

Addendum to THE FUNDAMENTALS OF CORPORATE LAW AND PROCEDURE

Since this book went to press in the summer of 2000, a number of changes have been made in the corporate law area. Not the least of these is a change in the name of the Ontario ministry responsible for the registration of business names and incorporations: from the Ministry of Consumer and Commercial Relations to the Ministry of Consumer and Business Services. In addition, the federal government has changed its incorporation fee so that it is now costs less (from the point of view of fees payable to the government) to incorporate federally. And, despite the best efforts of everyone involved, errors are inevitably made.

This sheet, then, is an attempt to update and correct the original text so that it may remain current and useful for its readers.

Chapter 1 - Introduction

"The Role of the Corporate Law Clerk" - page 6 —

- The Law Society of Upper Canada passed new Rules of Professional Conduct effective November 2000. All references to rule 16 on this page should be changed to r. 5.01(2). However, the content and spirit of this rule remains the same as that described in this chapter.

Chapter 2 - Sole Proprietorships and Partnerships

"Searching for Similar Names" - pages 11 to 12 —

- NUANS is the database which *must* be searched for proposed or changed corporate names; however, it is not at present mandatory for a NUANS search to be done prior to registration of a name for a sole proprietorship or partnership. It is, however, a good idea to search the NUANS database as it will reveal a broader range of similar names to that being proposed than a search with the Ministry of Consumer and Business Services will reveal. The Ministry's registration database will typically reveal only names that are exactly the same as a registration in the current database. The NUANS search is *not* currently available at Ontario Business Connects computer terminals.
- With reference to the action described in the last paragraph of this section, it is to be noted that the maximum award that may be granted in an action under s. 6 of the *Business Names Act* is \$500.00. It is likely that a business with a prior right to the use of a name would choose to sue in the Small Claims or Superior Court, depending upon the amount claimed, under the tort of "passing off."

"Registration of Name" - page 12 —

- This is the first reference in the text pertinent to the change of the Ministry from Ministry of Consumer and Commercial Relations to Ministry of Consumer and Business Services. The address remains the same as that shown in the book.
- It is now possible to register the name of a sole proprietorship or general partnership through Ontario Business Connects either at an office computerized station or over the Internet from your own computer. The current address for this website is www.cbs.gov.on.ca/obc and the fee is \$60, which is \$20 less than the fee for registering in a manual format, as is already noted on page 14 under "Advantages and Disadvantages."

Pages 22 and 23 —

- These pages contain many references to the Ministry of Consumer and Commercial Relations, which is now changed to the Ministry of Consumer and Business Services.
- "Limited Partnership" - "Registration of the Partnership Name" - on page 22 in the 2nd last paragraph of this section, only a change of name requires a new registration using Form 3, for which a fee is payable. Other changes require a change to be filed using Form 3, but no fee is payable.
- In "Dissolution of the Partnership" on page 22, the remaining general partners may choose to continue the partnership as noted on that page, but a change would have to be filed using Form 3.

Additional information:

Other types of registrations that might be made include the following:

- **Extra-Provincial Limited Liability Partnership**, under the provisions of s. 44.4 of the *Partnerships Act*, must be registered using Form 6
- **Extra-Provincial Limited Liability Company** under the provisions of s. 2.1 of the *Business Names Act*, must be registered using Form 6
- The registration by a (general) partnership or a limited partnership of a name other than its own, such as a trading name, is done using Form 5 under the authority of s. 3.1 of the *Business Names Act*
- Lawyers as well as other professionals listed in s. 3.1(2) of the *Business Corporations Act* are now entitled to incorporate professional corporations (this occurred in August 2001).

Chapter 3 - Joint Ventures, Franchises, and Other Ways of Carrying on Business

"Franchises" - "Characteristics" - page 28 —

- the Ontario bill mentioned in the second paragraph of this section has now been passed into law: the *Arthur Wishart Act (Franchise Disclosure)*, S.O. 2000, c. 3.

Chapter 4 - The Corporation: Essential Facts

"Ontario and Federal Corporations" - page 37 —

- Since April 1, 2001, the fees payable to the government have changed so that it is now less expensive to incorporate federally than provincially.
- Currently (May 2002), the fees are as follows:

		Electronically	Manually
Provincial (Ontario)	\$ 300.00	\$ 360.00	
Federal	200.00	250.00	

- The forms for a federal incorporation also differ in initial appearance from those used for provincial incorporations; however, the information contained in them is substantially the same.

Chapter 5 - Pre-incorporation Issues

"Incorporation: Provincial or Federal?" - page 39 —

- Under item number 3, and for the reasons set out immediately above, the fees payable to the government in order to incorporate are now lower for a federal corporation than for an Ontario corporation, for the first time in decades.
- Under this same item number, the federal annual return can now be filed electronically at the cost of \$20, and an Ontario corporation must file an annual return combined with its corporate income tax return, for which there would be a fee if filed electronically.
- Under item 4 of this same page, federal articles that are filed electronically are now promised to be available the next day; or, if received online by 1:00 p.m.

through the Corporation Directorate's Electronic Filing Centre, they will be processed before 5:00 p.m., Eastern Standard Time, the same day. See the subsequent note, under the reference to page 72, for particulars on how to file.

"Shares and Shareholders" - "Non-Offering Corporations" - page 55 —

- It must be clarified that the lower income tax rate under section 125 of the *Income Tax Act* is payable on the first \$200,000 of its **taxable** income earned from active business in its fiscal year.

"Registered Office" - page 56 —

- In federal articles, recent amendments state that a corporation, in its Form 1, need only state the province in which the registered office is located. Form 3, the Notice of Registered Office or Notice of Change of Address of Registered Office, provides the specific municipal address within that province. Thus, a federal corporation making a change of its registered office would only require an amendment of its articles if it moved to another province.

"Section 1: Name of the Corporation" - page 67 —

- In the last paragraph, when a numbered corporation is being created, a total of 9 boxes (not 20 as stated in the text) at the beginning of the first line of the grid are to be left empty.

"Registering the Corporation" - page 72 —

- Once again, it should be noted that the Ministry name has been changed to the Ministry of Consumer and Business Services.
- In the first bullet, be clear that each set of articles must be originally signed by the incorporators.
- Although some offices of the Ministry like to see and occasionally to keep the Director's Consent, Form 2, where it is needed, s. 5(2) of the OBCA states that this form is to be kept at the registered office address of the corporation. Section 5(2.1) goes on to state that the corporation is to permit a director, shareholder or creditor to inspect and make a copy of this Consent.
- Note that the incorporation fees have changed from those set out in the 4th bullet under this heading: the fee payable to the Minister of Finance (of the Ontario government) is \$360 if the corporation is incorporated manually and in paper format, and \$300 if filed electronically. This must be done through one of the two primary service providers who will charge a fee for this service.
- The procedure for registering the corporation federally is as follows:

Manually: two copies of each of Forms 1, 3 and 6, each originally signed, together with a NUANS search and cheque must be filed with Industry Canada at the following address:

The Director,
Canada Business Corporations Act,
Journal Tower South, 9th Floor,
365 Laurier Ave. West,
Ottawa, ON K1A 0C8

The current fee for filing manually is \$250.

Electronically through <http://strategis.ic.gc.ca> including an electronic version of the NUANS and payment by credit card of the fee of \$200.

"Electronic Registration and Filing" - p. 73 —

- As indicated above, the possibility of filing articles of incorporation electronically exist both for Ontario and federal corporations. The range of documents to be filed this way will expand over time.

Chapter 8 - Shareholder Agreements and the Lawyer's Reporting Letter

- Please note that Figure 8.1 contains an *extract from* a sample unanimous shareholder agreement, but that much more is required to make this the agreement. Figure 9.1 on pages 142 and 143 is a better example of a unanimous shareholder agreement.

Chapter 9 - Routine Management and Structural and Other Changes

"Business to be Conducted at Annual Meetings" — p. 139 —

- Point 4 on this page misstates the section at this point. It is section 148, not section 48, of the OBCA which states that the shareholders of a non-offering corporation can, by unanimous agreement, exempt the corporation from the requirement of an auditor.

"Unanimous Resolutions" - page 141 —

- The last sentence of this paragraph references Figure 9.1. This figure, found on pages 142-143, is an example of a unanimous shareholders' agreement (the type referred to in Chapter 8 above), but *not* unanimous resolutions. Unanimous

resolutions are written resolutions which refer, at the bottom of the resolution and just above the signing line, to the fact that the foregoing resolutions have been signed by all of the shareholders. Then signatures of all shareholders follow.

"CBCA Annual Returns" - page 144 —

- The last sentence indicates that there is no similar filing requirement for an annual return in Ontario. Since the date of publication of this book, the annual corporate return has been made part of the corporate income tax return filed with the Ontario government. The version of this combined Annual Return and CT23 tax return for smaller corporations can be found at http://www.rev.gov.on.ca/images/ctie_ct23-short-return-combo.pdf. It is the joint initiative of the Ministries of Finance and Consumer and Business Services, and the return, once filed with the Ministry of Finance (Ontario), is then shared with the Ontario Ministry of Consumer and Business Services for the purposes of updating corporate files. Unlike the federal annual return, no fees are payable at the present time for filing of this return.
- However, the CBCA Annual Returns do have a fee payable: \$40 per year or \$20 if filed electronically for returns filed after April 1, 2001, and a flat fee of \$50 per year for returns prior to April 1, 2001.

"Declaration of Dividends" - page 144 —

- It is important to note the requirements of section 38 of the OBCA (sections 43 and 42 of the CBCA). Section 38(3) OBCA and section 42 of the CBCA state that directors are not to declare dividends if there are reasonable grounds to believe that, following payment of the dividends, the corporation would be unable to pay liabilities as they come due, or that the realizable value of assets would be less than the corporation's liabilities and capital. Thus, the directors have a responsibility not to issue dividends to any shareholders if either the creditors or the corporation will suffer or be in peril in any way. Their liability is established by this section and could be the subject of an offence under section 258(1)(j) OBCA.

Federal Incorporation Forms

As noted above, since the publication of this text, the federal government has reduced its fees to incorporate so that it is now less expensive to do so federally than provincially, at least with respect to government fees. This will likely give rise to more federal corporations in the future, particularly given the fact that a federal corporate name is given a broader range of corporate name protection, in that no other federal corporation, nor no provincial corporation may use this name.

To incorporate a federal corporation, one needs to file with the federal Industry Canada:

- Form 1 - Articles, completed in full. This can be found at <http://strategis.ic.gc.ca/pics/cs/form1n.pdf> (Other forms can be found here as well, substituting the number of the form at the end of the e-address.)
- Form 3 - Notice of Registered Office (found on p. 145) - for a new corporation, only boxes 1, 3, 4 and the signature lines must be completed. In addition, this form has now been amended so that box 3 of Form 3 (and box 2 of Form 1) requires only the province or territory in Canada where the registered office is situated to be stated. Form 3 then requires the specific municipal address within that province to be inserted in box 4.
- Form 6 - Notice of Directors (found on p. 146) - for a new corporation, only boxes 1 and 5, in addition to the signature lines, must be completed.
- A NUANS search if required (i.e., where a name is chosen)
- The fee is payable to the Receiver General.

"Common Changes requiring Shareholder Approval" - p. 149 —

- With respect to federal changes (those affected by the CBCA), the changing of the location of the corporation's registered office now only requires articles of amendment if the registered office is moving from one province or territory to another. This is as a result of recent changes, as noted above in Forms 1 and 3.

"Leaving the Jurisdiction" - p. 165 —

- Note again, at the end of the first paragraph of this topic, that the Ontario ministry has been changed to the Ministry of Consumer and Business Services from the Ministry of Consumer and Commercial Affairs.
- In the first paragraph after the listing of the 8 items in the application, the references to the Director should be with a capital "D"; that is, the person approving the application to leave the jurisdiction is the Director of the Companies Branch, not a director of the corporation involved.
- In the first sentence of that same paragraph, the corporation has 6 months to complete the continuance in the new jurisdiction before expiry of the approval, instead of the 90 days noted in the text.

"Dissolution for Non-Compliance" - p. 177 —

- In the first sentence of the first paragraph, it is the Director of the Companies Branch who has the power to cancel the certificate for incorporation; thus that person should have an upper case "D" in their title.

Chapter 11 - Asset Purchases and Sales

- There is an inconsistency in some of the documents in this chapter, where the corporate name of the seller is shown in some places as *Global Lighting Ltd.* and in other places as *Global Lighting Inc.* They refer to the same seller.
- Also, there are numerous references in the searches portion of this chapter to the Ministry of Consumer and Commercial Relations, which, as noted above, has been changed to the Ministry of Consumer and Business Services.

Bankruptcy Searches" - p. 210 -

- Following the conclusion of "Bankruptcy Searches" on p. 210, a new section should be inserted known as "WSIB Purchase Certificates." Under s. 146 of the *Workplace Safety and Insurance Act, 1997*, a person who purchases or leases all or part of an employer's business is liable to pay all the amounts owing under the Act by the previous owner or employer. The WSIB is entitled to collect the unpaid amounts from the purchaser of the business as if they had always been the employer. To protect the purchaser, a request should be made of the WSIB to see if the vendor owes any funds. At no charge, a purchase certificate waiving liability on the part of the purchaser is provided, so long as the vendor's account is in good standing. This certificate is valid for a period of 30 days.

"Bulk Sales Act Compliance" - p. 217 —

- A recent case of the Ontario Court of Appeal reinforces this process: National Trust v. H & R Block, [2001] O.J. No. 4127.

"Shareholders' Resolution" - p. 221 —

- The section of the OBCA requiring a shareholders' special resolution approving the sale of all or substantially all of the assets of a corporate vendor is in s. 184(3); section 185(1)(e) carries with it the right of a shareholder to dissent concerning this vote.

"Registrations After Closing - Purchaser" - p. 223 —

- To be added to this list (as point 5) is the requirement of payment of Retail Sales Tax (PST) on equipment purchased, based upon the price established in the affidavit as part of the Bill of Sale.