

# Transportation Consortium Resource Guide

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## 1. Preamble

The Ministry is working with School Boards in Ontario to establish transportation consortia to streamline and economize the provision of safe and effective school transportation services among coterminous School Boards. Since the Efficiency & Effectiveness Review Team<sup>1</sup> has recommended transportation consortia to operate as separate functioning, autonomous entities, School Boards should move towards establishing not-for-profit corporations. This document outlines two business forms for reference by School Boards or consortia. The first, an unincorporated consortia, may be established as an interim step. The second, a legally separate not-for-profit corporation, is the ultimate form recommended by the Ministry to satisfy its separate legal entity requirements. The following is a brief synopsis of how these two entities are structured and how they operate.

**An Unincorporated Consortium:** An Unincorporated Consortium does not exist in law as an entity separate from the participating School Boards. Rather, the entity is “established” through a Consortium Membership Agreement which sets out the structure of the entity as well as the various roles and responsibilities of all the participating School Boards and their respective designated representatives.

**An Incorporated Not-for-Profit Consortium:** A not-for-profit corporation exists as a separate legal entity from the individual School Boards and is created pursuant to the *Ontario Corporations Act*. The participating School Boards would be members of the corporation, and the various roles and responsibilities would be set out in the corporation’s constating (organizing) documents, as well as in the Corporate Membership Agreement.

It may not be necessary to establish an unincorporated consortium as an interim phase and some School Boards may choose to move directly into operating their Transportation Consortium as a corporation. However, it should be noted that there may be some time delay proceeding with an incorporation and this should be taken into consideration, and is discussed more fully below. In addition, School Boards that are already operating through unincorporated consortia can use this guide to assist in the incorporation process. It is vital to recognize that all School Boards will have different considerations and issues depending on size, geography and local preferences.

The operation of these two entities will be discussed in greater detail in this Guide.

It is important to briefly discuss a business entity that School Boards should not use in connection with establishing a Transportation Consortium, and that is a partnership. The

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<sup>1</sup> The Effective and Efficiency Review Team is the team appointed by the Ministry responsible for reviewing the effectiveness and efficiency of transportation consortia across the Province.

term “partnership” has two separate spheres of meaning. The first is its in in law, which is a specific organizational structure for carrying on business that is governed by the Ontario *Partnerships Act*. Generally speaking, in a legal partnership, all partners are jointly liable for all debts and liabilities of the partnership. Similarly, any one partner can bind all partners to matters involving the partnership. The second meaning of partnership is the colloquial meaning, which conveys cooperation and joint effort in respect of a common goal or purpose. While the second meaning may have relevance for describing the goal and purpose of a Transportation Consortium, it is very important not to set up a Transportation Consortium as a partnership, since the legal ramifications are not appropriate for the operation and management of transportation consortia by School Boards.

This document is only intended to be a guide. There are several legal and operational issues that will need to be considered in greater detail amongst participating School Boards. In addition, it is vitally important to consult with legal counsel on all components of establishing consortia, from initial organization as an Unincorporated Consortia through to the incorporation process under the Ontario *Corporations Act*. One of the most difficult issues for School Boards to manage will be human resources issues. This guide highlights some of the issues and concerns that School Boards will need to consider; however, significant consultation between School Boards and legal counsel will be necessary in order to effectively manage human resource issues.

In order to move effectively toward an unincorporated and/or incorporated consortium, it is necessary for School Boards to discuss the various issues set out in this Guide with coterminous Boards. The Checklist for each of the unincorporated and incorporated consortium included in this Guide can be of assistance in this respect.

## 2. Glossary

**Board of Directors** — The group of representatives that are appointed or elected by the Members of a corporation to manage the corporation.

**By-laws** — In conjunction with the Letters Patent, the By-laws of a corporation set out how the corporation will be managed and governed. Governance issues that may change should be set out in the By-laws, since By-laws are more easily amended than the Letters Patent.

**Consortium Membership Agreement** — An agreement entered into by School Boards to establish and set out the operational and governance issues associated with an Unincorporated Consortium.

**Constituting Documents** — For a not-for-profit corporation, the constituting documents would be the Letters Patent, Supplementary Letters Patent (if any), and the By-laws, both of which set out the structure and governance of the corporation.

**Corporate Membership Agreement** — An agreement entered into by the Members of a corporation, in this case the participating School Boards, that sets out their agreed-upon understanding about the operation of the Incorporated Consortium. For example, the Agreement would specify that each Member School Board would vote for certain representatives to sit on the Board of Directors.

**Dispute Resolution Mechanisms** — The mechanisms that are specifically set out in an agreement and prescribe how disputes between the parties are to be resolved. A typical dispute resolution mechanism would provide that, in the event of a dispute, the parties agree to mediate the dispute within 30 days and, if mediation is unsuccessful, the parties agree to move the dispute to binding arbitration. The clause would also need to spell out the agreed-upon mechanism for selecting a mediator and arbitrator.

**Governance Committee** — For the purposes of this Guide, Governance Committee means the committee established by the Consortium Membership Agreement of an Unincorporated Consortium that governs the Transportation Consortium, and the committee that may be established by the Board of Directors in an Incorporated Consortium that similarly governs the Transportation Consortium.

**Incorporated Consortium** — The recommended business structure for the organization and operation of Transportation Consortium that is created and organized as a not-for-profit corporation pursuant to the Ontario *Corporations Act*. An incorporated consortium exists as a separate legal entity from the School Boards that are its members.

**Indemnity** — An agreement by one party in favour of another party to protect the second party from incurring any damages or costs associated with any liabilities. An indemnity acts as a form of security or insurance for the second party.

**Letters Patent** — The government document that establishes the not-for-profit as a separate legal entity and sets out the basic framework for a not-for-profit corporation.

**Member** — In a not-for-profit corporation, Members are the “owners” of the corporation, although they are not owners in the true sense of the word, since there is no share capital. The Members “control” the corporation. In the Transportation Consortium context, the Members of the corporation would be the participating

**Operations Committee** — For the purposes of this document, it is the body established to deal with the day to day operations of the transportation Consortium and

to report on same either directly to the participating Boards or to the Governance Committee or Board of Directors (as set out below).

**Supplementary Letters Patent** — The government document that a corporation must apply for if it wants to amend its Letters Patent, which would include a name change, a change in purpose or a change to any of the governance matters that may be set out in the Letters Patent.

**Transportation Consortium** — A set of coterminous School Boards operating transportation services for their students in conjunction with one another through a business vehicle.

**Transportation Service Provider** — The third-party bussing company that provides bussing and transportation services to a Transportation Consortium.

**Unincorporated Consortium** — A business structure for the organization and operation of a Transportation Consortium that is created and governed through a Consortium Membership Agreement, in which all participating School Boards are parties. An Unincorporated Consortium is not a separate legal entity from the School Boards themselves, and would only operate separately from an operational standpoint and not from a legal standpoint. An Unincorporated Consortium could be used as an interim step before School Boards move towards incorporation, but the School Boards could proceed directly to an Incorporated Consortium.

### **3. Unincorporated Consortium**

#### **a.) Legal implications for the Transportation Service Provider**

There are two possible processes for agreements with the Transportation Service Provider:

- There could be one agreement signed by all participating School Boards with the Transportation Service Provider. The agreement would be negotiated by the appropriate representatives of the Transportation Consortium. The agreement would clearly indicate the role of the consortium in managing and coordinating the bussing services by the Transportation Consortium (that is, that the individual School Boards would not be responsible for such management and coordination but rather the Transportation Consortium).
- Each School Board could enter into a separate, similar agreement for the provision of transportation services. This agreement would reference administration of the transportation services by the Transportation Consortium. For example, each School Board would have a separate agreement with the

Transportation Service Provider but each agreement would refer to the management and coordination of the bussing services by the Transportation Consortium instead of by each individual School Board which is a party to the agreement itself.

- These agreements would need to be assigned to the Incorporated Consortium following incorporation or a whole new agreement would need to be entered into between the Transportation Service Provider and the Incorporated Consortium. If it is contemplated that these transportation agreements could be assigned to Incorporated Consortium, the right to transfer/assign such agreements should be included in the agreement either with all of the participating School Boards or with each of the participating Schools Boards as set out above.

## **b.) Governance Structure**

Note that the specific governance structure of a Transportation Consortium will depend on the preference, structure, size and interests of the involved School Boards and should be discussed in detail with the School Boards' legal advisors; however, the suggestions below provide a guide and framework.

Whether Trustees are involved in the Governance of the Unincorporated Consortium is a matter for local decision. Trustees should only be involved in the Governance of the Transportation Consortium if the Board of Trustees agrees that the Trustees are prepared to assign/delegate the overall responsibilities for transportation to a smaller group of Trustees. For example, it may be that two or three Trustees are involved in the Governance Structure of the Unincorporated Consortium rather than all of the Trustees. As a result, it is essential for the appropriate Governance and operation of the Unincorporated Consortium that the entire Board of Trustees be prepared to assign/delegate to the small group the responsibility to govern the Consortium. In addition, if one of the participating School Boards decides that Trustees will not be involved but another participating School Board decides that Trustees will be involved, this would not be an effective arrangement for the Governance of the Consortium. The participating School Boards should come to a consensus as to whether Trustees will or will not be involved and there should not be a governance structure where Trustees from one Board are involved but Trustees from the other Board or Boards are not involved.

In any event, a Governance Committee should be implemented for an Unincorporated Consortium. If Trustees are not involved, it could be one or two senior management representatives from each of the participating School Boards. It should be structured in a way that the Operations Committee reports to the Governance Committee.

Governance of an unincorporated entity would be structured through a Consortium Membership Agreement that would set out the specific arrangements between the participating School Boards. The issues set out below are recommendations based on an analysis of Unincorporated Consortium already existing in the Province. The Membership Agreement would address matters such as:

- Where a decision is made that Trustees will be involved, management of the Consortium includes a Governance Committee which consists of an equal number of representatives from each School Board, such as one Trustee and one administrator from each School Board. The administrator is generally the Senior Business Official or a member of Senior Administration as designated. Where Trustees are not involved, the Governance Committee could be one or two senior administrators from each of the participating School Boards. The Operations Committee would report to the Governance Committee;
- Management of the day-to-day operations of the Unincorporated Consortium and the provision of transportation services is usually the responsibility of an Operations Committee consisting of an equal number of administrator representatives from each School Board. The Operations Committee reports to the Governance Committee;
- The Consortium Membership Agreement should contain dispute resolution mechanisms. For example, the use of mediation mechanisms as a first step to resolving conflicts, followed by mandatory and binding arbitration if mediation fails to resolve the issue. Language to this effect may resemble:
  - All differences or disputes which arise between the parties in relation to the interpretation of this Agreement or to any act or omission of any party to the dispute or to any act which ought to be done by the parties in dispute or in relation to any other matter whatsoever touching the terms and conditions of this Agreement shall be referred to a mediator jointly selected by the parties, such mediation to take place within 30 days of the referral unless such period is extended by consent of all parties and if such mediation is unsuccessful, then to a single arbitrator to be agreed upon by the parties to the dispute and in default of agreement to a single arbitrator appointed by the Court under the provisions of the Arbitrations Act, R.S.O. 1991. Upon any such irreconcilable difference or dispute arising either party may give notice as provided for herein of same to the other. Upon any such notice being given, the parties shall within five (5) days thereafter agree upon an arbitrator. In the absence of agreement within the said five (5) day period, either party may have recourse to the provisions of Section 8 of the Arbitrations Act, R.S.O. 1991. The award or determination which shall be made by such arbitrator shall be final and

binding upon the parties hereto and their successors and assigns, as the case may be, and there shall be no appeal from such award or determination. The cost of any mediation and/or arbitration will be paid by the parties [this could be equal as amongst the participating School Boards or on some pro rata basis].

- How administrative and technical services for the Transportation Consortium will be provided. In particular, information technology requirements need to be carefully reviewed. Differences in information technology as between the Boards needs to be taken into consideration and a decision made as to how information technology will be implemented and whether an existing or new system will be utilized;
- Which School Board(s) will be providing the necessary staff members to operate the Transportation Consortium and how the assignment of these staff members will be effected (the human resources issues are discussed more fully below).
- If one of the signatory School Boards to the Consortium Membership Agreement chooses to leave the Consortium, the Membership Agreement would need to be amended accordingly and all exit issues, including financial contributions, shared ownership of any assets and any relevant staffing issues, would need to be discussed and where necessary mediated or arbitrated. Similarly, if a new School Board was going to join the Consortium, then the Membership Agreement would also need to be changed and issues such as additional capital contributions by the new member School Board would need to be addressed.

### **c.) Liability**

Liability is a significant concern for School Boards with respect to all initiatives, and consideration of liability issues is key in establishing and structuring an appropriate legal structure.

Liability needs to be limited and allocated through indemnifications and other provisions in the Consortium Membership Agreement. The Membership Agreement should contain clauses which clearly indicate that each School Board accepts only several liability (eg. that each School Board only accepts liability for its own students or its own actions, errors and omissions) as well as indemnifications as between the participating School Boards just in case there is any situation of joint liability as between the School Boards.

The agreement with the Transportation Service Provider should specify that each participating School Board is only liable for their own transportation matters. It should be noted however that it would be open to a potential plaintiff to sue all parties involved in

the Transportation Consortium. Nevertheless, it would be difficult for a plaintiff to establish liability on the part of a School Board where the student is not a student of the School Board. However, because the possibility exists, it is recommended that there be appropriate clauses with respect to several liability and indemnification.

If Trustees are involved in the Unincorporated Consortium, and certainly with respect to employees who act on the Governance and Operations Committees, steps should be taken to ensure that such Trustees and employees are covered by an errors and omissions insurance policy. Similarly, the School Board should provide an indemnity in favour of any such Trustee or employee with respect to their role in the Transportation Consortium. The indemnity is usually provided through the appropriate resolution of the Trustees.

#### **d.) Insurance**

Each participating School Board's insurer should review its participation in the Transportation Consortium and should provide the necessary rider to the existing insurance policy.

Each participating School Board should ensure with their insurers that any of its employees (and this would also include Trustees to the extent that they are involved in the Unincorporated Consortium) who will be participating in or acting in connection with the consortium will be covered by the School Board's existing insurance policy. To the extent that existing insurance does not cover employees or Trustees operating within the Transportation Consortia, additional insurance should be purchased.

#### **e.) Human Resources**

The importance and complexity of human resource issues should not be underestimated. The possible issues with respect to human resources should be carefully reviewed by human resources personnel at the Board as well as legal counsel responsible for human resources issues.

An Unincorporated Consortium would not be able to hire its own employees; rather staff would be assigned to the Transportation Consortium.

The participating School Boards should discuss how such employees would be identified and which positions such employees would fill.

The assignment arrangements would need to be reviewed by the participating employer School Board, the employee and any union. In appropriate circumstances, such arrangements should be confirmed in writing.

In addition, it is possible that the arrangements will create redundant positions. As a result, the participating School Boards should discuss how such redundancies will be dealt with. For example, will the most senior transportation officer be assigned and what impact this might have on any other transportation officer in other participating School Boards. In this respect, then, consideration must be given to redundancy provisions in respective Collective Agreements.

Consideration must also be given to other human resources issues including seniority, benefits, workers' compensation and management structures. In many existing Unincorporated Consortia, an agreement has been reached with the employees whereby if for any reason the Transportation Consortium does not continue, the employee has the right to rejoin the Board without any loss of seniority etc. During any discussions with respect to human resources issues, consideration must be given to the impact of respective Collective Agreements.

In addition, the participating School Boards should give consideration to the senior employee who will be responsible for the operation of the Unincorporated Consortium. For example, this might be a General Manager. The issue might be how such General Manager might be selected if one or more of the participating School Boards have an existing General Manager for transportation. Again, consideration would have to be given to how the position is going to be filled, which employee might be assigned to the position of General Manager, or whether a General Manager might have to be hired from outside of the participating School Boards. If a new General Manager is hired, whether such person will be hired pursuant to an employment contract. While the Unincorporated Consortium is not able to hire its own employees, the General Manager could be under contract with all of the Boards in the Consortium. This could be by one contract which names the Boards as carrying on business as the Unincorporated Consortium. Nevertheless, all of the Boards would have to sign such contract. On the other hand, it may be possible that one of the Boards will agree to hire the General Manager. If such is the case, then consideration must be given to cross-indemnities as between the Boards as well as to reimbursement to the Board carrying the responsibility for the employment of the General Manager for the costs.

In addition, consideration must be given to how the costs of the human resources assigned to the Unincorporated Consortium will be handled. For example, will the costs of employees assigned to the Unincorporated Consortium be paid by each of the participating School Boards or will the total cost of the employees assigned by each participating School Board be calculated by the Unincorporated Consortium which will reimburse the respective School Board.

## **f.) GST/Taxation**

School Boards should have their accountants review the proposed business structure for Transportation Consortium for the effects on taxation matters, especially GST. The experience with respect to GST has varied as between Unincorporated Consortium. Consideration should be given to the implications of the financial arrangements as between the participating School Boards and the Unincorporated Consortium. For example, as noted above, if the Unincorporated Consortium will reimburse the School Board for the cost of assigned employees, would the Unincorporated Consortium have to include GST and would the participating School Board pay GST. If this is the case, then to what extent is there an additional cost of GST for these arrangements. Or, can the arrangements be structured in such a manner as to minimize any negative GST impact. These are issues that need to be reviewed in detail with the appropriate Board financial personnel as well as possibly with the Board's external auditors.

## **g.) Privacy Issues**

As the Consortium will be dealing with the personal information of students in its operations, the Member School Boards should ensure that privacy matters are sufficiently considered and addressed by the Consortium and that the operation of the Consortium complies with all applicable privacy laws. The Consortium should develop a separate Privacy Policy from that of the Member School Boards, but should reference the Member School Boards' continuing privacy obligations.

The Consortium, working with the appropriate representatives of the Member School Boards, should develop a form of consent in conjunction with legal counsel that parents could sign. This consent would allow the School Boards to share students' personal information with the Consortium and with the Transportation Services Provider.

## **h.) Procurement Policies and Practices**

The Unincorporated Consortium should follow the appropriate policies and practices with respect to procurement. In particular, the Unincorporated Consortium should follow the OPS Procurement Directives as a minimum standard. In addition, the Boards participating in the Unincorporated Consortium should consider what other policies and procedures might be applicable to procurement and whether the policies and practices of one School Board might be appropriate.

Further, the participating Boards should give consideration as to who will be responsible for any procurement. It may not be feasible for the Unincorporated Consortium to have its own staff responsible for procurement. As a result, the participating School Boards should give consideration as to whether one of the Boards should take responsibility for procurement. If this is the case, then the same issues apply with respect to cross-indemnification and reimbursement.

## **i.) Transition Process**

One possibility that the participating School Boards could consider is to proceed by way of an Unincorporated Consortium, and proceed with the steps necessary to incorporate while functioning under the Unincorporated Consortium. As noted below under Incorporated Consortium, it can take some time to finalize the incorporation. As a result, the participating School Boards might wish to arrange an Unincorporated Consortium to commence operations pending finalization of the requirements for an Incorporated Consortium.

In addition, consideration needs to be given as to the appropriate start date for an Unincorporated Consortium or for the transition to an Incorporated Consortium. It may be appropriate that a year-end be utilized for such transition. In the case of School Boards, this would be to commence operations on September 1 of a particular school year.

## **4. Checklist for Establishing an Unincorporated Consortium**

1. Arrange a meeting of representatives of the participating School Boards to discuss a framework for operation of the Transportation Consortium. These issues should be included in the Consortium Membership Agreement:
  - a) The Consortium Membership Agreement should specifically state that there is no intention to create a partnership or joint venture between the participating School Boards
  - b) The Consortium Membership Agreement should specifically set out how the Transportation Consortium will be governed. Where there is a decision that Trustees will be involved, there should be a Governance Committee which might consist of one trustee and one senior business official from each participating School Board. If Trustees will not be involved in the Governance structure, then the Governance Committee might consist of the senior business official and another senior administrator from each Board. In any event, it would be necessary to have an Operations Committee consisting of an equal number of administrator representatives from each participating School Board. (As indicated above, this is a recommendation based on best practices as currently exist in the Province)
  - c) Each Transportation Consortium should have a General Manager/Coordinator/Chief Administrative Officer, and the Agreement should set out how the Manager/Coordinator/Chief Administrative Officer is to be selected, and how such position would be filled if it became vacant

for any reason. The terminology for this particular position does vary among Unincorporated Consortia and includes concepts such as General Manager and/or Chief Administrative Officer. For example, if there are existing Managers/Coordinators within one or more of the participating School Boards, a decision will have to be made as to how to select the appropriate General Manager/Coordinator/Chief Administrative Officer for the Transportation Consortium. The process should be fair and consistent with other human resources practices. If there is no such individual, then the process used to recruit for the position should be consistent with generally accepted HR policies. The contract could be with one Board or with all the Boards in the Consortium

- d) The process of selecting Transportation Service Providers should be specifically set out. Which method of procurement will be used? Which School Board will operate and manage the process? Is there any compensation for such School Board for the cost of such process? The indemnity clause in the Membership Agreement should clearly include any and all liability with respect to such RFP process. As noted above in 3.h), consideration needs to be given to policies and practices for procurement and complying with the OPS Procurement Directives
- e) There should be specific provisions in the Agreement to address all of the following issues:
  - i) Which School Boards will be providing administrative / legal / technical / other support services, and how will each School Board be reimbursed
  - ii) Where will the Transportation Consortium operate? In order to maintain the “autonomy” of the Transportation Consortium, it is recommended that the consortium occupy separate space. However, this may be a financial issue and it may be determined that one of the School Boards will provide space. The Transportation Consortium should be responsible for the cost of such space. As noted above, the use of separate space may be one of the indications of autonomy. However, if this is a financial issue and the Transportation Consortium “rents” space from one of the School Boards, then such space should be specifically designated for the Transportation Consortium and restricted to other persons (for example, a separate entrance with locks accessible only by Transportation Consortium personnel)

- iii) What policies will be necessary for the consortium's operation and how will those policies be developed? Each School Board would still have the power to enact policies with respect to bussing for its pupils. Nevertheless, consideration will have to be given to complementing the policies of the participating School Boards to minimize differences which make the operation of the Transportation Consortium more difficult. For example, if each School Board has different minimum distances, it may be difficult to facilitate transportation. These are issues to be discussed by the participating School Boards and would be subject to a decision of the Board of Trustees of each participating School Board
- iv) How will finances be administered? For example, will one of the School Boards operate the financial system or will it be completely independent? If one of the School Boards operates it, then how is it to be reimbursed for this initiative
- v) There should be provisions for an audit of the operation. This audit could be undertaken by one of the existing auditors of one of the School Boards or could be a totally independent auditor selected through an appropriate RFP process. In addition, consideration should be given to an internal audit function. Again, this might be through one of the School Boards or an individual assigned to the Transportation Consortium
- vi) How will the Transportation Consortium be staffed? Reference should be made to the issues with respect to human resources set out above
- vii) What indemnities will each School Board provide? Indemnities should be cross-indemnities to ensure that each School Board is only responsible for any liability arising from the operation of the bussing for its students
- viii) How will the Transportation Consortium be insured? Consideration will have to be given to whether all of the members of the Transportation Consortium are insured through OSBIE or whether any or all of the Boards are insured outside of OSBIE. In any event, consideration must be given to confirming insurance coverage for any liability. The Transportation Service Provider will be required to carry insurance for its liability, but given the potential for other liability, the School Boards should take this into consideration and

make the appropriate inquiries and ensure that the appropriate insurance is in place

- ix) How will disputes between participants be resolved? School Boards should agree to participate in mandatory mediation and/or arbitration. The mandatory mediation or arbitration is also a best practice in existing Transportation Consortia throughout the Province
  - x) How will the Transportation Consortium's assets be owned? Which School Board will own the assets on behalf of the Transportation Consortium? Consideration should be given to whether a specific School Board will purchase the assets and continue to own the assets, or whether the participating School Boards will contribute to the costs of such assets on an agreed basis. If the latter, then consideration must be given to what happens to the assets if the Transportation Consortium is wound up or otherwise dissolved
  - xi) How will the exit of one of the Member School Boards from the consortium be dealt with? Similarly, how will the entrance of a new Member School Board to the Consortium be dealt with
- f) Assignment should be specifically addressed: can the Agreement be assigned by any of the participating School Boards? The best practice is that a School Board should not have the ability to assign the Agreement without the consent of the other participating School Boards, unless such assignment is to a successor School Board
- g) Termination should be specifically addressed: how can the Consortium Membership Agreement be terminated by either all the participating School Boards or one single School Board which no longer wishes to participate? The best practice would be that any notice of termination would require one school year's notice to be provided on or before August 31
- h) To the extent that one School Board is taking on a task on behalf of the consortium (i.e. employment, owning assets, financial management, procurement process of transportation services provider), then the other School Boards should provide that School Board with an indemnity. Again, the indemnity clause should be broad enough to cover any and all possible liability

- i) To the extent that any or all of the School Boards are amalgamated, that the Transportation Consortium will or will not continue
2. Have legal counsel prepare a draft Consortium Membership Agreement for review by participating School Boards based on outcome of discussion, above
3. As part of the finalization of the structure and agreement for the Transportation Consortium, accountants and risk managers for all participating School Boards should review
4. Select Transportation Service Providers and prepare draft contract for provision of services through the Transportation Consortium that each participating School Board is to sign
5. School Boards should ensure that a review or internal audit is done annually to ensure that the Transportation Consortium is operating effectively and, where there are problems, how those problems should be addressed

## **5. Incorporated Consortium**

### **a.) Legal implications for Transportation Service Provider**

The Consortium would enter into any necessary agreements with Transportation Service Providers.

### **b.) Governance Structure**

Note that the specific governance structure of a Transportation Consortium will depend on the preference, structure, size, and interests of the involved School Boards, and should be discussed in detail with the Boards' legal advisors. However, the suggestions below provide a guide and framework.

The governance of a corporation lies in its three distinct components: Members, Directors, and Officers.

The voting members of the Transportation Consortium would be the participating School Boards. In other words, the corporate School Board is the voting member and not individuals. Voting members vote for the Board of Directors, as well as having the right to vote on other major issues affecting the corporate entity, as set out in the Ontario *Corporations Act*. Since the corporate member acts through individuals, it is appropriate for the School Boards to designate the individual or individuals who will exercise the vote on behalf of the School Board. The general practice in this respect is the Chair and Director of Education. However, as indicated above with respect to Unincorporated Consortium, a decision will need to be made as to whether Trustees will be involved in

the Governance structure at all. If Trustees are not involved, then the exercise of the vote could be by the Director of Education alone or by the Director of Education and Senior Business Official. This is accomplished through a Resolution of the Trustees. The School Board Voting Members should enter into a Corporate Membership Agreement that provides how they will agree to vote for the Board of Directors, as well as any other matters of concurrence between the participating School Boards. If it is agreed that each participating School Board will have two representatives on the Board of Directors of the Corporation, the Corporate Membership Agreement should indicate that these two representatives will be ex-officio by designated positions. For example, if Trustees are involved it might be the designated Trustee and a designated member of Senior Administration. For example, it might indicate ex officio the Chair of the Board and ex-officio the Director of Education or a Senior Business Official. Where Trustees are not involved, it may well be the Director and the Senior Business Official. In any event, once a decision is made by the participating School Boards as to who will be a member of the Board of Directors this should be included in the Corporate Membership Agreement. In addition, once that decision has been made as to who will represent each School Board on the Board of Directors, this can also be implemented by appropriate Resolution of Trustees of each participating School Board. The Corporate Membership Agreement should also include specific dispute resolution mechanisms, such as mediation, followed by binding arbitration, if the mediation is unsuccessful.

The Board of Directors manages the Consortium, approving budgets, developing policy and controlling the direction of the organization. A Board of Directors usually includes a Chair and possibly a President. These positions can be filled ex officio. For example, the Chair might be the Senior Business Official of one of the participating Boards. Given the participation of a number of Boards, the position might be rotating on an annual basis. In addition, other officers might include a Secretary and a Treasurer. Again, these positions could be ex officio and could rotate among the participating Boards.

In addition, there would usually be a senior administrative position, such as Chief Administrative Officer.

Given the existence of the Board of Directors, it is not necessary to have a Governance Committee. This should be distinguished from an Unincorporated Consortium, which should have a Governance Committee. In essence, the Board of Directors would take the place of the Governance Committee, which would be implemented for an Unincorporated Consortium. The Operations Committee can report directly to the Board of Directors. If there was some business reason for having a smaller group handle the management of the Incorporated Consortium, this could be a Governance Committee or even a Management Committee. Such Governance Committee might include the Senior Business Official from each of the participating Boards. Consideration would have to be given to whether or not this creates an unnecessary level of management given the existence of the Board of Directors.

It will be noted that in the Sample Agreement attached as Schedule 2, Schedule B sets out the structure of the Board of Directors. With respect to the position of Chair, there is reference to the alternating. With respect to the position of Chief Administrative Officer, there is an indication that the CAO could serve as the Secretary to the Board of Directors. This is only one model and the designation of the Officers will vary from Consortium to Consortium.

The actual management of the Consortium and the provision of transportation services should be managed by an Operations Committee, which would consist of equal representation of administrators from each School Board, together with the Corporation's officers. This is a best practice that is implemented at many transportation consortia in the Province.

Specific matters of governance could be set out in the Letters Patent or the By-laws of the Consortium, together which form its constating documents. These possibilities should be reviewed with legal counsel.

The By-laws should specifically set out what is to happen if one of the Member School Boards chooses to leave the corporation or if a new School Board is going to join as a member of the corporation. Similar provisions could also be included in the Membership Agreement itself. All exit issues, including financial contributions, shared ownership of any assets and any relevant staffing issues, would need to be discussed and where necessary mediated or arbitrated. Additional matters to be considered when a new School Board joins the Corporation include payment of additional Membership fees.

### **c.) Liability**

The exposure of members of a corporate entity to the liabilities and obligations of the incorporated body is limited and this advantage is one of the major reasons why many organizations choose to incorporate.

It should be noted that despite the incorporation of a Transportation Consortium, liability of any given member School Board will never be completely eliminated because a plaintiff could always bring a suit against the Consortium and the individual School Board. In general terms, the more arms-length the Transportation Consortium from its member School Boards, the more likely a court would find that potential liability should remain with the Incorporated Consortium. The issue of when a court will lift the “corporate veil”, which is a legal doctrine whereby the limited liability of a corporation is lifted, is very complex and is beyond the scope of this Guide to discuss in detail; however, the advantage conferred by separate legal status should not be underestimated, despite the possibility that the protection against liability that it offers is not absolute. It is for this reason that it is recommended that appropriate clauses with respect to indemnification be included in the Membership Agreement and that appropriate insurance be in place.

Where a decision is made by the participating School Boards that Trustees will be involved, and in any event given that employees will be involved with the Board of Directors, the representatives of the School Board who are members of the Board of Directors should be covered by either existing insurance or an errors and omissions insurance policy, which protects members of the Board of Directors against a suit brought against them in connection with an error or omission on their part in their role as a director. Similarly, the School Boards should provide an indemnity in favour of any such Trustee or employee with respect to their role in the Consortium. Again, this is implemented through an appropriate Resolution of the Trustees of each participating School Board.

Although an Incorporated Consortium may reduce the potential liability of participating School Boards with respect to claims by students who are not students of the School Board, the issue may be academic from a rating and premium perspective, particularly if the Incorporated Consortium and the participating School Boards are insured through OSBIE. This is referred to below under Insurance.

### **d.) Insurance**

The Consortium could enter into its own insurance contract to obtain the necessary level of insurance coverage. In some cases, this has been an extension of coverage through OSBIE or through other insurers providing insurance coverage for a particular School Board.

The Consortium should also ensure that errors and omissions insurance is included or purchased for its directors and officers.

The Consortium should ensure that any insurance it purchases effectively covers School Board employees who may be seconded to the Consortium.

The participating School Boards should also review their insurance coverage to ensure that it provides coverage in the event that the Consortium coverage does not apply.

The existence of an Incorporated Consortium may not have a significant advantage with respect to rating and premiums. Particularly if the Incorporated Consortium and the participating School Boards are insured through OSBIE. These issues should be reviewed with the School Boards' insurer or other insurers providing coverage for the participating School Boards and the Incorporated Consortium.

### **e.) Human Resources**

The importance and complexity of human resource issues should not be underestimated. These issues should be carefully reviewed by human resources personnel at each of the participating School Boards as well as by legal counsel.

The corporate entity could enter into secondment agreements with respect to School Board staff, where staff working for the Transportation Consortium would remain employees of the participating School Boards and the Consortium would reimburse the School Board for the costs of the employees.

Before any such arrangements are undertaken, careful consideration must be given to all of the potential issues. Internal consultation as well as consultation between the Boards needs to occur to deal with issues such as pay equity issues and other differentiations between salary and benefits among the employees being seconded from different Boards.

Alternatively, an incorporated entity could hire its own employees and enter into employment contracts. Given the complexity of the issues associated with independent hiring of employees, a secondment is likely the simplest and most efficient option. However, if a Consortium wishes to enter into its own employment agreements, there are several issues to consider. Firstly, an issue that must be considered is whether or not existing employees will be allowed to transfer their employment into the incorporated consortium. If such transfers are to be permitted, then consideration must be given to:

- the transfer of seniority and benefits;
- transfer of pension rights;

- successor union issues;
- implementation of an appropriate employment contract;
- pay equity issues;
- implementation of appropriate benefits.

If the decision is made not to transfer or second employees but rather to hire new employees, this can raise considerable issues with respect to existing collective agreements, and careful consideration should be given to such implications. In addition, if employees are to be hired, consideration must also be given to:

- implementation of an appropriate employment agreement;
- implementation of appropriate benefits, including possible pensions;

as well as the possible implications of successor union issues. As individual issues and considerations will differ depending on each Consortia's specific circumstances, member School Boards should consult extensively with applicable human resource departments and with legal counsel about the hiring process.

All of these issues should be considered and dealt with prior to proceeding with the implementation of the Transportation through an Incorporated Consortium.

For example, if employees are to be transferred into the Incorporated Consortium, arrangements should be made to ensure that the pension rights of the employees continue and would be recognized and available through the Incorporated Consortium. This would have to be put in place before such transfers are effected.

It may be possible to make an agreement with the union that employees can be transferred or hired by the Consortium and successor rights will not apply. However, consideration must also be given to the possibility that the employees transferred or hired by the Consortium could apply for certification as a union.

## **f.) GST/Taxation**

Each participating School Board should explore the option of a "flow-through" treatment of the GST, which would not result in losing access to lower rebates that would otherwise be available to the School Board and not the Consortium. As noted above under Unincorporated Consortium, there are possible significant implications for GST. This is an issue that needs to be reviewed by the appropriate representatives of each participating School Board as well as by external resources such as the School Board's auditors.

In order to achieve a “flow-through”, that is, no negative GST tax implications, each participating School Board could enter into an agency agreement with the Consortium where the Consortium would act as agent of the Member School Boards for the purposes of the transportation fees paid by the Member School Boards. This would need to be done in careful conjunction with the School Boards’ accountants or tax advisors.

### **g.) Privacy Issues**

As a separate legal entity, the Consortium will have privacy obligations separate from those of the Member School Boards. In addition, the Member School Boards will need to ensure that their ongoing privacy obligations are being met.

The Consortium, working with the appropriate representatives of the Member School Boards, should develop a form of consent in conjunction with legal counsel for parents to sign that allows it to collect and use student information, as well as to disclose that information as necessary to the Transportation Services Provider. The Consortium should also ensure that it has comprehensive privacy policies in place and that its staff are properly trained in privacy matters.

### **h.) Procurement Policies and Practices**

The Incorporated Consortium should follow the appropriate policies and practices with respect to procurement. In particular, the Incorporated Consortium should follow the OPS Procurement Directives as a minimum standard. In addition, the Boards participating in the Incorporated Consortium should consider what other policies and procedures might be applicable to procurement and whether the policies and practices of one School Board might be appropriate.

Further, the participating Boards should give consideration as to who will be responsible for any procurement. It may not be feasible for the Incorporated Consortium to have its own staff responsible for procurement. As a result, the participating School Boards should give consideration as to whether one of the Boards should take responsibility for procurement. If this is the case, then an appropriate agreement needs to be entered into with the School Board providing such procurement services, which would include the cost and reimbursement for such cost. In addition, the Membership Agreement should include the appropriate cross-indemnification provisions to protect the School Board providing such services.

### **i.) Transitional Process**

One possibility that the participating School Boards could consider is to proceed by way of Unincorporated Consortium and proceed with the steps necessary to incorporate.

Since it can take some time to finalize the incorporation, the participating School Boards might wish to arrange an Unincorporated Consortium to commence operations pending finalization of the requirements for an Incorporated Consortium. The Checklist set out below indicates the issues and concerns that need to be dealt with before proceeding to the Incorporated Consortium. Given the various implementation issues, it may be appropriate to commence the Incorporated Consortium on the first day of a new financial and school year, being September 1 of a particular year. This will minimize the changes which would be required if the implementation of the Incorporated Consortium occurred during a school year. This would have implications for bussing contracts, financial and audit arrangements, employment, and other issues.

### **j.) Transfer of Assets**

Consideration should be given to whether and how existing assets relevant to pupil transportation could be transferred or sold to the corporation. This could include computers, software, office furniture, etc.

## **6. Checklist for Establishing an Incorporated Consortium**

Whether the coterminous Boards already have an Unincorporated Consortium or plan to move directly to an Incorporated Consortium, it is essential that a meeting of representatives of the participating School Boards be arranged to discuss the legal and operational issues related to an Incorporated Consortium. In addition to the issues set out above, following is the Checklist for consideration by the coterminous Boards.

1. **Select the proposed corporate name:** There are several restrictions on corporate names that should be considered and the process of finding an appropriate name can be quite time-consuming. The following is a list of restrictions, some of which are statutory, and considerations for selecting a corporate name:
  - a) The name shall not be similar to that of a known corporation, association, partnership, individual or business if the name is likely to deceive (unless the existing entity gives its consent in writing)
  - b) The name must be “distinctive” and must not mislead or confuse the public as to the nature of the undertaking, business or activities of the corporation. For this reason, the name should also have a descriptive component
  - c) A not-for-profit corporation may use the legal indicators “Incorporated” or “Inc.” but does not have to

- d) The corporate name cannot be too general, as this will likely infringe on several existing entities' names
- e) The name cannot suggest any connection to the Crown or with the government
- f) The corporation can have an English and French version of its name and operate under both, but this must be included in the Application for Letters Patent
- g) Please note that ensuring a proper corporate name will likely require the assistance of a lawyer to ensure that it complies with all requirements of the Ontario *Corporations Act*
- h) Note that once the proposed corporate name has been agreed to by the parties based on a review of the requirements and restrictions (discussed above), then a NUANS name search must be conducted. This can be obtained through a corporate name search house. Fees for the search vary and names of several search houses are provided below. If a lawyer is assisting with the incorporation process, this can usually be conducted by such lawyer

2. **Prepare and file the Application for Incorporation (The form for the application for incorporation is available on the Ontario Business Connects website):** In order to incorporate, the following information is needed. Note that the governance structure and other matters that will be addressed in the letters patent or by-laws should be discussed prior to incorporation so that all participating School Boards are clear on how the corporation will operate

- a) Head office of the corporation (note that this may be one of the School Board's offices if necessary)
- b) Who are the first directors? (see comments on governance structure above)
- c) Objects of the corporation. These should be drafted by a lawyer to ensure that the operation of the consortium achieves its purpose and is not unnecessarily restricted
- d) Special provisions, as may be necessary for the operation of the corporation, for example, ancillary powers that are available to the corporation

3. **Once the application is complete, it is sent in with the appropriate fee, which at the time of this publication is \$155.00 and an Ontario-biased NUANS name search current to within 90 days:** Note that it can take approximately eight weeks to process the application and for the letters patent to be issued unless a more expensive “expedited process” is used. The corporation exists as of the effective date of the letters patent. Again, participating School Boards should consult with their legal counsel to obtain an estimate of the fees for all of the above.
4. **Following receipt of Letters Patent or pending receipt of same, organize the corporation (Note that the assistance of a lawyer familiar with not-for-profit corporations is recommended for the start-up process for not-for-profit incorporations)** Issues that need to be addressed once the letters patent have been received:
  - a) Adopt the corporation’s general by-law, which should address issues such as:
    - i. Election of directors (can be specifically agreed to in Membership Agreement), including ex-officio directors, qualification of directors, remuneration and indemnification of directors, procedures for directors’ meetings, and including notice
    - ii. Governance structure: Board of Directors consisting of an equal number from each participating School Board, such as one Trustee and one senior business official or one senior business official and one senior manager. There could also be a Management Committee consisting of administrative members
    - iii. Appointment of officers and management committee
    - iv. Establishment of committees
    - v. Decision-making model—should be a consensus based model
    - vi. Directors’ and Members’ quorum
    - vii. Execution of documents
    - viii. Borrowing by the corporation
    - ix. Financial year end and appointment process for auditor
    - x. Amendment or repeal process for by-law

- b) Establish banking and financial arrangements
  - c) Adopt the corporate seal
  - d) Appoint an auditor
  - e) Draft and execute Membership Agreement between the School Boards who are members of the corporation. Issues to address in Agreement include:
    - i. Agreement to vote for the Board of Directors to reflect the agreed-upon governance structure (e.g. one trustee and one administrator from each participating School Board)
    - ii. Agreement to make decisions with respect to the corporation on a consensus model
    - iii. Conflict resolution clause with respect to disagreement between Members (i.e. - mandatory mediation and arbitration)
    - iv. Agreement to keep all information with respect to the corporation and the Membership Agreement confidential
    - v. Membership fees payable by each School Board (if any)
    - vi. Termination provisions if one School Board no longer wants to participate in the corporation. Should be on one school year's notice to be provided on or before August 31
  - f) Within sixty (60) days of incorporation, an Initial Return must be filed with the Companies Branch of the Ministry of Government Services
5. Ensure that the Corporation is being effectively and properly maintained on an ongoing basis
  6. Within fifteen (15) days of a change to any information set out in the Initial Return (e.g. change of directors, officers or head office address) a Notice of Change must be filed with the Companies Branch of the Ministry of Government and Consumer Services
  7. The corporation must file its Annual Returns with the Corporations Branch of the Ministry of Government and Consumer Services
  8. An annual meeting where financial statements are reviewed and approved must be held no later than eighteen months after incorporation and subsequently not

more than fifteen months after the holding of the last annual meeting. Directors are generally elected by the members at the annual members' meeting. Officers are generally appointed by the Board of Directors following such annual general meeting. The requirements of the annual meeting can be handled through written resolutions signed by all of the members

9. Any action that can be taken by directors or members may be conducted by a resolution signed by all members or directors, as the case may be, in place of a vote at a meeting
10. The corporation must comply with all reporting requirements, including filing Notices of Change when appropriate, as well as any Special Information Notices that the corporation receives from the government
11. The corporation must also ensure that it keeps proper records and documents. These requirements are:
  - a) proper books of account and accounting records
  - b) minutes of meetings of members and directors
  - c) copies of the Letters Patent, any Supplementary Letters Patent, By-laws and Special Resolutions in the minute book
  - d) an up-to-date register of the members and directors
12. The corporation must use its full corporate name in all transactions. A corporation may use another name to conduct its affairs; however, if it chooses to do so, it must register that business name with the Companies Branch of the Ministry of Government and Consumer Services. Given the difficulty in choosing a corporate name, many non-profits use a "business-style" which is registered for its daily business (to use an example from outside of the education sector: "Safe- House Residential and Community Services of Metropolitan Toronto Inc." was the name approved by the Ministry and is registered as "Safe-House" as a "business style" for its daily operations)
13. Any subsequent change to the corporate name, the authorized number of directors, the location of the head office or the corporation's objects or special provisions needs to be conducted through an application for Supplementary Letters Patent
14. All tax matters must be attended to and all filings completed and payments made, including under the *Income Tax Act*, the *Ontario Corporations Tax Act* and with respect to GST

15. If the corporation is no longer needed, it can be rendered “dormant” or it can file an application to surrender its Charter and cease to exist
16. The corporation would also be required to implement all of the other issues as set out in the Checklist for an Unincorporated Consortium including:
  - a) the selection of the General Manager / Coordinator / Chief Administrative Officer and the development of an appropriate Employment Agreement
  - b) appropriate policies and procedures with respect to procurement (and compliance with the OPS Procurement Directives)
  - c) the process for selecting transportation service providers
  - d) the implementation of administrative / legal / technical or other support services
  - e) location for the operation of the Incorporated Consortium
  - f) appropriate implementation with respect to financial requirements including independent auditor, financial statements
  - g) implementation of appropriate staffing
  - h) implementation of appropriate insurance

## **7. Implementation of Planning Software System, Transportation Database and Digital Map**

### **a.) Unincorporated Consortium**

These components would be the responsibility of the unincorporated consortium.

All of the School Boards participating in the Consortium should enter into a Technology Agreement, which addresses issues such as procurement and ownership of these components.

One School Board should be responsible for procurement associated with the development of these components. The other School Boards should indemnify the procuring School Board. Alternatively, one School Board could manage the process on behalf of the other School Boards who would jointly purchase the components.

The Technology Agreement should also set out how the cost of the development of these components will be shared between the participating School Boards and how

ownership of the components will be divided. These matters will depend on the particular circumstances; however cost and ownership could be divided on a pro rata basis. The Technology Agreement should also provide for a division of any liabilities associated with the components, such as intellectual property violations connected with the components.

### **b.) Incorporated Consortium**

These components would be the responsibility of the corporation, which would be responsible for procuring the development of the components. The Corporation would also be the owner and would pay for the development of the components through membership fees. Any liabilities connected with the components would belong to the Corporation.

## **8. Sample Members' Agreement for an Unincorporated Consortium**

Attached as Schedule 1 is a sample template agreement for an unincorporated consortium. This sample template agreement is not recommended as part of this Guide. In addition, it is not recommended by COSBO or the Ministry of Education. It is a sample template for consideration by School Boards with respect to the implementation of an Unincorporated Consortium.

This template is based on the participation of two School Boards. Where there are more than two participating School Boards, significant changes must be made to the template agreement.

COSBO and the Ministry of Education would stress that it is essential that School Boards obtain advice from their legal counsel as to such an agreement.

Neither COSBO nor the Ministry of Education can assume any responsibility for any Board using such sample agreement.

## **9. Sample Members' Agreement for an Incorporated Consortium**

Attached as Schedule 2 is a sample members' agreement for an incorporated consortium. This sample members' agreement is not recommended as part of this Guide. In addition, it is not recommended by COSBO or the Ministry of Education. It is a sample template for consideration by School Boards with respect to the implementation of an Incorporated Consortium. This sample agreement is based on the participation of two School Boards. If there were more than two School Boards, significant amendments would have to be made to this sample template before it could be used by the Member School Boards.

COSBO and the Ministry of Education would stress that it is essential that School Boards obtain advice from their legal counsel as to such an agreement.

Neither COSBO nor the Ministry of Education can assume any responsibility for any Board using such sample agreement.