

# CED: An Overview of the Law

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## Business Corporations (Ontario) – Incorporation

BY: H. Peter Eccles, B.A., LL.B., of the Ontario Bar

III.1-III.4.(b)

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### III.1.(a): Introduction – General

**See** Canadian Abridgment: BUS.II.3.a Business associations — Creation and organization of business associations — Corporations — Incorporation

Although new companies are still incorporated from time to time by special Act, virtually all new business corporations in Ontario are now incorporated under the authority of Ontario's *Business Corporations Act* or the *Canada Business Corporations Act*. It is a principle of the common law that the members of a body may not by themselves confer corporate status upon it, except by act of the sovereign.<sup>1</sup> However, the incorporation of a corporation does depend to a degree upon the will of its members, for it is also a principle of the common law that no group of persons can be incorporated without their consent.<sup>2</sup> Thus the creation of a corporation pursuant to the statutes involves a two-step procedure, involving first an application for incorporation made by one or more persons (which evidences their consent to incorporation), and then the issue of a certificate of incorporation by the Director (which evidences the consent of the sovereign).<sup>3</sup>

### III.1.(b): Introduction – Restrictions on Incorporation

**See** Canadian Abridgment: BUS.II.3.a Business associations — Creation and organization of business associations — Corporations — Incorporation

Except where otherwise expressly provided,<sup>1</sup> Ontario's *Business Corporations Act* applies to every body corporate with share capital incorporated by or under a general or special Act of the Parliament of the former province of Upper Canada, of the Parliament of the former Province of Canada, if the corporation has its registered office and carries on business in Ontario, or of the Ontario provincial legislature.<sup>2</sup> It does not apply to a corporation within the meaning of the *Loan and Trust Corporations Act*.<sup>3</sup> The Act also applies to corporations with share capital under the *Railways Act*,<sup>4</sup> except those engaged in constructing or operating a railway, street railway or incline railway.<sup>5</sup>

The *Canada Business Corporations Act* applies to every corporation incorporated under

# CED: An Overview of the Law

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that Act and every body continued as a corporation under it.<sup>6</sup> No provision of the *Canada Corporations Act*,<sup>7</sup> the *Canada Not-for-Profit Corporations Act*,<sup>8</sup> the *Winding-up and Restructuring Act*,<sup>9</sup> or the provisions of a Special Act, as defined in the *Canada Transportation Act*,<sup>10</sup> that are inconsistent with the *Canada Business Corporations Act*, applies to such a corporation.<sup>11</sup>

A *Canada Business Corporations Act* corporation may not carry on the business of a bank, an association to which the *Cooperative Credit Associations Act*<sup>12</sup> applies, a company or society to which the *Insurance Companies Act*<sup>13</sup> applies or a company to which the *Trust and Loan Companies Act*<sup>14</sup> applies.<sup>15</sup>

## III.1.(c): Introduction – Incorporation of Degree-Granting Educational Institution

**See** Canadian Abridgment: BUS.II.3.a Business associations — Creation and organization of business associations — Corporations — Incorporation

Under the *Canada Business Corporations Act*<sup>1</sup> no corporation shall carry on business as a degree-granting educational institution unless expressly authorized by a federal or provincial agent that has by law the power to confer degree-granting authority on an educational institution.

## III.1.(d): Introduction – “Three- Two” Corporations

**See** Canadian Abridgment: BUS.II.3.a Business associations — Creation and organization of business associations — Corporations — Incorporation

While a corporation incorporated under the *Canada Business Corporations Act* is prohibited from engaging in the business of a company to which the federal *Trust and Loan Companies Act*<sup>1</sup> applies,<sup>2</sup> a corporation under Ontario’s *Business Corporations Act* may be incorporated with its powers restricted by its articles to lending and investing money on mortgages and real estate, or otherwise with its powers restricted by its articles to accepting and executing the office of liquidator, receiver, assignee, trustee in bankruptcy or trustee for the benefit of creditors and to accepting the duty of and acting generally in the winding-up of corporations, partnerships and estates, other than estates of deceased persons. The corporation is not deemed to be a corporation within the meaning of the provincial *Loan and Trust Corporations Act*<sup>3</sup> by reason of conducting that business. The number of its shareholders, exclusive of employees of the corporation, is limited to five. Nor may the corporation issue debt obligations except to its shareholders, or borrow money on the security of its property except from its shareholders, or receive money on deposit, or offer its securities to the public. In general terms, this allows a private corporation to engage in some functions reserved to companies under the *Loan and Trust Corporations Act*, provided that it does not raise funds by public subscription.<sup>4</sup>

# CED: An Overview of the Law

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## III.2: Procedure for Incorporation

**See** Canadian Abridgment: BUS.II.3.a Business associations — Creation and organization of business associations — Corporations — Incorporation

Both the Ontario and federal statutes employ a registration regime of incorporation, under which a corporation comes into existence upon the registration of the prescribed documents with a specified government agency. This method of incorporation did not exist at common law, and it makes use of few conventions that were historically employed in corporate law regimes. For instance, under a memorandum of association regime, the creation of a company inherently involves the formation of a contract of incorporation among its members. In contrast, the formation of a *Business Corporations Act* corporation is not a matter of contract, but instead is purely a matter of statute and regulations.<sup>1</sup>

Both the federal and Ontario Acts require the Director to incorporate a corporation if the required statutory and regulatory conditions are met. There is no discretion to refuse incorporation.<sup>2</sup> Thus neither the minister nor any departmental official may refuse an incorporation on any criterion other than a failure to comply with the statutory requirements. In contrast, under many statutes relating to the creation of certain types of companies, considerable discretion is reserved and vested in an administrative officer.<sup>3</sup> However, even though such regulatory discretion has been eliminated under Ontario's *Business Corporations Act* and the *Canada Business Corporations Act*, incorporators may not obtain an order in the nature of mandamus compelling the incorporation of the corporation until they have complied fully with all statutory and regulatory formalities and requirements in respect of the proposed corporation.<sup>4</sup> Once these steps have been taken, the Director may not impose additional requirements.<sup>5</sup> Eliminating the element of discretion has streamlined the incorporation procedure, so that the creation of a corporation usually requires little time.<sup>6</sup> Ontario corporate charters can usually be obtained on the day of application, provided the application is in order.<sup>7</sup>

## III.3: Requirements for Incorporators

**See** Canadian Abridgment: BUS.II.3.a Business associations — Creation and organization of business associations — Corporations — Incorporation

One or more individuals or bodies corporate or any combination thereof may incorporate a corporation.<sup>1</sup> An individual who seeks to incorporate a corporation must: be at least 18 years of age;<sup>2</sup> not have been found under the *Substitute Decisions Act, 1992*<sup>3</sup> or under the *Mental Health Act*<sup>4</sup> to be incapable of managing property or to have been found to be incapable by a court in Canada;<sup>5</sup> elsewhere; and not have the status of a bankrupt.<sup>6</sup>

# CED: An Overview of the Law

---

## III.4.(a): Corporate Constitution – General

**See** Canadian Abridgment: BUS.II.3.c Business associations — Creation and organization of business associations — Corporations — Corporate constitution

Every company must have certain basic charter documents, which constitute the fundamental terms of the corporation concerned. In exercising its powers, carrying on its business and organizing its affairs, every company must stay within the boundaries traced out by that constitution.<sup>1</sup>

Ontario<sup>2</sup> and Canada<sup>3</sup> also provide in their business corporations legislation for unanimous shareholder agreements. A unanimous shareholder agreement is a written agreement among all the shareholders of a corporation and one or more persons who are not shareholders that may restrict in whole or in part the powers of the directors to manage or supervise the management of the business and affairs of the corporation.<sup>4</sup> Such an agreement is also one of the basic charter documents of the corporation.

## III.4.(b): Corporate Constitution – Articles of Incorporation

**See** Canadian Abridgment: BUS.II.3.c.i Business associations — Creation and organization of business associations — Corporations — Corporate constitution — Articles of association

The basic charter documents of a corporation consist of the articles of incorporation and any amendments or other variations to those articles.<sup>1</sup> The corporation may operate under articles of continuance if it was originally incorporated under some other statute and then continued under Ontario's *Business Corporations Act* or the *Canada Business Corporations Act*, as the case may be.<sup>2</sup> The definition of articles under Ontario's *Business Corporations Act* is more expansive than in its federal counterpart, and clarifies certain provisions of the Act which apply to corporations incorporated under other statutes.<sup>3</sup>

Incorporation is effected through a certificate of incorporation, which is issued, or in the case of Ontario's *Business Corporations Act* endorsed, upon an incorporator filing of articles of incorporation.<sup>4</sup> The prescribed form of articles, rather than the *Business Corporations Act* itself, requires that the names and addresses of the incorporators be set out in the articles of incorporation.<sup>5</sup> The articles of incorporation must follow the prescribed form<sup>6</sup> while under the federal statute the names and addresses of the first directors and the street address of the registered office are provided in separate notices filed together with the articles of incorporation.<sup>7</sup>

Ontario's *Business Corporations Act* requires that the articles be filed in duplicate and signed by all incorporators.<sup>8</sup> Articles, applications or statements filed with the Director which require the signature of one or more persons must be signed manually by each such person,

# CED: An Overview of the Law

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not by an attorney.<sup>9</sup>

There are a number of specific matters with which the articles for a federal incorporation must deal: the name of the corporation; the province within Canada where the registered office is to be situated; the classes and any maximum number of shares that the corporation is authorized to issue; the number of directors, or the maximum or minimum number of directors; and any restrictions on the businesses that the corporation may carry on.<sup>10</sup> The provincial requirements are similar.<sup>11</sup> If there are to be two or more classes of shares, the articles must specify the rights, privileges, restrictions and conditions attaching to each class of share;<sup>12</sup> if the shares of a class may be issued in series, the articles must set out the authority of the directors to fix the number of shares in a series and to determine the designation of and the rights, privileges, restrictions and conditions attaching to the shares of each series.<sup>13</sup> If the issue, transfer or ownership of shares of the corporation is to be restricted, the articles must contain a statement to that effect and state the nature of the restrictions.<sup>14</sup>

The articles must contain any restrictions on the businesses that the corporation may carry on.<sup>15</sup> The Ontario statute requires, in addition, that the articles set out any restrictions on the powers which the corporation may exercise.<sup>16</sup> The articles, or a unanimous shareholders' agreement, may increase the required number of votes of directors or shareholders of a corporation above any statutory stipulation, other than for removing a director.<sup>17</sup>

The status of the articles of a corporation under the Ontario and federal statutes is unclear. While the articles of the corporation clearly bind the corporation<sup>18</sup> and its directors and officers,<sup>19</sup> both Acts are silent as to their effect upon the members of the corporation. In memorandum of association corporate law regimes, the memorandum, which is the equivalent document, is usually deemed by statute to be as binding and effective between the company and its members, and among the members of the company themselves, as a contract.<sup>20</sup>

However, there is no such contract under the *Canada Business Corporations Act* and Ontario's *Business Corporations Act*, which suggests that the articles are binding between the corporation and each shareholder, but only to the extent that the shareholder is acting in the capacity of a shareholder.<sup>21</sup> It is doubtful that the articles create any rights or obligations among the shareholders themselves.

A shareholder or other complainant<sup>22</sup> may apply to the court for an order directing the corporation or any person to comply with its articles or by-laws or a unanimous shareholder agreement.<sup>23</sup> Similarly, a complainant may seek relief through the oppression remedy if his or her interests have been oppressed, treated in an unfairly prejudicial manner or unfairly disregarded.<sup>24</sup> A complainant also has standing to seek leave of the court to institute a derivative action on behalf of the corporation if the corporation's rights have been transgressed.