Management Approach to your Housing Portfolio*

INNOVATION BREAKFASTS

- **January 28th**- *Community Engagement: Why it Matters in the Regeneration Equation (Steve Stride, CEO, Poplar HARCA UK & President CIH)*
- **April 23rd**- *Alternative Sources of Capital for Social Housing (Shayne Ramsay, CEO BC Housing, Canada). Location to TBD- Potential London, Ontario*
- **Scheduled topics**- *Panel (Living Through EOA), Making A Profit in the Housing Business- Entrepreneurial Prosperity, Role of Private Sector in Funding Redevelopment*
- **May 9th and May 10th 2016: Regeneration Forum, Toronto** *(Canadian focused, practical and interactive)*

About this Webinar:

The social housing sector is at a crossroads of sustaining its housing business operations while entering into a new era of advancing housing development. However, innovative affordable housing development may require having different corporate structures to enable the implementation of regeneration initiatives.

Drawing on examples from Ontario, during this webinar you will learn:

- *Types of corporate structures and their pros and cons*
- *Elements to think about in assessing what structure is right for you*
- *Implications to consider- governance and political*
- *How risk is assigned in a corporate structure*

Covered in this Webinar:

- **John Fox** – My Bio-logo-graphy
- **Why Corporate Structure Matters**
- **Where to Start** (aka Form follows Function)
- **Types of Corporate Structures**
- **An Example:** Real Estate Development
 - Governance
 - Risk Allocation
 - Political Oversight.
- **Robins Appleby LLP** – What we do.

Note- This presentation does not deal with Co-operative Corporations





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Toronto
Community
Housing



JOHN FOX

LIDLAW
FOUNDATION



Daily Bread
Food Bank

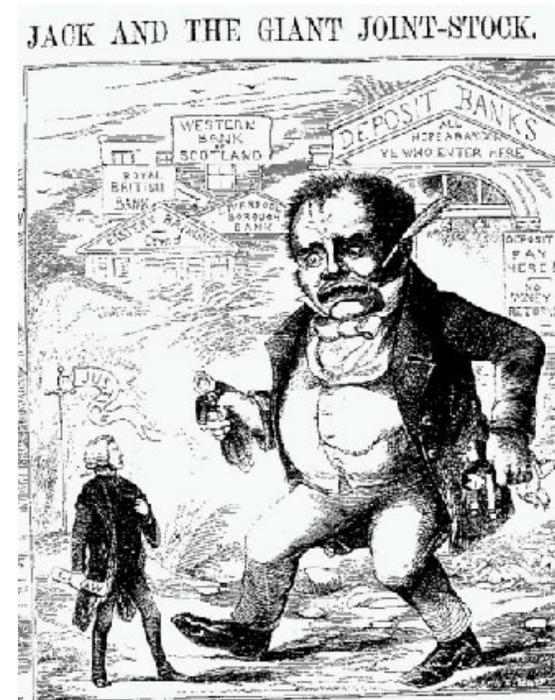


Why Corporate Structure Matters

OR - “**Companies are people too!**” – Why Mitt Romney was right (sort of)

A bit of the History of the Corporation:

- 1843 – William Gladstone creates the Joint Stock Companies Act
 - *allows incorporations by registration (as opposed to Royal Charter) for the first time*
 - *lets groups of people organize as a corporation.*



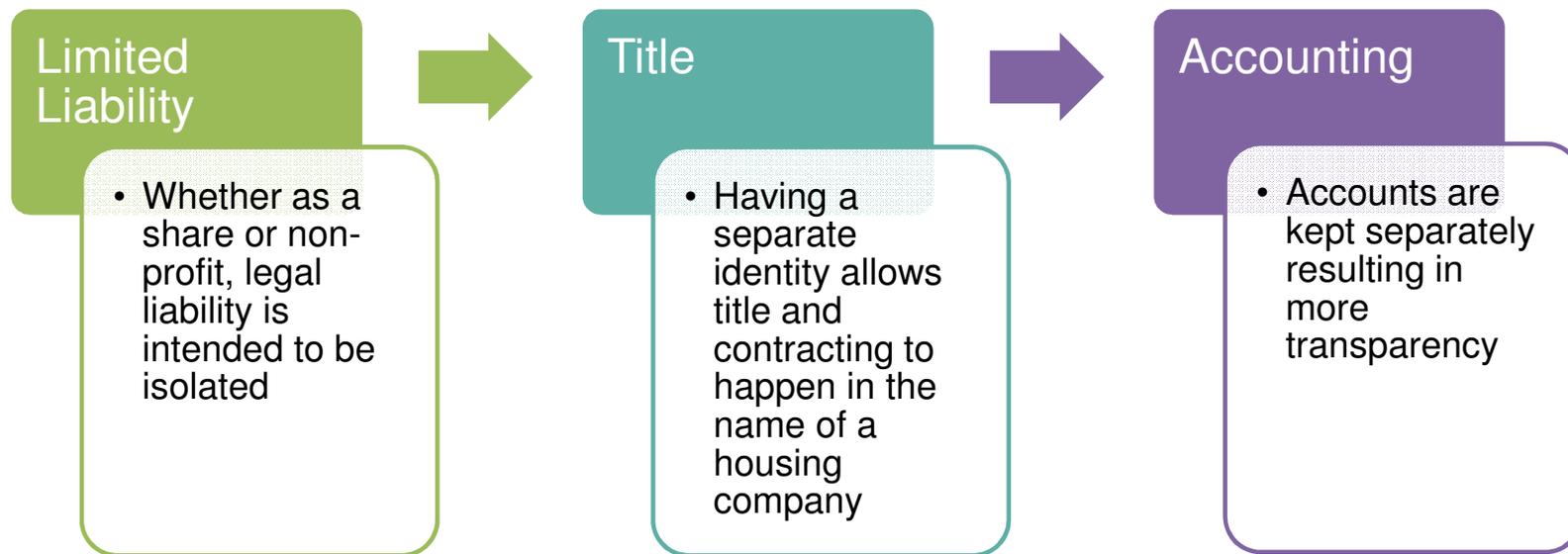
Why Corporate Structure Matters

- 1855 – Concept of limited liability is introduced, so that risk is limited to investment.
 - *The Economist* states at the time that this is an over-rated change. 70 years later, they recant, stating that this concept is as important as the Industrial Revolution
- 1897 – Salomon v. Salomon (House of Lords)
 - *Creditors could not sue shareholders directly*
 - *Confirms the separate legal personality of the Corporation.*



Why Corporate Structure Matters – Housing Considerations

The **main** benefits to incorporation follow these three principles:



Why Corporate Structure Matters

Corporate Structure Matters because there are variables:

Governance

- Who is on the board
- How many are on the board
- What is their expertise

Risk Allocation

- Shareholders can take certain risks back from the Directors
- Will the directors be indemnified
- What other risks will the directors take (example: environmental)

Profit

- For Profit or Non-Profit

Where to Start – Form Follows Function

The best form for any given community is the one that best fits:

- The functions the Community is trying to carry out
- Who it wants to govern the enterprise
- How much risk it is willing to incur
- Who the other stakeholders are



"You look different somehow today — did you incorporate yourself or something?"

There is no one size fits all solution to corporate structure.

Where to Start – Form Follows Function

What risks does the Shareholder wish to isolate?

- Development risk (ie. Cost over-runs)
- Financial risk (inability to pay back lenders)
- Environmental Risk (cost of cleaning a contaminated site)
- Liability (damages brought by an injured party)

How real is the isolation of this risk?

- Is the shareholder a distinct entity?
- Is the shareholder going to respond anyway?

Where to Start - Housing Considerations

Alternatives may be different

- Municipalities/Service Managers are usually choosing between bringing housing and development in house or creating a subsidiary, or using a local housing corporation.
- A non-profit provider will virtually always operate in a more traditional corporate context.

Local Housing Corporations

- Local Housing Corporations are Business Corporations Act Corporations incorporated in accordance with the Social Housing Reform Act. There is no enabling provision under the Housing Services Act.
- Any new corporation will not be a LHC.



Types of Corporate Structures

There are two Ontario Statutes that govern Incorporation:

Business Corporations Act

- The most commonly used incorporating statute from for-profit businesses
- The identified means of incorporation for Local Housing Corporations
- The classic governance model with Shareholders and Directors

The Corporations Act

- Governs most non-profit corporations
- Has members, not shareholders
- Directors generally approve the members; members elect the directors

Types of Corporate Structures - Comparison

	Business Corporations Act	Corporations Act (Not for Profit)
Mission	For Profit	If any of the purposes of the corporation are of a commercial nature, the articles must state that the commercial purpose is intended only to advance or support one or more of the non-profit purposes of the corporation S. 8(3) Not-For-Profit Corporations Act, 2010
Flexibility with Profit	May be reinvested in corporation or paid to shareholder as dividend	Must be reinvested in the corporation to further the objects of the corporation. [If applicable: For income tax purposes: corporation can take reasonable reserves for future liabilities, but cannot have any profit at the end of the tax year.] Distributions Prohibited to Members
“Ownership” and Control	Shareholders – vote in accordance with their shareholdings	Members are people (or corporations) who support or benefit from the goals and objectives of the corporation. – Each member has one vote. The by-laws set out membership conditions that determine who is eligible to become a member. Often appointed by the board.
Governance	Board of Directors elected by the Shareholders Alternatively, pursuant to a Shareholder Declaration, the Shareholders can assume all the authority of the Board of Directors and delegate this authority to an executive committee	Board of Directors Elected by the Members
Share Capital	Yes	No
Examples of municipally owned or “Public Purpose” Corporations	Toronto Community Housing Build Toronto Toronto Lands Corporation (Owned by Toronto District School Board)	Greater Toronto Airport Authority.

Types of Corporate Structures – Director Responsibilities and Liabilities

Director Duties

- Act in the best interests of the corporation, not individual shareholders/members
 - duty to act honestly and in good faith
 - duty to exercise care, diligence and skill
 - duty to comply with legislation
 - duty to avoid conflict of interest
- Director duties are fiduciary in nature. They are the “guiding mind”

Types of Corporate Structures – Director Responsibilities and Liabilities (continued)

Potential Director Liabilities

- Wages, Tax, Environmental, Health & Safety, certain other matters

Protection from Liability

- Indemnity, D&O insurance (does not respond to everything – read the policy)

Types of Corporate Structures

Governance Choices:

1. Traditional Board Governance
2. Shareholder **Declaration** – The Shareholders Take Over
3. Shareholder **Direction** – The Shareholder guides



Types of Board Structures

Shareholder Declaration

- Moves responsibility and liabilities to the Shareholder
- Can be effected through a Unanimous Shareholders Agreement
- Can still seek outside help though a Management Committee
- Often used in Private Companies

Shareholder Direction

- Not binding on Directions as a matter of corporate law. Only a guideline.
- Establish the expectations and objectives of the Corporation.
- Identify the Corporation's relationship to City departments engaged in housing and real estate related activities (if desired).
- Set out the board responsibilities, term, compensation and composition.
- Define which, if any, decisions require the consent of the Shareholder
- Set out the parameters of the business plan.
- Establish reporting protocols to the Shareholder.

Application – Real Estate Development

An Applied Example

Your Service Manager wishes to build more housing and is not sure how to structure it. What is the road map to making a decision on Corporate Structure?

1) What are the functions that are being considered?

- Development, Construction, Financing
- Partnering
- Administration of granting programs

2) Who are the other stakeholders?

- Map existing resources (i.e. existing non-profits)
- Can other providers perform the functions being considered?
- What will their reaction be?
- Consultation and engagement?

3) Consider alternatives

- Existing LHC, Service Manager directly, New Subsidiary
- Profit or Non-Profit

Application – Real Estate Development

4) What kind of Governance is required?

Expertise

Real Estate, Finance, Planning

Is the expertise resident at Service Manager? or LHC?

Will the existing expertise be sufficient to govern, identify issues and help the corporation achieve its goals?

Control

How much leeway will be afforded to the Corporation in its activities?

What restrictions?

How much political oversight?

Liability

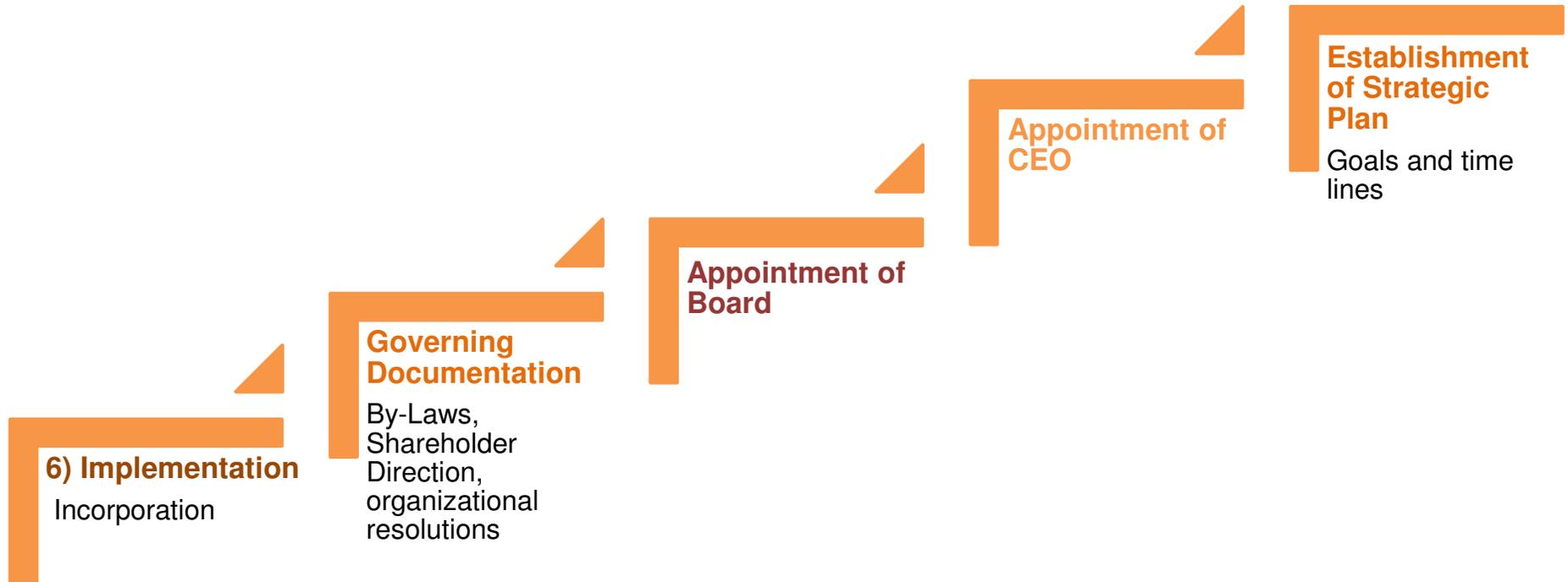
Use of a Management Committee or Director Liability.

How will directors be protected?

Application – Real Estate Development



Application – Real Estate Development



Robins Appleby Housing Related Services:

We have established a Housing team which can assist with:

- *Corporate Structure and Financing*
- *Funding Agreements*
- *Real Estate Development*
- *Employment Matters*
- *Litigation*
- *Tax*

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Robins Appleby Housing Related Services:

Recent Housing Mandates:

- Represented City of Toronto on “Aquavista” Project, which creates 80 affordable units in the same building envelope as a marquee condominium
- Represented a Housing Provider in negotiating of a Repayable Loan Agreement intended to finance renovations
- Engaged by City of London as part of a broader consulting team to advise on the structure of a housing development corporation

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Thank you

Questions?

Resources from this webinar (PowerPoint presentation and audio recording) will be posted on the SHARE website) <http://share.hscorp.ca>

Send your comments or questions to share@hscorp.ca