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Mergers and Amalgamations in the Canadian Non-Profit and Charitable Sector: Experiences from the International Development Sector

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Introduction

- Legal information not legal advice
- Views expressed are my own
- Questions during and at end
- Logistics and timing

Environment

- Competition
- Insufficient resources (money, volunteers) vs. need
- Uncertain resources
- Maximize public benefit of charities
- Reporting requirements
- Desire for greater transparency and accountability
- Technology
- Standards
- Visibility
- National and International activities

Variety of Charities

Every charity is different:

- Objects
- Areas of charitable work
- Risk tolerance
- Public profile
- Donors and level of government support
- Independent vs. affiliated
- Resources
- Values and knowledge
- Local vs. international activities

2012 T3010 Statistics

- 5322 charities declared direct foreign activities
- $2.9 billion spent abroad directly

- 4 over $100 million
- 37 over $10 million
- 269 over $1million
- 200 over $500,000
- 917 over $100,000
- 2272 over $10,000

Charity Stakeholders

- Members
- Board
- Employees of charity
- Volunteers
- Government (CRA, federal, provincial, and municipal)
- Partners
- Media
- Public
- Donors
- Beneficiaries, clients

Hard times - High Level Overview

- Bring in more revenue
- Spend less
- Build reserves, pay down debt vs. spend reserves, increase debt, sell assets
- Diversification between types and sources with each type

Short Term Ideas When Lose Major Funder

- Close programs
- Cut costs including people, deferring purchases
- Using reserves
- Using self-restricted endowments
- Selling Assets
- Using lines of credit or get loan
- Asking supporters for increased support
- Merge
- Close charity

Other Ideas

- Have good communication with stakeholders
- Be aware of cash flow and adequacy of cash reserves
- Budgeting – zero based vs. Incremental
- Prepare for the worst, hope for the best
- Time matters – if you have little time cuts will be deeper, impact greater and more risk to charity.
- Evaluate programs – effectiveness, cost
- Should you be charging or charging more for services and effect
- Can costs be trimmed?

Other Ideas

- Are you using volunteers effectively?
- Are you investing adequately in new technology? Is technology being utilized effectively? Is more training needed
- Outsourcing
- Analyzing Costs and cost recovery
- Insurance – have appropriate coverage
- Good internal controls –prevent mistakes, fraud, theft.
- Collaboration and alliances, sharing assets, space and equipment
- Mergers

Thoughts

- Less pain if you fix problems sooner
- Know what you can control, what you cannot control and focus on what you can control
- You may be unique, but you are not uniquely unique
- Can other sources of funding be found? (Gov, Earned Income, Fundraising)
- Clean up issues now, no time when dealing with funding cuts, including governance, legal, policies etc.

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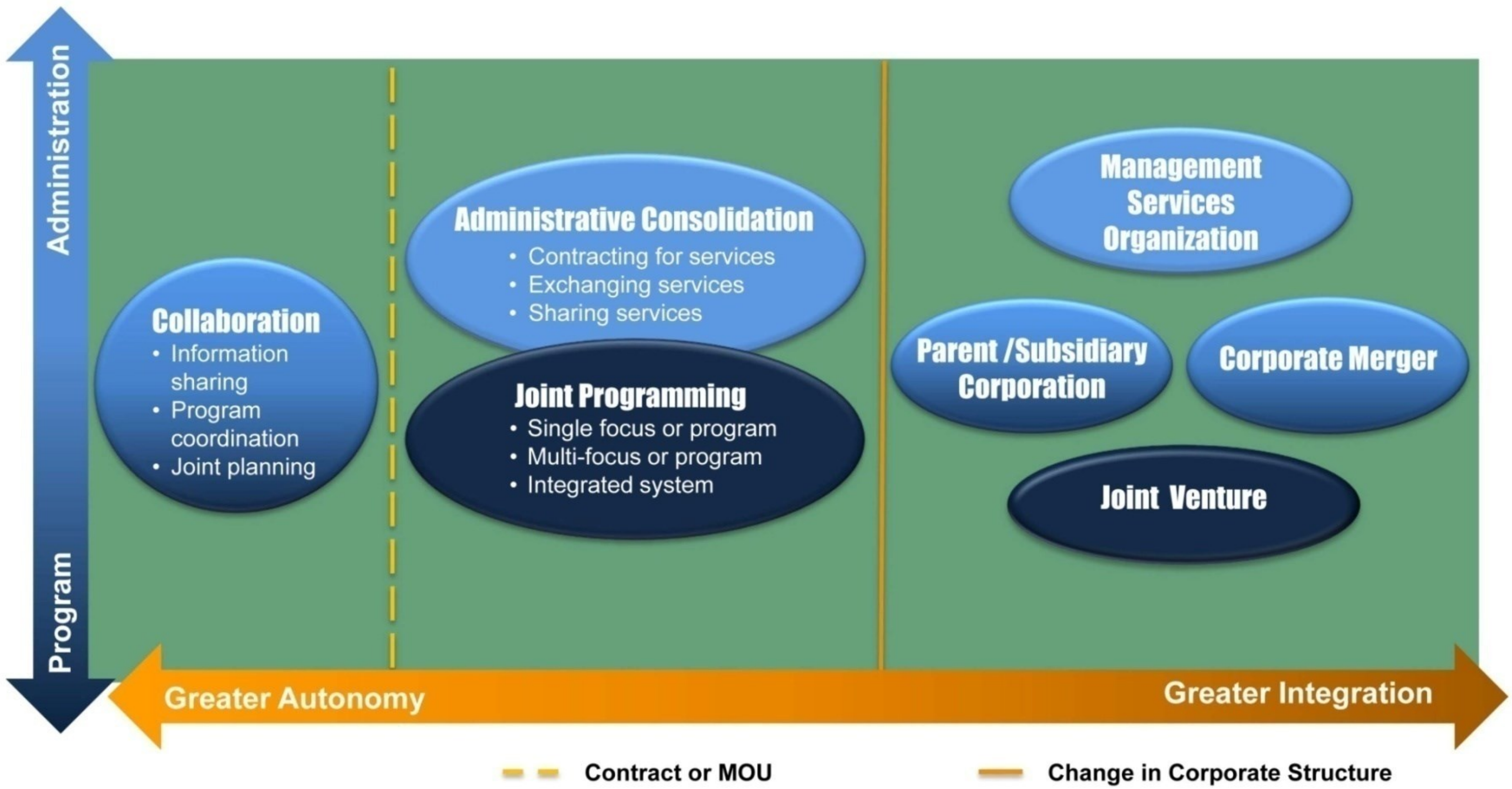
Strategic Solutions for Nonprofits and Foundations

The Partnership Matrix



- No permanent organizational commitment
- Decision-making power remains w/ individual organizations

Collaboration

- Involves a commitment for the future
- Decision-making power is shared or transferred
- Is agreement-driven

Strategic Alliance

- Involves changes to corporate control and/or structure, including creation and/or dissolution of one or more organizations

Corporate Integration

Strategic Restructuring

Three Scenarios

- Collaboration between two or more Canadian registered charities
- Merger of two Canadian charities
- Collaboration between Canadian charity and non-profit either in Canada or abroad or foreign charity

Merger of two or more Canadian registered charities

Why consider merger?

- Process in which organizations discover that there could be some benefits to collaborating
- Catastrophic event – collaboration is lifeline
- Opportunity to use assets/funding.
- Funder suggests collaboration or merger
- Merger can avoid discussion of winding up an organization
- Merger is progression of partnership

Why Consider Merger (cont)

- Increasing competition in a number of sectors
- Funders are increasingly requesting that nonprofits and charities work together - from joint programming to merger – avoid duplication, increase efficiency, improve service delivery
- “Merger Bonus” – may receive more funds from funders than the individual organizations did prior to merger.
- Can result in cost savings because of the ability to share resources, exercise greater purchasing power and consolidate duplicate governance structures.

Why Consider Merger?

- Shakeup organization to make major changes
- Greater demands for accountability, transparency, measurement and evaluation.
- Benefit from the technical, financial, fundraising, and other resources of another organization. As well, a larger staff resulting from a merger can allow for greater specialization.
- Public may feel area is overcrowded
- Greater public profile and credibility, greater resources for fundraising and development, and less confusion in the public's mind about what the organization does.

Why Consider Merger?

- Many small organizations try to be jacks-of-all-trades and end up being masters of none – want broader and better services.
- Trouble attracting human resources, including staff and volunteers, because of limited opportunities or low profile in the community.
- Staff may be close to exhaustion and burnout. A merger can alleviate this pressure.

Problems with Collaboration/Mergers

- Emotional baggage and ego
- Jobs on the line
- Organizational culture may not fit (Culture includes attitude to taking on risk, decision-making processes and management style, beneficiary participation, flexibility to change, and theories of change.)
- “merger penalty” - good intentions aside, after the merger the funder may provide the merged entity with less funding than it provided to the individual organizations prior to the merger.

Problems (cont)

- Distraction
- How will it affect mission
- Trust – were formerly “competitors”
- Jockeying for positions within the merged organization.
- Bigger is not necessarily better
- Restrictions on assets or funding
- Bad merger or collaboration agreements
- Can be expensive – professional costs, loss of goodwill, integration
- Decision paralysis

Questions for charity merger

1. What are the drivers for merger?
2. What are short, medium and long-term goals of merger?
3. Have you carefully indentified a number of possible merger partners and if not, why not?
4. Is this the right time to merge?
5. Are the merger organizations unincorporated, trusts or incorporated?
6. What are the legal objects of each merger partner? Are they acting currently within objects? Will objects need to be changed?

Questions for charity merger (cont.)

7. Do the organizations have the legal powers necessary to effect the proposed merger? Do either organization need to modify their governing documents?
8. Have the necessary professional advisors, including a lawyer who is knowledgeable about mergers, been retained to assist and give advice on a merger? Is the lawyer knowledgeable about charity law if one of the parties is a charity?
9. How many voting members are there for each organization? Who are the members and will they support merger? What do the statute and by-laws provide in terms of quorum for a members' meeting and can this be achieved?

Questions for charity merger (cont.)

10. Who are the stakeholders of each organization and will they support merger?
11. Who is going to be the dominant party or will there be equality?
12. How many board members are there for each party to the merger? How many will there be with the merged entity? What skills, resources, diversity, and connections does each board member bring?
13. Is the merger in the best interest of both organizations? The directors of an organization must be satisfied that the merger is beneficial.
14. How much time will be spent on the merger discussions, and how long will it take for the merger to take place?

Questions for charity merger (cont.)

15. How many employees are there?

Will all employees move to the merged entity?

How many years has each employee worked for the organization?

Is a review of factors relevant to termination and severance required?

What was last year's total payroll?

If one organization is paying its employees more than the other, will the more "efficient" organization have to raise the amount that it is paying its employees?

Will there be employment law issues, pension liability issues, et cetera?

Will there be redundancies at some point, and will they be handled appropriately by attrition or proper notice or termination and severance payments?

Questions for charity merger (cont.)

16. Are there any liabilities with respect to either of the parties?
17. Have both organizations been provided with a list of all actual and threatened litigation over the last five years?
18. Has each party reviewed the financial statements and information of the other?
19. Does one or both charities have any special purpose trusts or endowments, and what donor restrictions need to be complied with?
20. What name will the merged entity have, and has it been reserved?

Questions for charity merger (cont.)

21. Have debts been appropriately identified and dealt with?
22. What are sources of revenue for each organization? Will donors, funders, and earned income be able to continue and be assigned or transferred to the merged entity?
23. Are the organizations' cultures compatible, and is there a fit? Have both parties to the merger successfully completed work together?
24. Is there a communication strategy in place to consult with and communicate with each stakeholder?

Questions for charity merger (cont.)

25. Is there a plan for implementing the merger?
26. What will the post-merger structure look like?
27. What obligations will the merged entity take on in terms of continuing programs of one or the other organization, if any?
28. Are there any particular consents required for the merger? Are there provincial or federal acts or regulations that could affect the merger such as the *Public Hospitals Act* (Ontario) for a hospital merger? It is important to obtain consents from funders to the merger and obtain commitments with respect to funding. Funding after a merger can be less, the same, or more from a funder, and it is important to know what the effect of the merger will be on a major funder or funders.

Steps in Canadian Charity Merger

1. Obtain board approval for any negotiations.
2. Have a confidentiality and non-solicitation agreement with any prospective merger partner.
3. Establish a committee or representative from each organization to deal with the merger and establish terms of reference for the committee or representatives.
4. Work together with the other organization to discuss feasibility.

Steps in Canadian Charity Merger

5. Identify all assets owned by each organization, restrictions on the asset and the ease with which that asset can be transferred to another entity. Assets could include real estate, intellectual property, valuable equipment, et cetera.
6. Identify all liabilities and ongoing obligations including service agreements, leases, employment, funding agreements, and partnership agreements with domestic and foreign partners.
7. Conduct a comprehensive due diligence process on your potential partner to identify any concerns or impediments to merger.

Mechanics of merger

- Charity A, Charity B, and Charity C
- A, B, and C could amalgamate.
- A could survive, and B and C could transfer their assets to A.
- B could survive, and A and C could transfer their assets to B.
- C could survive, and A and B could transfer their assets to C.
- Two of the corporations can be amalgamated, and the assets of the third one could be transferred into the amalgamated entity.

Mechanics of merger (cont)

- A new corporation (D) could be set up, and the assets of A, B and C could be transferred into D.
- One of the merger partners could decide it is prepared to merge with only one of the others and not the third.
- All three could decide that merger is not right for them at this time.
- During the process, one or more of the parties could realize that another party might provide better synergies for a merger.

Look to constating documents

- Trusts - look at the terms of the trust deed to see whether an amendment is possible.
- Unincorporated associations should look at the agreement between the members—usually called the constitution. Consent of all members if merger procedures not in constitution.
- For corporate mergers, references must be made to corporate law and the letters patent and by-laws of the corporation.

Federal Rules

- Federal corporations under the Canada Corporations Act are not allowed to amalgamate. Similarly, a federal corporation and a provincial corporation could not amalgamate.
- In order for a merger to take place, in the past either a new corporation must be created and the assets from both transferred into it, or the assets of one corporation must be transferred into the other.
- Now with CNCA Federal corporations can amalgamate.

Ontario Corporations

- Non-share capital corporations of Ontario, under the *Corporations Act* (Ontario), can amalgamate under section 113 of the *Corporations Act* (Ontario).

- This section sets out some limitations and requirements.

- If the nonprofit is an Ontario non-share capital corporation and a charity, but not necessarily a registered charity with the Canada Revenue Agency, then the Ontario Public Guardian and Trustee will review the application for Letters Patent of Amalgamation.

Thank you!

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