

## FAQ

# Incorporating Your New Business

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### **What are the benefits of incorporating my new business?**

The key benefits to incorporation are:

- a lower “small business” income tax rate if it is a “qualified” Canadian Controlled Private Corporation;
- the potential availability of up to \$883,384 of tax-free capital gains if shares in the corporation are sold by a shareholder; and
- shielding you from personal liability for the debts of the corporation.

You should discuss your particular tax situation with your accountant.

If you are borrowing money for your new business, your bank may insist on a personal guarantee of the corporation’s bank borrowings.

### **Who can be a director or officer?**

Subject to the director residency requirements discussed below, any person can be a director if he or she is eighteen years of age, is mentally capable and is not bankrupt. Also, any person, including a director, can be appointed as an officer and one person can be appointed to multiple offices (e.g. President and Secretary).

Subject to any restrictions in a unanimous shareholders agreement, the directors are responsible for the management and affairs of the business corporation. Usually, the directors delegate the day-to-day management of the corporation to its officers, although in closely held private companies the directors and officers will likely be the same individuals. Directors and officers have a duty to act honestly, in good faith and in the best interest of the corporation. They also have a duty to act with the same skill and care as reasonably prudent person would in a comparable situation. Please bear in mind that if you are a director, you will have personal liability

for certain matters.<sup>1</sup> These can include but are not limited to up to 6 months of unpaid employee wages and unpaid employee income tax source deductions, Employment Insurance premiums and Canada Pension Plan remittances.

### **What are the roles of the directors, officers and shareholders?**

The shareholders own the corporation. They elect its directors.

Subject to any restrictions in a unanimous shareholders agreement, the directors are responsible for the management of the business and affairs of the corporation.

Usually, the directors delegate the day-to-day management of the corporation to its officers. In small private corporations, one person may be a shareholder, director and officer. Directors and officers have a duty to act honestly, in good faith and in the best interest of the corporation. They also have a duty to act with the same skill and care as a reasonably prudent person would in a comparable situation.

Please bear in mind that if you are a director, you will have personal liability for certain matters. These can include but are not limited to unpaid employee wages, unpaid employee income tax source deductions, Employment Insurance premiums and Canada Pension Plan remittances.

### **What is the residency requirement for directors of Ontario or federal business corporations?**

Currently, at least 25% of the directors for both Ontario and federal business corporations must be residents of Canada. If the business corporation has less than 4 directors, at least 1 must be a resident of Canada. However, the Government of Ontario has proposed and passed legislation that would remove the residency requirement for Ontario business corporations. If this change is made, Ontario business corporations will have much more flexibility when electing directors. The proposed changes will come into force on a day to be named by proclamation of the Lieutenant Governor of Ontario.

### **What if I do not know a resident Canadian who could be a director?**

If you do not have a resident Canadian who would serve as a director, please speak with us about your options.

### **What are your fees? Do you require a retainer?**

We calculate our fees by multiplying the time-spent by the hourly rate of the lawyer or law clerk involved. We can give you an estimate before beginning work.

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<sup>1</sup> Typically, a director's personal liability can be limited by acting in accordance with his or her duty to act with the same skill and care as a reasonably prudent person would in a comparable situation. If you are a director and would like to discuss your potential liability, please consult with us.

Our fees will depend largely on how complicated the share structure of the corporation will be. To control your legal costs of incorporation we recommend starting with a simple share structure and later, if required, revise that structure.

We do require a retainer from new clients. We will hold this money in trust and apply it to our accounts when they are sent to you.

### **What are my out-of-pocket expenses?**

A company can be incorporated under the federal Canada *Business Corporations Act* or the Ontario *Business Corporations Act*. The two Acts are very similar. Usually for reasons of convenience, we incorporate companies under the Ontario Act.

For Ontario incorporations, your typical out-of-pocket expenses would be:

NUANS Name Search Report	\$45-55
Articles of Incorporation (Ontario)	\$300-360
Initial Notice of Directors and Officers	\$12
Minute book and share certificates	\$60
Corporate seal (if necessary)	\$58-\$85
Photocopies, faxes, postage, courier	Approx. \$50
<b>Total:</b>	<b>\$525-622</b>

*\*All costs are current estimates. Government fees may change. HST applies to these costs and it is extra. There may be other costs which apply depending on your requirements.*

*\*Please also see the note below regarding professional corporations.*

### **What are the steps to incorporating my new business?**

- Step 1: Decide:  
(a) the name of the new corporation;  
(b) its share structure; and  
(c) answers to the questions listed at the end of this document.
- Step 2: When these decisions are made and we have searched your choice of name, we will comment on its availability. The name decision is ultimately yours. If additional name searches are required, this will increase your costs. We will prepare for your review and signature the Articles of Incorporation and resolutions which approve a general by-law, appoint officers and directors, issue shares, open a bank account, appoint accountants or auditors and deal with other preliminary issues.
- Step 3: We will file the Articles of Incorporation with the Ministry of Government Services either by delivery to the Ministry or by electronic means, and the corporation will then be incorporated.
- Step 4: You can then give to your bank the necessary documents to open a bank account.

Step 5: Apply for a Business Number with the Canada Revenue Agency and GST/HST or other tax numbers, if applicable.

If you are a professional and you are incorporating your practice, you may have to apply to the relevant authority for approval of your new corporation. This may require additional documents and fees.

### **What kind of name can I give my new company? Are there any naming restrictions / limitations? Is there a cost for finding if a name is available?**

A corporation can have a unique name like “J. Smith Importers Ltd.,” or a name which is a number like “123456 Ontario Inc.” The government assigns numbered names. You cannot choose the number. If you want a name rather than a corporate number, we must search to find if the name is available. If you select a numbered name and still wish to do business with another assumed name, you will have to register that name under the *Business Names Act*. Such a registration does not grant you any rights; it is merely a notice that you are using that assumed name.

If you are a professional and you are incorporating your practice, your corporation’s name must meet applicable regulations.

### **How will I know if my proposed name is available?**

Before incorporating an Ontario company, it is important to confirm that the proposed corporate name is not:

- prohibited by the Ontario *Business Corporations Act*. We will tell you if your proposed name is prohibited;
- so similar to a known person or entity that use of this name would be likely to deceive.

A corporate name usually comprises of three elements:

1. a distinctive element such as a unique word, letters, or name;
2. a descriptive element describing the type of business; and
3. a legal element such as “Inc.” to indicate the legal structure of the business.

### **Test for Likelihood of Deceit/Confusion**

A corporate name is likely to deceive or cause confusion if it is the same as the name of another business or if its use would likely lead customers to think that the businesses are related.

The likelihood of deceit or confusion depends on the degree of similarity between the names, and a comparison of the goods, services and operating area of the proposed business with those of similarly named existing corporations.

## **Name Search (NUANS) Report**

To determine the risk of confusion, we can obtain a NUANS name search report. This report compares a proposed name to business names and trade-marks registered in Canada at the time of the report. The name search system is neither exhaustive nor conclusive, and the chosen name may be subject to challenge in the future.

### **How can I avoid confusion with an existing name?**

If a business wishes to use a name that is the same or confusingly similar to an existing name or trade-mark, it must obtain the consent of the existing business. Otherwise, it must use a different name or risk legal action.

A proposed name can be distinguished from an existing name by differentiating one or more elements of the name. In some cases, a different descriptive word may be sufficient to distinguish a proposed business from existing businesses. However, a difference in only the legal element of a name (e.g. "Inc." or "Limited") is not sufficient to overcome confusion.

Where a word is commonly used, it will be difficult to protect from other users. Please discuss your proposed name with us to ensure you choose an appropriate name.

### **What are the risks if my Corporation's name causes confusion?**

If a corporate name is likely to deceive or cause confusion, incorporation may be denied. Even if a corporation is incorporated, it could be forced to discontinue using the corporate name and pay damages if sued by the owner of an existing name or trade-mark.

### **What are the key documents required for incorporating a new business?**

The key documents are:

- the Articles of Incorporation (this is the legal foundation or "charter" of the corporation);
- the By-laws of the corporation (its internal rules);
- the share certificates that show legal ownership of the issued shares of the corporation; and,
- the organizing resolutions that set up the internal structure.

### **What do I receive from you after incorporation?**

We put all the key documents in a book called a minute book. We can deliver it to you or keep it at our offices for safekeeping.

### **What do I need to do to maintain the corporate records?**

If we retain your Minute Book, as part of our service we would suggest that we prepare annual resolutions for the Corporation.

Annual resolutions are typically done shortly after the end of the financial year to ratify the financial statements and confirm past acts, officers and directors. They are also a useful opportunity to ratify any decisions which have been made and need to be recorded in the Minutes, such as the payment of dividends or management bonuses.

Subject to changes, we charge a fixed fee of \$385 plus HST and out of pocket expenses (like postage) for preparing annual resolutions for a company. Our fees would increase for any extraordinary or more complicated minutes.

We recommend that we keep the company's minute book up to date. This service will certainly pay for itself the next time you have a significant transaction or a tax audit.

### **How do I choose my fiscal year-end?**

When incorporating a new business, you must decide on a year-end date. The year-end that you choose cannot exceed 53 weeks from the date of incorporation. Typically, the fiscal year-end will coincide with the end of a calendar month, but that is not a requirement. You can choose your year-end to be any fixed date or you could select a "floating year-end" such as the last Friday of a specified month, as long as your fiscal year does not last more than 53 weeks. You should consider your normal business operating cycles when choosing a year-end for your company. If you have more than one company, you should also consider synchronizing their financial year-ends.

### **Will my new corporation need a GST/HST number?**

As part of your company's incorporation process, you will submit a business number request by completing Canada Revenue Agency's RC1 form. Depending on what portions of the form are applicable to your corporation, it can provide for automatic registration of the company's GST/HST account, a payroll account, an import/export account, or a corporation income tax account.

Your corporation's obligation to register for a GST/HST number depends on the volume of its sales and the nature of its business. Most goods and services in Canada are taxable. However, some kinds of supplies are "zero-rated" or exempt (for example, some basic grocery items), and some businesses are exempt as small suppliers (with a small annual revenue value). It is important to know which supplies are taxable and at which rate, or if your business could be exempt as a small supplier.

Additional information on the GST/HST number and exempt or "zero-rated" supplies can be found on the Canada Revenue Agency [website](#).

### **How do I apply for a GST/HST number? How long does it take to get one?**

You can apply on-line to the [Canada Revenue Agency](#). Before you begin the registration, you will be asked to provide certain information with which the Canada Revenue Agency will verify your (and your corporation's) identity.

One note for non-residents of Canada: though the form requests the owner's social insurance number, this is **not** a requirement for non-residents.

Your application may take up to 6 weeks to be processed.

If you require a GST/HST number sooner, you can register with the Canada Revenue Agency by telephone as early as 24 hours after incorporation. You will be asked to provide certain information from your RC1 form, and your business number will be provided to you over the phone.

A package regarding the registration will be sent from the Canada Revenue Agency to your new corporation's office.

If you are having difficulty with registration, your accountant will be able to help you.

### **What is a shareholder agreement? Is it mandatory? Is it a public document?**

A shareholders' agreement is an agreement between some or all of the shareholders. If all shareholders participate in the agreement and if they limit the powers of the directors of the corporation, it is specially recognized by the Ontario *Business Corporations Act*.

A shareholders' agreement may be appropriate when there are two or more shareholders. Please speak with us about whether an agreement would be suitable for you.

A shareholders' agreement is a voluntary and private matter.

### **What issues can a shareholder agreement address?**

This depends on whether it is a unanimous shareholders' agreement (all shareholders have signed). If it is unanimous, it can address a wider range of issues and it can restrict the powers of the directors to deal with management of the corporation. A unanimous shareholders' agreement can also address other issues.

Houser Henry & Syron provides additional information on shareholders agreements in its [Shareholder Agreements and Disputes](#) (PDF) booklet. For information specific to your situation, contact Lisa Hegedus at [lhegedus@houserhenry.com](mailto:lhegedus@houserhenry.com) to set up an appointment.

### **What best practices do you recommend for my business?**

#### **a) Annual Reviews**

Business owners need to balance their time between the immediate needs of the business and their longer vision for success. Unfortunately, this balance is hard to maintain and the immediate needs usually dominate. As a remedy to this, we recommend an annual review.

The Annual Review is an opportunity for us to meet with you and look at the coming year and plan ahead. It assists us in understanding your business needs better and ultimately help support you in your efforts.

Over the years we have learned that there are ways we can help our clients beyond a singular legal matter. We work with you, get to know your business, develop strong relationships and this puts us in the unique position of being able to see the bigger picture.

We have had tremendous success when we sit down at the end of the fiscal year and have an open and candid meeting with our clients to help facilitate good business planning. In partnership with the accountant team and your team, we can help focus on the priorities in the long-term (5-year plan) and tackle any issues that may arise. It is a win-win situation for everyone.

We have had great success with these meetings, and we think you would find it worthy of arranging a time to discuss how we can help you.

For more information about the Annual Review and how it all comes together, please see speak with us.

#### **b) Board of Advisors**

Running a business can be a lonely job. Business owners often find that they need a sounding board for key decisions. This is the usual role of the board of directors but in private companies, directors are usually the owners and perhaps professional advisors. This is a missed opportunity. A better approach is to establish a board with outside directors with valuable and related experience. If there is any concern about personal liability, you can instead create a board of advisors without personal obligations or liabilities.

For more information, please see our publication “Active Outside Directors for Private Companies – A Hidden Asset?”

#### **c) What is your exit plan?**

It may seem surprising to ask at the start of a new enterprise, how you will exit. While planning for an exit or succession may seem like a distraction or even a luxury, it is an essential feature of every successful business.

For more information on succession planning, please see our publication “What’s Your Game Plan? Planning for a Successful Succession for your Business”.

### **What are the requirements for a professional corporation?**

The Ontario *Business Corporations Act* permits certain regulated professionals to incorporate their practice as a professional corporation (“PC”). Please note that, although business corporations can shield a shareholder from personal liability for the debts of the corporation, a PC does not limit the member’s personal professional liability when operating his or her practice through a PC.

Currently, the following members of these professions may incorporate a PC:

- Accountants;
- Lawyers;
- Most regulated health professionals (e.g. physicians, dentists, psychologists, etc.);
- Social Workers;
- Veterinarians; and
- Real Estate Brokers and Salespersons.<sup>2</sup>

These are the key requirements for most PCs:

1. Typically, before practicing through a PC, the member of the profession must receive a certificate of authorization (or other licence) from the profession's governing body.
2. Each profession's governing body has different restrictions on who can hold the voting shares in a PC and who can be an officer and director of a PC. Please consult with us to determine which restrictions apply to you.
3. Typically, the PC must have "Professional Corporation" (or other suffix as required by the profession's governing body) in its name and can only carry-on business activities related to the practice of the member's profession.

Each governing body may also have other requirements that must be met before a member can practice through a PC. If you are interested in incorporating a PC, please speak with us to discuss your specific needs.

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### About HHS

Since 1934, Houser Henry & Syron LLP has provided legal services to Canadian and foreign private businesses, helping them deal with complex legal challenges to grow and to manage risk successfully. We help our clients with mergers and acquisitions, commercial real estate, reorganizations, shareholders disputes and agreements, commercial agreements, employment issues and financing. We also pride ourselves in practising in *Plain English*.

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<sup>2</sup> The incorporation of a personal real estate corporation is governed by the *Real Estate and Business Brokers Act, 2002* (which, shortly, will be renamed to the *Trust in Real Estate Services Act, 2002*). For more details about these types of corporations, please contact us.