

GUIDE TO INCORPORATION

Here is a simplified guide to the steps taken to incorporate a new business corporation in Ontario. For more specific information, please refer to the Disclaimer and Copyright Notice.

1. Select Corporate Jurisdiction

In Canada, incorporators can choose to incorporate in one of 12 provincial and territorial jurisdictions or one federal jurisdiction of incorporation. In most cases, the choice of jurisdiction is limited to either the home province/territory of the incorporator or to federal jurisdiction.

Federal (Canada) corporations, are incorporated pursuant to the *Canada Business Corporations Act* and have the constitutional right to carry on business anywhere in Canada under their registered corporate name, subject to registration requirements in each province or territory. Provincial corporations are incorporated pursuant to the applicable provincial corporate statute, and only have the right to carry on business within the province or territory of incorporation. (i.e. an Ontario Corporation can only carry on business within the Province of Ontario). Provincial corporations can however make an extra-provincial registration to carry on business in another province or provinces (i.e. if an Ontario corporation wants to set up offices in Alberta it could apply to the Province of Alberta for registration as an extra-provincial corporation in Alberta).

Another important difference between a federal and provincial corporation is the scope of protection given to the name of the corporation. Incorporating federally under the *Canada Business Corporations Act* (CBCA), provides protection for corporate names across Canada. Once a particular corporate name is registered as a federal corporation, no one else may use that name or a confusing name for their corporation anywhere in Canada. This federal corporate name protection is second only to trademark protection in terms of its scope and effectiveness for protecting business names. Because of the scope of corporate name protection provided under the CBCA, proposed corporate names are thoroughly scrutinized by the federal Corporations Directorate according to strict name granting guidelines. As a result, many names that would be acceptable for corporate registration provincially are rejected by the Corporations Directorate as being too vague or non-descriptive of the business.

Provincial incorporation provides corporate name protection only within the province or territory of incorporation. If you are only intending on operating your corporation within one province or territory, this should not be an issue for you to worry about. If you intend to incorporate provincially and then register the corporation extra-provincially in another province or territory at a later date, you may be disappointed to find out that your corporate name, or a similar one, has already been registered in the other province, and you will have to choose a new name for the other province.

The final difference between federal and provincial corporations is the cost of incorporation. For federal corporations, the federal Corporations Directorate currently charges a fee of \$500.00 to register the Articles of Incorporation. Most provinces do not charge as much to register corporations. For Ontario Corporations, the Government of Ontario currently charges \$360.00 for registration and certification of Articles of Incorporation.

In deciding which jurisdiction in which to register, prospective incorporators should ask themselves the following questions:

1. Where will the corporation carry on business? In one or more provinces, or across Canada?
2. Is federal name protection important for the business? Will the corporate name be used in other provinces or territories?
3. Is the corporate name unique enough to justify protecting it with federal incorporation?

4. Will you decide to incorporate additional companies in the future? If so, it is generally recommended to incorporate these new companies in the same jurisdiction as the first corporation, so that future corporate changes can be made cheaply and easily.

2. Select Corporate Names

Selecting a corporate name can be the most frustrating part of incorporating a company. Although there are no mandatory requirements to choose a particular name, each jurisdiction has its own set of guidelines and requirements for proposed corporate name approval.

As mentioned in the last section on jurisdiction, the name granting guidelines used by the federal Corporations Directorate are the most stringent of any jurisdiction in Canada. In most cases, the federal Corporations Directorate will require any proposed name to consist of a distinctive and descriptive portion. The distinctive portion identifies the particular corporation, while the descriptive portion identifies the particular activities of the corporation. Many proposed corporate names are rejected after much time, energy and money has been spent in attempting to have them approved. As a result, it is advisable for all federal incorporators to choose a minimum of three alternate names in advance, so that if their first choices are rejected, they have an alternate names to submit.

Corporate names can either be created by the incorporator, or they can be the corporate number assigned to the corporation by the incorporating jurisdiction (i.e. 123456 Ontario Inc.). A numbered corporation is a good choice when a fast and relatively inexpensive incorporation is required. In this situation, the corporation may be created using a numbered name and Articles of Amendment may be filed later to change the name. Alternatively, a numbered corporation may be used where the incorporator will operate the business under another business name registered to the corporation (i.e. 123456 Ontario Inc. carrying on business as (c.o.b.) Mike's Plumbing Mart).

The following general rules apply to any proposed corporate name:

- * Under the laws of most jurisdictions, the incorporator is responsible for ensuring that the chosen corporate name complies with the applicable law in that jurisdiction
- * Corporate names must generally not be the same or similar to that of any other existing business name or trademark, if the use of the proposed name would be likely to deceive the general public.
- * Corporate names can be in either English, French, in both English and French, or in a combined English and French form.
- * Corporate names usually consist of a distinctive element and a descriptive element.
- * Corporate names must end with a legal element consisting of one of the following:

Limited or Ltd.
Incorporated or Inc.
Corporation or Corp.
Limitée or Ltée.
Incorporée or Inc.

3. Determine Corporate Name Availability

Before submitting a proposed corporate name to the government for approval, the name must be searched using the Newly Upgraded Automated Name Search ("NUANS") system. A NUANS report must then be submitted with the Articles of Incorporation (unless you are incorporating a numbered company in which case a NUANS report is not required) to demonstrate that there are no identical or deceptively similar names already registered in the jurisdiction. A NUANS report consists of three pages of registered trade names and two pages of trade marks similar to the proposed name.

Specific types of NUANS searches are completed depending on the desired jurisdiction of incorporation. For federal incorporation, a "Canada-biased" report is required. For an Ontario incorporation, an Ontario report must be obtained. If it is likely that in the future, a corporation will apply to carry on business in a jurisdiction other than the jurisdiction of incorporation, it is recommended that a NUANS report for that jurisdiction be obtained for the proposed corporate name as well so that the incorporator has advanced knowledge of any potential problems with the proposed name.

For federal corporations, the Corporations Directorate offers a name pre-clearance service. If an incorporator is unsure of the suitability of a particular name, he or she may forward a NUANS report for that name to the Corporations Directorate in Ottawa in advance of filing the Articles of Incorporation for a name decision. If the proposed name is accepted, it is reserved for thirty days, while the Articles of Incorporation are prepared. If the name is not accepted, the incorporator has saved the time and effort of submitting useless Articles of Incorporation and he or she can submit a new name or provide additional information to the Corporations Directorate to allow it to accept the proposed name.

4. Complete Articles of Incorporation

In most Canadian jurisdictions, business corporations are created by filing articles of incorporation with the appropriate government agency. Although incorporators are free to complete and submit articles of incorporation without hiring a lawyer, it is advisable to seek legal assistance because of the specialized legal nature of the documents.

Before completing articles of incorporation, incorporators will have to make basic decisions about their corporation as follows:

- * Where will the registered office be located?
- * How many and what classes of shares will the company be authorized to issue? (There may be any number of tax-related or tax planning issues associated with this choice)
- * Should there be restrictions on share transfers to ensure that the corporation remains "private?"
- * How many directors will be appointed? Will there be a set number of directors or a minimum and maximum number?
- * Should there be restrictions on the types of activities or type of business that the corporation may conduct?
- * Are there any other restrictions or clauses that should be included in the articles?

Answers to the questions listed above vary according to the specific requirements of each individual's situation. As a result, specific legal and/or tax advice should be obtained by the incorporator prior to completing the articles of incorporation.

Once the articles of incorporation and supporting documents are completed, they must be signed in duplicate by at least one incorporator who is competent, at least 18 years of age and not bankrupt. Incorporators may, but do not have to be directors or shareholders of the corporation after it is incorporated.

5. Submit & Register Articles of Incorporation

Articles of Incorporation and supporting documents, including a NUANS report and filing fee must be filed with the appropriate government agency before the corporation is created.

For federal corporations the Corporations Directorate requires the following documents to be filed:

- * 2 copies of Articles of Incorporation (Form 1)
- * Notice of Registered Office (Form 3)
- * Notice of Directors (Form 6)
- * Federally-biased NUANS report
- * Filing fee (currently \$500.00 by cheque payable to Receiver General for Canada)

Federal incorporation documents are to be delivered to the following address:

Corporations Directorate
 Industry Canada
 9th Floor, Jean Edmonds Towers South
 365 Laurier Avenue West
 Ottawa, ON K1A 0C8

For Ontario corporations, the Companies Branch of the Ministry of Consumer and Business Relations requires the following documents to be filed:

- * 2 copies of Articles of Incorporation (Form 1)
- * NUANS report
- * Consent of the Director (if a director named in the Articles of Incorporation is not an incorporator) (Form 2)
- * Filing Fee (Currently \$360.00 by cheque payable to Minister of Finance or credit card if registering in person)

Ontario incorporation documents can be delivered by mail or registered in person at the following address:

Companies Branch
 Ministry of Government Services
 2nd Floor, 393 University Avenue
 Toronto, ON M7A 2H6

Articles of Incorporation may be filed electronically as well through authorized service providers including, in Ontario, Cyberbahnn and OnCorp.

6. Purchase Corporate Seal & Minute Book

All corporations are required by law to keep certain corporate records including, but not limited to:

- * a copy of the Articles of Incorporation
- * all corporate by-laws
- * minutes of shareholder meetings
- * shareholder resolutions
- * minutes of directors' meetings
- * resolutions of directors

- * directors register
- * securities register
- * share transfer register
- * a copy of any forms filed with the government
- * a copy of any unanimous shareholder agreement

All of these documents are usually kept in a binder or case known as a corporate minute book. Although there is no specific type of minute book required (incorporators can use a simple binder if they choose), it is useful to have a professional minute book prepared and updated each year to reflect the ongoing business of the corporation. A professionally updated minute book allows for quick organized reference to corporate documents, and is extremely important in a variety of corporate transactions, such as the sale of the corporation to another shareholder (the purchaser's lawyer will usually want to examine the corporate minute book in advance of the sale to ensure that all legal requirements have been met by the corporation).

A corporate seal is used to emboss the corporation's name on legal documents. There is currently no legal requirement for a corporate seal for either federal or Ontario corporations, however, most corporations continue to seal certain legal documents to verify their validity.

7. Complete By-Laws, Organizational Minutes & Issue Shares

After the corporation has been created, its structure must be organized. The organization of the corporation is documented in written form and maintained in the corporate minute book. The initial organization of the corporation is achieved by a meeting of directors or shareholders of the corporation or by written resolutions signed by all directors or shareholders. Included in this initial organization are the following:

- * approval of corporate by-laws
- * issuance of shares to shareholders
- * election of directors
- * appointment of corporate officers
- * other organizational resolutions
- * shareholder agreements (optional)

8. Obtain Other Permits & Licenses

After you have set up your corporation and are maintaining it according to the legal requirements, you must turn your attention to other legal requirements such as the following:

- (i) Register for a federal Business Number (for all corporations). The Business Number is used by the federal government to identify businesses for a variety of accounts:
 - * federal corporate income taxes
 - * import/export account
 - * GST/HST collection

* employer payroll source deductions

- (ii) Register any non-corporate business names (business names other than the exact registered corporate name) used by the corporation in the province in which the business operates. This is a provincial legal requirement.
- (iii) Register for a provincial sales tax account (if applicable)
- (iv) Register for provincial Employer Health Tax, & Worker's Compensation
- (v) Obtain any Provincial and/or municipal licenses

Remember that there are a variety of industry specific laws and regulations that you must be aware of in order to operate your corporation legally. Consult a competent lawyer in your province or territory for specific legal advice

9. Set Up Bank Account

In order to set up a corporate bank account, you will need to supply the bank with a copy of your articles of incorporation and any articles of amendment. All authorised signing officers of the corporation must sign on to the account at the bank before they are permitted to sign cheques or access the corporate account. The bank may also require certain corporate by-laws or other resolutions to be passed before opening the account.

10. Start Your Business!

Now that all of the many legal requirements are satisfied, you can concentrate on operating and growing your new business!