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CHAPTER 3

Incorporating a Charitable or Not-for-Profit Organization

A OVERVIEW

The corporate form is a useful and common method for an organization to carry on charitable and not-for-profit activities. It provides limited liability for the members and is often the legal structure required by governments for an organization to be eligible for funding or to carry out certain activities. There are three major types of corporate forms available to charitable and not-for-profit organizations: corporations without share capital incorporated under the Ontario *Corporations Act*;[1] corporations without share capital incorporated under the *Canada Corporations Act*;[2] and co-operative corporations without share capital incorporated under the Ontario *Co-operative Corporations Act*.[3] There are other options for incorporation, such as private legislation; however, most not-for-profit or charitable corporations will be incorporated under one of these three statutes or the equivalents in the other provinces. The concordance in Appendix A identifies the relevant statutes and provisions for the other provinces. Appendix B provides a list of the government departments responsible for incorporating corporations and co-operative corporations without share capital.

Each statute serves a different purpose. The decision under which statute the organization will incorporate will depend upon the needs and desires of the members and on any legal requirements. For example, in order to be incorporated under the federal statute, the objects of the corporation should fall within federal jurisdiction or be national in scope. If the members want to operate a not-for-profit co-operative, to benefit from bulk sale purchases, for example, the provincial co-operative legislation is a more appropriate choice.

Within these three incorporating statutes, several different types of not-for-profit corporations or co-operative corporations may be incorporated. Historically, the major types have included a general not-for-profit

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1 R.S.O. 1990, c. C.38 [as am. to S.O. 2001, c. 9, Sched. D, s. 5].

2 R.S.C. 1970, c. C.32 [as am. to S.C. 1999, c. 3].

3 R.S.O. 1990, c. C.35 [as am. to S.O. 2001, c. 8, ss. 6-17].

corporation and charitable corporations. For Ontario corporations, not-for-profit corporations also included social clubs, service clubs and athletic or sporting clubs. In more recent years, not-for-profit and charitable corporations have been used to deliver government programmes and may need to comply with specific policy or legal requirements, some of which are reviewed in general terms in Chapter 2.

The application processes and requirements are generally the same for all three statutes, with minor variations or additional requirements depending upon the circumstances. Each statute requires that the proposed corporation have a name and not be just a "numbered company". The name must meet criteria set out in the relevant statute or its regulations. For example, the name must not be so similar to other corporate names as to mislead or deceive the public. There are also restrictions on what words can or cannot be included in the proposed corporate name or words that require the consent of a governing body. The name must be distinctive, descriptive and may include the legal status of the corporation. The process also requires the applicant to file a computerized name search report — the NUANS report — to ensure that the name is available.

The applications must include two original copies of the proposed letters patent or articles of incorporation, in the case of a cooperative corporation. The name of the corporation and its objects, first directors and their addresses and head office must be included in the application. Because the 1992 amendments provide that a co-operative corporation has the powers of a natural person, objects are not required for co-operatives. The special provisions may be used, however, to limit the co-operative's activities or objects, which could occur, for example, to comply with government requirements or programme criteria. Additional information may be required depending upon which statute is involved. For example, the federal legislation also requires the occupations of the applicants. Any consents should also be included with the application, such as the Public Guardian and Trustee's approval if the application is for letters patent for a charitable corporation under the Ontario *Corporations Act* — assuming that the pre-approved object clauses do not meet the needs of the organization. The federal statute also requires that the by-laws be included with the application for incorporation. Each application requires an application fee and may require a name reservation fee. These fees are subject to change but are less than those for the incorporation of a business corporation.

Once the corporation is incorporated, a copy is returned to the incorporators and must be kept with the corporate records. The other copy is maintained in the public records. The Ontario corporations and co-operative corporations are required to file an Initial Return or Notice which identifies the officers and directors, the head office and principal

place of business, language of preference and activity classification. This notice is required under the Ontario *Corporations Information Act*.[4]

B INCORPORATION

I ONTARIO CORPORATIONS WITHOUT SHARE CAPITAL

(1) General Comments

The objects of a corporation without share capital incorporated under the Ontario *Corporations Act*[5] are very broad. Section 118 permits a corporation to be incorporated under Part III of the Act for the purpose of carrying on objects that are within the constitutional jurisdiction of Ontario. There are five types of not-for-profit corporations under the Act: general not-for-profit corporations, sporting and athletics organizations, social clubs, service clubs, and charitable corporations.

(2) Application Process and Requirements

Incorporation is usually a simple process, provided that the members have taken the time to review what they want. The process may take several weeks to several months from application to receipt of letters patent. The time period will depend in part on the application's completeness, whether or not there are any backlogs, whether or not the appropriate preclearances, approvals or reviews have been obtained, and whether or not changes to the application are necessary.

There are three major steps to the incorporation process: name search; submission of the application and receipt of the letters patent; and establishing the corporation. Each of these three steps is discussed below.

(a) Step 1 — Selecting and Searching a Corporate Name

(i) General Comments

The corporate name serves two functions. First, it reflects the desires of the membership and often indicates the types of activities that the corporation is involved in or the background of the members. Second, it distinguishes the corporation from other persons so that other parties know with whom they are dealing. Through the corporate name, other parties may find out more about the corporation and its directors and officers from various public records, including the application for letters patent, the corporate filings and personal property registration systems.

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4 R.S.O. 1990, c. C.39.

5 R.S.O. 1990, c. C.38 [as am. S.O. 1994, c. 27, s. 78(5)].

There are a number of practical issues that members of an organization should consider before they choose a corporate name. First, the name should be memorable and easily recognized. A recognizable and memorable name is particularly important if the corporation will be dealing with the public, will be providing services to the community or intends to raise funds from the public. Second, the name should be short. Longer names tend to be more cumbersome and confusing than short names. Names that look or sound awkward may alienate the public. Names that are pejorative in nature or that appear to be discriminatory contrary to the *Ontario Human Rights Code* should be avoided. Third, the name should have a broad appeal among the members and within the community that the corporation intends to serve. The members and community should feel comfortable with the name and believe that it reflects the objects of the corporation.

A useful approach is to hold a brainstorming session to develop a list of several words or names. The Act and Regulation should be checked to ensure that none of the words or names are prohibited or restricted. Following this initial review, the list of names should be checked against several telephone directories, municipal directories, trade association directories and so forth to determine if anyone else is using the same or a similar name. The directories are generally accessible at public libraries. The name could also be checked against existing corporate names at the Ministry of Consumer and Business Services. These types of checks may eliminate names that are the same or similar to existing corporate and business names and avoid unnecessary expense and delay through additional NUANS name searches.

(ii) Elements of a Corporate Name

There are three elements to a corporate name: it should be distinctive; it should be descriptive; and it should indicate the legal status of the corporation.[6] A name is distinctive if it is not too general, will not be confused with existing names in use and will not mislead or confuse the public. The name may be distinctive in and of itself or it may have acquired its distinctiveness over time. Coined words are usually distinctive, as are names that combine two or more generic words.

Names that include geographic references, numbers, initials or dictionary words are less distinctive than coined or combination words. A corporate name may not, usually, be primarily or only a geographic name. An exception exists if the name has been in continuous use for at least 20 years before the date of application or the name has, through use, acquired a meaning that renders it distinctive.[7]

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6 Ontario Ministry of Consumer and Commercial Relations and the Office of the Public Guardian and Trustee, *Not-For-Profit Incorporator's Handbook* (Toronto: Queen's Printer, 2000), at 12.

7 R.R.O. 1990, Reg. 181, s. 5.

The descriptive element describes the nature of the main activity or undertaking of the corporation and should not be misleading about the activities or undertaking.[8] The legal element is optional. The use of the words "corporation" or "incorporated" or their abbreviations may be used but are not necessary.

(iii) Prohibitions for a Corporate Name

Paragraph 13(1)(a) of the *Corporations Act* provides that a corporation shall not be given a name:

> that is the same as or similar to the name of a known corporation, association, partnership, individual or business if its use would be likely to deceive, except where the corporation, association, partnership, individual or person consents in writing that its, his or her name in whole or in part be granted ...

It is not uncommon for members of an unincorporated organization to decide to incorporate after a few years. The incorporation may take place for any of the reasons discussed earlier, including to minimize the exposure of the members and officers and directors to liability. If an unincorporated organization existed prior to the application for incorporation, a "consent and undertaking" from that organization should be included with the application. The consent and undertaking stipulates that the organization has consented to the incorporation and to the use of the name. The organization also undertakes to cease operations or to cease the use of the name within six months of incorporation.

If the corporation through inadvertence or otherwise is or has been given a name that is objectionable, subs. 13(2) of the Act provides the Lieutenant Governor with the authority to direct the issue of supplementary letters patent changing the name of the corporation to some other name. Prior to doing so, the Lieutenant Governor must provide written notice of his or her intention to do so.

A person who feels aggrieved by the giving of the name in the letters patent or by the change under subs. 13(2) of the Act may apply to the Ontario Superior Court of Justice for a review of the matter. The Court may make an order changing the name of the corporation to such name as it considers proper or may dismiss the application. The applicant must serve notice on the Minister and on such other persons as the Court directs at least seven days before the hearing. A corporation which fails to comply with an order of the Court is guilty of an offence and, on conviction, liable to a fine of not more than $200. Every director or officer of the corporation who authorizes, permits or acquiesces in any such failure is guilty of an offence and, on conviction, is liable to a like fine.[9]

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8 *Ibid*., s. 7.

9 Subs. 13(4).

Subsection 13(1) provides that the corporate name may not suggest or imply a connection with the Crown, a member of the Royal Family or the Government of Canada or of any province, or any department, branch, bureau, service, agency or activity of any such government without the written consent of the appropriate authority. If the objects of the corporation are of a political nature, the name may not suggest or imply a connection with a political party. Furthermore, the corporate name may not be objectionable on any public grounds.

The Companies Branch has established a process for dealing with objections to corporate names.[10] Once a formal objection is made, the Director exchanges correspondence with the objector and the corporation. A corporation that receives a letter from the director about a formal objection should respond thoroughly to the objection. A decision is made whether or not an inquiry should be held based on the objection letter and the response from the corporation. If there are no allegations of actual deception in the public and the names do not appear to be so similar as to be likely to deceive the public, a decision may be made without the need for an inquiry. A letter is sent to the objector that an inquiry will not be held.

Where the corporation's name is likely to deceive the public, an inquiry officer is appointed and a notice of inquiry is issued to the objector, the corporation complained of and any solicitors of record in the matter. The notice sets out the date, time and place for the inquiry, the purpose of the inquiry, and a statement of the consequences that may follow if the corporation is not represented at the inquiry. The objector is called upon to present its case to have the name changed. The objector may call witnesses and introduce documents. The witnesses may be cross-examined by the corporation's representative or lawyer, or by any other parties. The corporation or proponent is then called upon to present its case and may do so using witnesses and documents.

Based on the evidence and arguments presented at any hearing, the inquiry officer makes a decision using the authority delegated by the minister. If the inquiry officer concludes that the name is sufficiently similar, an order is issued requiring the corporation to choose a new name which is dissimilar to that complained about by the objector. If the corporation does not do so, the inquiry officer may change the corporation's name. The corporation may appeal any order to the Ontario Superior Court of Justice pursuant to subs. 13(3) of the Act in accordance with the Rules of Court.

(iv) Restricted Words for a Corporate Name

Several words are permitted but restricted in their use as part of the corporate name by subs. 3(1) of the Regulation. "Amalgamated", "*fusioné*"

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[10] Ontario Ministry of Consumer and Commercial Relations, "Companies Branch Directive", No. 8002, July 29, 1983.

or any other related word or expression may not be used in a corporate name unless the corporation is an amalgamated corporation. Certain words may only be used with the consent of the appropriate body. For example, the words "college", "institute", "university" or their French language equivalents may only be used with the written permission of the Ministry of Training, Colleges and Universities. The Association of Professional Engineers of Ontario must consent to the use of the words "engineer", "engineering" and any variation or French language equivalent. The word "housing" and its French language equivalents may only be used if the corporation is owned by, sponsored by or connected with the Government of Canada, the Government of Ontario or a municipal government in Ontario. "Royal" may be used only with the consent of the Crown obtained through the Secretary of State for Canada. Numerals indicating the year of incorporation may only be used if the proposed corporation is a successor to a corporation with the same or similar name or it is the year of amalgamation of the corporation.

Subsection 3(4) provides that the word "veteran" or "*ancien combattant*" or any abbreviation or derivative may be used only if 95 per cent of the members of the corporation are war veterans, their spouses, same sex partners or children of war veterans, or if the name has been in continuous use for at least 20 years. "War veterans" is defined in subs. 3(5) as persons who served in the armed forces of any country while that country was in a state of war. This subsection was amended in 2000 to define "spouse" and "same sex partner". "Spouse" includes a spouse as defined in the *Family Law Act*[11] and two person of the opposite sex who live together in a conjugal relationship outside of marriage. "Same sex partner" are two people of the same sex who live togther in a conjugal relationship.[12]

The use of a name of another province or of Canada may be refused because it suggests that the corporation was incorporated in that jurisdiction and is, therefore, misleading. Paragraph 13(1)(b) of the Act requires that the applicant provide the consent in writing of the appropriate authority if the use of a word suggests or implies a connection with the Crown or any member of the Royal Family or the Government of Canada or the government of any province. This restriction extends to any department, branch, bureau, service, agency or activity of any such government.

At one time, the use of the word "association" or a similar word or expression that denotes that the corporation is a representative body was restricted. The word could be used only if the applicants could satisfy the director that two thirds of the persons represented by the corporation would be members of the organization. This restriction was deleted in 1993. However, the general rule that a name not be misleading to the public continues to apply. An objector could object to the name of a cor-

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11 R.S.O. 1990, c. F.2.

12 O. Reg. 43/00, subs. 1(2).

poration that includes the word "association" or "federation" if, in fact, the corporation was not an association or federation of members.

A family name or the name of a particular individual who is living or who has lived within the previous 30 years may not be used without written permission of the individual or his or her heir, executor, administrator or guardian.[13] The prohibition does not apply if the proposed corporation is the successor or affiliate of a corporation that uses the family name and the first corporation consents in writing to the use of the name. The first corporation may also be required to consent to dissolve itself or change its name where the two corporations would have the same or similar name. The individual or family name may also be used if the consent cannot be obtained or the family name is of historic or patriotic significance and has a *bona fide* connection to the objects of the corporation.[14]

Names cannot exceed 120 characters in length, including punctuation marks and spaces.[15] Only letters from the Roman alphabet or Arabic numbers or combinations of the two may be used.[16] Only the punctuation marks and other marks as set out in subs. 8(2) of the Regulation may be used in a name.

Bilingual (English and French) names are permitted where the translation is exact. Minor changes may be made to ensure that the name is idiomatically correct. The translated name must not mislead the public into thinking that two separate corporations have been created. A translated name must be set out as a special provision with exact translations of the English and French names. Care must be taken in the use of acronyms.

Subsection 3(3) of the Regulation requires the name of a fraternal society incorporated under s. 176 of the Act to include the words "fraternal society" or its French language equivalent. Similarly, a pension fund or employees' mutual benefit society incorporated under s. 185 of the Act must use the words "pension fund society", "employees' mutual benefit society" or the French language equivalents. These two types of corporations are very specialized and, as such, are not dealt with in this text.

(v) Name for a Charitable Corporation

Where the corporation is to be a charitable corporation, the name should describe the charitable objects of the corporation.[17] The exception to this requirement is if the charitable corporation is a public or private foundation, in which case the name may include a reference to the name of the

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13 O. Reg. 181/90, subs. 6(1).
14 *Ibid.*, subs. 6(3).
15 *Ibid.*, s. 9.
16 *Ibid.*, subs. 8(3).
17 *Not-for-Profit Incorporator's Handbook*, *supra*, note 6, at 33.

individual or family. The term foundation may be used only if the objects of the charitable corporation are in the nature of a foundation.

(vi) NUANS Name Search and Report

The Ministry requires that the proposed name be cleared by a private search house. The search houses are operated by private sector companies that have obtained access to the NUANS computer database of corporate names, trade marks and business names. The NUANS database is owned and maintained by Industry Canada. The search house will produce, for a fee, an "Ontario biased" report that is submitted as part of the application to the Ministry of Consumer and Business Services. Some search houses will also advise on whether or not the name appears to be similar to another existing corporate name or registered trade name or trade mark.

The NUANS search report must be dated not more than 90 days before the application for letters patent is submitted.[18] Only the person who proposes the name may use the name identified in the computer search report unless a consent in writing has been obtained from the person who first proposed the name.[19] The NUANS search report is not necessary if the incorporation is required by a government authority as a condition to the awarding of financial assistance under a government program.[20]

(b) Step 2 — Application for Letters Patent

(i) General Comments

Charitable and not-for-profit organizations are often involved in activities that involve the delivery of government services or services that are regulated. An organization should review the requirements with the appropriate ministry or agencies prior to submitting an application for letters patent. Until January 1, 1993, the Ministry would circulate applications to relevant ministries for comment. This practice is no longer in place and the responsibility is on the applicants to obtain any pre-clearances, approvals or reviews that may be necessary or appropriate.

Subsection 1(1) of the Regulation does require that the application include any consent or consent and undertaking required by the Act or the Minister. The application should, therefore, include any consents required for the use of a corporate name or word in a corporate name. The applicants for incorporation are also required to ensure that the letters patent comply with any statutory provisions and any relevant policies and practices of the appropriate ministries or agencies. Any required consents

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18 O. Reg. 181/90, subs. 1(1).

19 *Ibid.*, s. 2 [am. O. Reg. 625/93].

20 *Ibid.*, subs. 1(3) [am. O. Reg. 625/93].

supplied by those ministries or agencies should be included in the application for letters patent.

In addition, the Public Guardian and Trustee's consent is required for the incorporation of a charitable corporation. Since November 1, 1989, the Ministry will accept an application for incorporation of a corporation that is or appears to be a "charitable corporation" only after it has received the approval of the Public Guardian and Trustee. The applicants must submit the application to the Public Guardian and Trustee and pay a $150 fee to obtain the pre-clearance of the letters patent. The Public Guardian and Trustee has, however, put in place a number of "pre-approved" objects clauses. If the pre-approved objects clauses and prescribed special provisions are used, there is no need to obtain the Public Guardian and Trustee's approval. The PGT fee is not, therefore, required and the time that would otherwise be used to obtain the approval is saved. Furthermore, Canada Customs and Revenue Agency has agreed to accept these pre-approved objects clauses for purposes of registration as a charity, resulting in additional time being saved. The downside is that there is no flexibility in the wording; the exact wording must be used for both the relevant objects clauses and the special provisions. However, the pre-approved objects clauses do cover most situations.[21]

The application should be completed in duplicate in the prescribed form.[22] Detailed instructions are included on the form. The form was simplified in 1993 and 1998 to take into account the amendments to the regulation and changes to the Companies Branch's administrative practices.[23] The form prescribed under the Regulations requires the name of the corporation, the address of its head office, the names and residence addresses of the first directors, the objects of the corporation, any special provisions and the names and residence addresses of the incorporators. The prescribed form also includes the following special provision:

> The corporation shall be carried on without the purpose of gain for its members, and any profits or other accretions to the corporation shall be used in promoting its objects.

Any additional special provisions, which may be required by a regulator or ministry, or to take into account the desires of the membership, would be included after this mandatory special provision. The application must be executed in duplicate. The second copy may not be, therefore, a photocopy of the original with signatures.

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21 *Charities Bulletin #2*, Public Guardian and Trustee, October 1999.

22 *Ibid.*, s. 18.

23 O. Reg. 625/93. The application form is available online at the Ministry's website <http://www.cbs.gov.on.ca>.

(ii) Head Office

Every corporation must have a head office, but it need not own or lease the premises. The intent is to provide a physical location that will be designated as the head office where records are kept and where persons may contact the corporation. Many smaller charitable and not-for-profit organizations use the home address of one of the applicants or the secretary or treasurer for this purpose.

A social club, which may maintain a club house or similar premises, should ensure before it files an application that the municipality will permit the land and premises to be used for that purpose. The organization should also consult with municipal authorities to ensure that premises comply with the Building Code,[24] the Fire Code[25] and the *Health Protection and Promotion Act*.[26] The application for letters patent as a social club no longer includes the club's address nor must it obtain prior written consent of the Minister to change premises. These requirements were revoked in 1994 and came into effect in 1995.[27] A genuine incorporated social club may be exempt from the definition of common gaming house if it is licensed by a provincial Attorney General or other authorized person and the club receives no consideration from the gambling. Prior to 1993, the application for letters patent had to include "bars and bolts" provisions to ensure access by police. This requirement probably arose out of the exemption under subs. 196(2) of the *Criminal Code*.[28] However, licences are no longer issued in Ontario.

(iii) Directors

Section 286 of the *Corporations Act* sets out the minimum standards for the first directors. A first director must be at least 18 years of age, a member of the organization or become a member within ten days of becoming a director, and not an undischarged bankrupt. The number of directors is fixed and must be at least three. The first directors remain as directors until they are replaced. The number of directors may be changed by a special resolution passed by the members voting at a meeting called for that purpose. The first directors shall have all the powers, duties and liabilities of elected directors. Any clause to authorize rotating election of directors must be set out in the special provisions of the letters patent in detail. It is not sufficient to leave this clause to the by-laws.

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24 *Building Code Act*, 1992, S.O. 1992, c. 23.

25 *Fire Protection and Prevention Act, 1997*, S.O. 1997, c. 4.

26 R.S.O. 1990, c. H.7. There are several Regulations under the Act. The most relevant for most club houses would be the Regulation dealing with the preparation and service of food and beverages, O. Reg. 562/90.

27 *Corporations Act*, R.S.O. 1990, c. C.38, s. 278 [am. S.O. 1994, c. 27, s. 78].

28 R.S.C. 1985, c. C-46.

(iv) Objects

The objects of the corporation are set out in the application for letters patent. They are intended to identify the purposes of the corporation in a concise fashion. The objects are not a list of proposed activities but a statement of the primary and secondary purposes. The objects may include a commercial purpose provided that the profits accrue to the corporation and are not distributed to members. If the intent is to make a profit for distribution, the organization should be incorporated under the *Business Corporations Act*[29] or similar statutes and not Part III of the *Corporations Act*.

A charitable corporation is more restricted in what types of business activities it may undertake. As discussed in Chapter 1, at common law and under the *Income Tax Act* charitable corporations may carry on business activities provided that these activities are incidental or ancillary to its charitable objects.

The difference between an object and an activity is important. An example may assist to understand the distinction. A corporation without share capital may have as one of its objects "to operate, equip and maintain a community theatre". In carrying out this object, the corporation could purchase lighting equipment for use in the theatre. When the equipment is not being used for a production in the theatre, the corporation could rent it out to others for use in another theatre. This activity is a business activity that is incidental and ancillary to its object and would usually be an acceptable activity for that corporation. Provided that the activity is only incidental and any revenues are used to carry out the objects of the corporation, for example, to purchase new equipment or to pay for the operation of the theatre, the activity would probably be valid.

The Ontario Racing Commission's written consent is required if the proposed objects include horse-racing.[30] The Commission has, under the *Racing Commission Act, 2000*,[31] a very broad regulatory jurisdiction over race-tracks and racing. Subsection 12(2) of the regulation prohibits the objects from including dog-racing. The objects may, however, include the breeding of race-dogs.

(v) Powers

Section 23 of the *Corporations Act* provides a number of ancillary powers. A corporation without share capital may, for example, enter into agreements with any public authority, purchase or lease personal or real

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29 R.S.O. 1990, c. B.16. For-profit corporations may also be established under other parts of the *Corporations Act* and other statutes such as the *Co-operative Corporations Act*, R.S.O. 1990, c. C.35 and the *Loan and Trust Corporations Act*, R.S.O. 1990, c. L.25.

30 O. Reg. 181/90, subs. 12(1).

31 S.O. 2000, c. 20.

property, pay all costs and expenses related to the incorporation, and do all such other things that are incidental or conducive to the attainment of the objects of the corporation as set out in s. 23 of the Act, the letters patent and any supplementary letters patent. There is no need to list the powers set out in s. 23 in the application for letters patent or for supplementary letters patent. Not all of the s. 23 powers, however, are applicable to Part III corporations without share capital. Subsection 133(1) provides that only paras. 23(1) (a) to (p), (s), (u) and (v) are applicable. Paragraphs 23(1) (q), (r) and (t) are concerned with shares of corporations with share capital incorporated under the Act.

(vi) Special Provisions

Subsection 23(2) provides that any of the ancillary or incidental powers may be withheld or limited by the letters patent or supplementary letters patent. Additionally, subs. 119(2) provides that any matter that could be the subject of a by-law could be included in the letters patent or supplementary letters patent. Clauses with respect to the terms and conditions of directors, the distribution of assets upon dissolution and the qualifications for membership are common special provisions included in letters patent. Restrictions on the powers of corporations without share capital may be required by the Ministry, other ministries or the Public Guardian and Trustee in several circumstances.

"Clubs" are generally considered by the Ministry to be "social" in nature, absent evidence to the contrary. A club that is purely athletic in nature and whose objects do not include any of the usual attributes of a social club, such as a club house, would not usually be considered to be a social club. At one time, the applications were referred to the Commissioner of the Ontario Provincial Police and to the local municipal police. This practice is no longer in effect. It is no longer necessary to have a minimum of 10 applicants; three are sufficient. The letters patent no longer set out the club house premises.

Restrictions on the powers of charitable corporations are also included as special provisions. These restrictions are intended to ensure that charitable corporations carry out activities that are only charitable in nature. The Public Guardian and Trustee, as part of its pre-clearance approval, requires that the following clauses be included as special provisions to ensure that the corporation carries out its charitable objects:

(1) The corporation shall be carried on without the purpose of gain for its members and any profits or other accretions to the corporation shall be used in promoting its objects.

(2) The corporation shall be subject to the *Charities Accounting Act* and the *Charitable Gifts Act.*

(3) The directors shall serve as such without remuneration and no directors shall directly or indirectly receive any profit from their position as such, provided that directors may be paid reasonable expenses incurred by them in the performance of their duties.

(4) The borrowing power of the corporation pursuant to any by-law passed and confirmed in accordance with s. 59 of the *Corporations Act* shall be limited to borrowing money for current operating expenses, provided that the borrowing power of the corporation shall not be so limited if it borrows on the security of real or personal property.

(5) If it is made to appear to the satisfaction of the Minister, upon report of the Public Guardian and Trustee, that the corporation has failed to comply with any of the provisions of the *Charities Accounting Act* or the *Charitable Gifts Act*, the Minister may authorize an inquiry for the purpose of determining whether or not there is sufficient cause for the Lieutenant Governor to make an order under subsection 317(1) of the *Corporations Act* to cancel the letters patent of the corporation and declare it to be dissolved.

(6) Upon dissolution of the corporation and after the payment of all debts and liabilities, its remaining property shall be distributed or disposed of to charities registered under the *Income Tax Act* (Canada), in Canada.

(7) To invest the funds of the corporation pursuant to the *Trustee Act.*

Or

(8) To invest the funds of the corporation in such manner as determined by the directors, and in making such investments the directors shall not be subject to the *Trustee Act*, but provided that such investments are reasonable, prudent and sagacious under the circumstances and do not constitute, either directly or indirectly, a conflict of interest.[32]

(9) For the above objects, and as incidental and ancillary thereto, to exercise any of the powers as prescribed by the *Corporations Act*, or by any other statutes or laws from time to time applicable, except where such power is limited by these letters patent or the statute or common law relating to charities.

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[32] These special provisions were drafted prior to the implementation of the prudent investor approach in amendments to the *Trustee Act*. It is not clear whether the optional (8) is required anymore as a result.

The Public Guardian and Trustee, in pre-clearing the application, does not certify the charitable corporation. The pre-clearance is intended to provide the opportunity to the Public Guardian and Trustee to determine if the objects of the corporation are charitable and therefore within the jurisdiction of the Public Guardian and Trustee under the *Charities Accounting Act*.[33] The legal authority for the Public Guardian and Trustee to pre-clear an application for letters patent appears to be based in the discretionary nature of the issuance of letters patent and the requirement that the application for letters patent include any consents required by the Minister.[34] The Public Guardian and Trustee charges a $150 fee for providing this pre-clearance.[35] The pre-clearance and payment of that fee can be avoided if the incorporators use the "pre-approved" object clauses and special provisions.

Unlike the Ontario *Business Corporations Act*,[36] the *Corporations Act* does not provide to applicants a legislative right to incorporation. The Minister exercises discretion in determining whether or not to incorporate a corporation by letters patent. The degree of discretion, however, has not been tested by judicial review.

The Public Guardian and Trustee has jurisdiction over charitable organizations at common law and pursuant to the *Charities Accounting Act*. It has broad discretionary power to refuse to approve the objects of a proposed charitable corporation where, for example, the objects are too vague, broad or not wholly and exclusively charitable. In other instances, the Public Guardian and Trustee has expressed an opinion that power clauses in an application went beyond the purposes of the charity; that the name did not reflect the purposes and objects set out in the application; that the organization was pursuing political purposes; that it would not be properly administered based on the previous failure of the incorporators to comply with the law with respect to charities; and that the financial statements of the predecessor indicated that too high a proportion of charitable funds were spent on noncharitable activities and administrative expenses.

(vii) Special Corporations

There are a number of corporations that provide services that are regulated by other ministries, including the Ministry of Housing, the Ministry of Health, the Ministry of Community and Social Services, the Ministry

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33 R.S.O. 1990, c. C.10.

34 O. Reg. 181/90, subs. 1(1).

35 O. Reg. 1078/90 under the *Public Guardian and Trustee Act*, R.S.O. 1990, c. P.51.

36 R.S.O. 1990, c. B.16.

of Education, the Ministry of Training, Colleges and Universities and the Ministry of Municipal Affairs. At one time, the Companies Branch would refer applications for letters patent to the various relevant ministries. As of January 1, 1993, this practice is no longer in effect. The applicants, however, remain responsible for ensuring that the letters patent and by-laws comply with the requirements of those ministries. It is advisable to review a draft application for letters patent and, if available, draft by-laws, with the relevant ministry prior to submitting it to the Companies Branch.

(c) Step 3 — Establishing the Corporation

Once the letters patent have been issued by the Ministry, the first directors are required to take a number of steps to establish the operations of the corporation. The board of directors must meet and adopt the by-laws, make banking and financial arrangements, adopt the corporate seal, appoint the auditors and the officers of the corporation.

An Initial Return (Form 1) under the *Corporations Information Act*[37] must be filed within 60 days of the issuance of the letters patent. The Initial Return is placed on the corporation's public file to provide basic information to the public about the directors and officers of the corporation, including their names and residential addresses. The Initial Return also includes the location of the corporation's head office. A Notice of Change must be filed within 15 days of a change in the information contained in the initial return.

II FEDERAL CORPORATIONS WITHOUT SHARE CAPITAL

(1) General Comments

Incorporation under Part II of the *Canada Corporations Act*[38] is appropriate where the organization will operate on a national level or in more than one province, or if the objects and activities fall within federal constitutional jurisdiction. If the objects and activities fall within provincial jurisdiction, the applicants should also consider incorporation under the Ontario statute and then obtain registration to operate as an extra-provincial corporation in other appropriate provinces.

Industry Canada is consulting the sector with respect to proposed legislative changes.[39] It appears that there will be draft legislation proposed that will substantially change the application process. For example, one option is that incorporation will be "as of right" as it is under business

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37 R.S.O. 1990, c. C.39 [as am. S.O. 1995, c. 3].

38 R.S.C. 1970, c. C.32.

39 *Reform of the Canada Corporations Act: The Federal Nonprofit Framework Law*, Corporate Law Policy Directorate, Industry Canada, July 2000.

corporation incorporating legislation, although object clauses will still be required.

(2) Types

The federal Act provides for similar types of corporations as does the Ontario statute but is not as specific as is the Ontario legislation. A corporation without share capital may be a not-for-profit corporation that provides services to its members, such as a professional association. It may also be a not-for-profit corporation with charitable objects that does not intend to register as a charitable organization. Finally, the corporation may be a charitable corporation that does intend to register its charitable status.

It is not certain whether a corporation that is charitable in nature is required to notify the Public Guardian and Trustee of its existence under the *Charities Accounting Act*.[40] Although there may be an argument that it does not on constitutional grounds, it would appear that the Public Guardian and Trustee does claim jurisdiction over federally incorporated charitable corporations that carry on activities in Ontario. Furthermore, under head 7 of s. 92 of the *Constitution Act, 1867*, charitable institutions are within provincial jurisdiction.

(3) Application Process and Requirements

Industry Canada is responsible for the administration of the *Canada Corporations Act*. Corporations without share capital are incorporated under Part II of that statute. The department developed an information kit to assist applicants for incorporation under Part II.[41] The kit includes a sample application; model by-laws; a summary of the department's policy on not-for-profit corporations; a checklist for use with the application; and a fee schedule.

The kit is intended to assist applicants in several ways. First, it sets out the requirements under the Act for incorporation. The policy summary also provides information on what is acceptable under the Act, including areas where the Act is not clear. Second, the use of the model by-laws will speed up the process for incorporation. The model by-laws include provisions on all the areas that must be in the by-laws under Part II of the Act. Adoption of the model by-laws avoids the need for departmental review of the by-laws. Where changes to the model by-laws are necessary, the list of requirements assists applicants to ensure compliance with the Act and the Department's policies. Third, the information kit provides information to applicants to understand the process of incorporation and the maintenance of a corporate entity.

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40 R.S.O. 1990, c. C.10.

41 Industry Canada, "Information Kit on the Creation of Not-for-profit Corporations", November 25, 1999.

(a) Step 1 — Selecting and Searching a Corporate Name

The first step is choosing the corporate name for the corporation. As with the Ontario incorporation, the choice of a corporate name is important.

(i) Distinctive Name

The name must be distinctive. It distinguishes the organization and activities from others and their activities. In determining whether or not a name is distinctive, the Minister is to consider the whole name and not only its separate elements.

Section 19 of the Regulations provides that a name is not distinctive where it is too general; is only descriptive of the quality, function or other characteristic of the goods or services in which the corporation intends to deal; is primarily or only the name or surname used alone of an individual who is living or has died within 30 years preceding the date of request for that name; or is primarily or only a geographic name used alone. The name would be acceptable, however, if the applicant establishes that the name, through use, has acquired and continues to have a secondary meaning at the time of the request. A corporate name could include, as an element, the name of a family of an individual where the individual or his or her heir or legal representative consents in writing to the use of his or her name and the individual has or had a material interest in the corporation.[42]

(ii) Prohibited Names

The corporate name must not be the same or similar to the name of any other company, society, association or firm that is in existence, carrying on business in Canada or that is incorporated under the laws of Canada or any province. Furthermore, the name must not so resemble another name so as to be calculated to deceive. It may be the same or similar to another name if the existing company, society, association or firm is in the course of being dissolved or changing its name and has consented to the use of the name. The name may not otherwise be objectionable on public grounds.[43]

Section 16 prohibits the use of several elements in a corporate name. A corporate name is objectionable if it includes "Air Canada"; "Trans Canada Airlines" or "*Lignes aeriennes Trans Canada*"; "Canada Standard" or "CS"; "Co-operative", "co-op" or "pool" when it connotes a co-operative venture; "Parliament Hill" or "*Colline du Parlement*"; "Royal Canadian Mounted Police", "*Gendarmerie Royale du Canada*", "RCMP"

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42 *Canada Corporations Regulations*, C.R.C. [1978], c. 424, s. 21.

43 *Canada Corporations Act*, R.S.C. 1970, c. C.32, para. 9(1)(b) and subs. 28(1).

or "GRC"; or "United Nations", "*Nations Unies*", "UN" or "ONU".[44] A name is also objectionable if it connotes that the corporation carries on business under royal, vice-regal or governmental patronage, approval or authority unless the appropriate government department or agency approves the name in writing.[45]

The Regulation provides guidance on when a proposed name of a corporation shall be considered to be objectionable on the grounds that it is prohibited or deceptively misdescriptive.[46] Under s. 13, a corporate name would be considered to be confusing with a trade mark or a trade name if the use is likely to lead to the inference that the business carried on or intended to be carried on under the corporate name and the business connected with the trade mark or trade name are one business. It is not relevant whether or not the nature of the business of each is generally the same. The corporate name may be used if the other corporation has not carried on business during the previous two years and it has consented to the use of the name and undertakes in writing to dissolve itself or to change its name.[47]

(iii) Restrictions on Words in Corporate Names

Section 17 of the Regulation includes other restrictions on the elements in a corporate name to avoid confusion or misleading the public. A name is prohibited if it connotes that the corporation is sponsored or controlled by or is affiliated with the Government of Canada, the government of a province, a foreign government or a subdivision or agency of any such government unless that government, subdivision or agency has consented in writing to the use of the name. Similar written consents are required from universities, associations of accountants, architects, engineers, lawyers, physicians, surgeons or any other professional association recognized by the laws of Canada or of a province. If the name connotes the carrying on of the business of a bank, loan company, insurance company, trust company, other financial intermediary or a stock exchange that is regulated by a law of Canada or a province, the written consent for the use of the name is required from the appropriate government department or agency.

Section 20 sets out the circumstances that are to be considered in determining whether or not a name is "confusing". These circumstances include the inherent distinctiveness of the whole or any element of a trade name or trade mark, the length of time a trade name or trade mark has been in use, the nature or the goods or services associated with the trade name or trade mark and the likelihood of competition, the nature of the trade with which a trade name or trade mark is associated, the degree

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44 C.R.C., c. 424, s. 16.

45 *Ibid*., subs. 17(a).

46 *Ibid*., s. 11.

47 *Ibid*., s. 25. See also ss. 22 and 26.

of resemblance in appearance or sound or the ideas suggested by them, and the territorial area in which the proposed corporate name or existing trade name is likely to be used.

A corporate name is also prohibited if it contains a work or phrase that is obscene or connotes a business that is scandalous, obscene or immoral.[48] A name may not be used if it misdescribes in any language the business, goods or services in association with which it is proposed to be used; the conditions under which goods or services will be produced or the persons to be employed in the production or supply of the goods or services; or the place of origin of those goods or services.[49]

The name may be in English or French. If the corporation has a name consisting of a separated or combined French and English form, it may use either the French or the English form of its name or both. The corporate seal must show the corporate name in both English and French forms or the corporation must have two seals, each of which is equally valid, for the English and French forms.[50] The corporate name may include alphabetic or numeric characters, initials, punctuation marks or a combination of these elements.[51]

(iv) Change in Corporate Name

Pursuant to subs. 28(2) of the *Act*, the Minister may change a corporation's name by supplementary letters patent if letters patent were issued to a corporation with a name that is not in compliance with the Act. Prior to issuing the supplementary letters patent, the Minister must provide notice of his or her intention to do so.

A corporation may also change its name. To do so, two-thirds of the votes cast at a special general meeting called for the purpose must sanction a by-law for the name change. The name change is to be confirmed by supplementary letters patent. If the Minister is satisfied that the change in name is not objectionable, he or she may direct that supplementary letters patent be issued. A notice of the issuance of the supplementary letters patent is to be published in the *Canada Gazette* pursuant to section 29 of the *Act*.

(b) Step 2 — Application for Letters Patent

An application must be made by at least three applicants, all of whom are at least 18 years of age. A corporation may not be one of the applicants. All applicants must be individuals. The contents of an application for incorporation by letters patent are set out in subs. 155(1) of the Act. The application must include:

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48 *Ibid.*, s. 18.
49 *Ibid.*, s. 23.
50 *Ibid.*, subss. 25(2) and (3).
51 *Ibid.*, s. 24.

- the proposed name of the corporation;
- the purposes for which its incorporation is sought;
- the place within Canada where the head office will be situated;
- the names in full and the address and occupation of each of the applicants; and
- the names of the applicants, not less than three, who are to be the first directors of the corporation.

Subsection 155(2) requires that the by-laws shall accompany the application for incorporation. As noted above, the department provides model by-laws which may be used by the applicants. The model includes the matters that are required by subs. 155(2) to be covered in the by-laws and other matters that are required by policy. Any provision under subs. 155(2) could also be set out in the letters patent.

A completed application includes several documents. The department has established a format for the letters patent. The application includes an affidavit or statutory declaration of one of the applicants swearing to the truthfulness of the application. A Canada-biased NUANS report is to be filed with the application or, alternatively, the applicants may, for a fee of $15, request the department to search and to reserve a name. A bilingual name requires two searches ($30).

If the applicants are satisfied with the model by-laws, a copy of the unsigned by-laws should be enclosed. If the applicant is not satisfied with the model by-laws, the proposed by-laws should be attached. The applicants should also include a completed checklist indicating the required provisions that have been included in the proposed by-laws.

A covering letter should set out the documents that are enclosed with the application. It should also specify the street address of the head office of the corporation. The filing fee of $200 for application for letters patent must be included. All cheques are payable to the Receiver General of Canada.

The corporation will have a number of incidental and ancillary powers which are set out in s. 16 of the Act. It is not necessary, therefore, to include those incidental and ancillary powers in the application for letters patent. The list is extensive and in most cases it is unlikely that any additional powers would be required. The letters patent could, however, restrict the corporation in the exercise of any incidental or ancillary powers.

III CO-OPERATIVE CORPORATIONS

(1) General Comments

Co-operative corporations are another form of legal entity that meet a particular purpose. Under the *Co-operative Corporations Act*,[52] a co-operative corporation may be incorporated with share capital or without share capital. This text is concerned only with co-operative corporations without share capital, which are similar in purpose to corporations without share capital under the *Corporations Act*. As with corporations without share capital, a number of government programmes may be implemented by co-operative corporations or the activities of the co-operative corporations may be regulated. The incorporators may want to consult with the relevant ministry or agency prior to initiating the incorporation process.

(2) Procedures for Incorporation

(a) Overview

A co-operative corporation is incorporated by Articles of Incorporation. The *Act* is administered by the Financial Services Commission of Ontario. The completed application includes two copies of a completed Form 2 (co-operatives without share capital), a NUANS report and payment to reserve the name and for the incorporation of the not-for-profit co-operative corporation, an affidavit of verification and Form 3 consents to act as first directors. The name is reserved, pursuant to section 13, for 90 days.

(b) Name Selection and Approval

The first step in the incorporation process is the choice of name and its approval by the Commission. As with the other forms of corporation, the Act and Regulations set out restrictions and prohibitions on the words in the corporate name. Section 7 of the Act requires that the word "co-operative" or its French equivalent be part of the name. No other person other than a co-operative corporation may use this word in their name.[53] The name must include the legal status, such as "Incorporated" or "Corporation" or corresponding abbreviation or French equivalent.[54] Section 8 provides the discretion to approve a name in another form or language.

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52 R.S.O. 1990, c. C.38 [am. S.O. 1992, c. 19; 1994, c. 17].

53 Subsection 7(3). There are exceptions under subs. 7(4) for federally incorporated co-operative corporations or a corporation granted an extra-provincial licence and other similar exceptions.

54 Subsection 7(5). "Limited" may only be used by co-operative corporations with share capital.

Section 9 provides general guidance on what words may be used in a name. As with s. 13 under the *Corporations Act*,[55] the name may not be the same as or similar to the name of a known corporation, association, partnership or individual. The name must not suggest or imply a connection with the Crown or Government of Canada, a municipality, or province without the written consent of the appropriate authority. The name must not suggest or imply a connection with a political party or leader, contain any word or phrase that indicates or implies it is incorporated for any purpose other than that set out in its objects or contain any word or phrase that is prohibited or restricted under any other Act unless the restrictions are complied with by the corporation. Finally, the name may not be objectionable on any public grounds, in the opinion of the Minister. Under subs. 9(2), the Minister may cause the name of the co-operative corporation to be changed after giving the co-operative an opportunity to be heard.

The Regulations provide some additional restrictions to the words used in the name. For example, the name should not be too general in character[56] or use the word "veteran" unless it has become established by a long and continuous prior use.[57] The name cannot include the word "condominium".[58] If the name uses initials or numerals, the Minister may require the addition of a distinctive element.[59] The restrictions set out under the Ontario *Corporations Act* would also apply, as a result of s. 9 of the Act, and the reader should refer to the discussion of name earlier in this chapter.

(c) Application for Articles of Incorporation

Step two in the process of incorporation is the submission of the Articles of Incorporation. The information required in the Articles of Incorporation is prescribed by Regulation.[60] It must include the name of the co-operative; its head office location; the names, addresses and signatures of the incorporators; the number of directors; the names and addresses of the first directors; how the co-operative intends to finance itself (accepting loans from members or charging membership fees); the terms and conditions of the loans; and any special restrictions or provisions which apply to the co-operative. These restrictions or provisions may arise out of the type of co-operative or as a result of other government policies or programmes. For example, if the co-operative is to be a not-for-profit housing co-operative, certain special provisions are required to restrict the co-operative to those activities.

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55 R.S.O. 1990, c. C.38.
56 O. Reg. 178/90, s. 5.
57 *Ibid.*, s. 8.
58 *Ibid.*, s. 9.
59 *Ibid.*, s. 6.
60 O. Reg. 178/90.

The fee schedule to the regulation sets out several of the restrictions that apply to co-operatives without share capital. In order to be eligible for the reduced fee, the following clauses must be included in the Articles of Incorporation:

- The co-operative shall carry on business without the purpose of gain for its members;
- The co-operative shall use any profit or other accretion for the purposes of promoting its objects;
- Upon dissolution and after the payment of all debts and liabilities, the co-operative's remaining property shall be distributed or disposed of to charitable organizations carrying on their activities solely within Canada; and
- The directors
  (a) shall serve without remuneration; and
  (b) shall not receive, directly or indirectly, any profit from their positions as directors but the articles may provide that the directors may be paid reasonable expenses incurred in the performance of their duties.

These required special provisions for co-operative corporations without share capital are intended to ensure that the co-operative operates on a not-for-profit basis, similar to corporations incorporated under the Ontario and federal statutes.

The application must include two other documents. A consent to act as a first director must be submitted for each first director who is not an incorporator (Form 3 under the Regulations). This form confirms that the individual has agreed to be first director. The application must also include an Affidavit of Verification. The Affidavit confirms who are the incorporators, their ages and that they will be members of the co-operative.

(d) Establishing the Co-operative Corporation

Once the co-operative corporation is established, the co-operative must file an Initial Return under the *Corporations Information Act*.[61] The Initial Return includes information on the name, head office and business address of the co-operative and the names and addresses of the officers and directors. The Initial Return must be filed within 60 days of incorporation as a co-operative corporation.

A co-operative corporation without share capital may finance its operations through debt financing. The co-operative may, for example, borrow funds from its members. The membership loans may be a condition

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[61] R.S.O. 1990, c. C.39. See, also, the Commission's information pamphlet, Financial Services Commission of Ontario, *Filing Requirements and Record Keeping*.

of membership in the co-operative. The maximum interest rate on the membership loans is limited to two per cent above the prime lending rate of the financial institution mentioned in the co-operative's by-laws. Membership loans must be repaid with any accrued interest when the member ceases to be a member.

The co-operative must file an offering statement with the Commission prior to soliciting the loans from the membership. Every prospective member must be given a copy of the filed offering statement and a copy of any filed material change statement before he or she makes the loan. The offering statement and material change statement are intended to ensure that full, plain and true disclosure is made about the co-operative, the risks associated with the loan and how the funds will be used, so that a potential member has the information that he or she needs to make an informed decision. The Commission provides a template for offering statements in Bulletin No. C-1/00, July 31, 2000.

Sections 34 to 37 of the Act set out the requirements for an offering statement. An offering statement is not required if the membership loans are a condition of membership and the value is less than $100 to each member and the total amount of membership loans held by a member is less than $1,000, or if the loans are offered to less than 25 persons.

A loan certificate must be issued to the member. The certificate must include the name of the co-operative and the fact that it is incorporated under the *Co-operative Corporations Act*, the name of the member to whom the certificate is issued, any restrictions on the transfer of the security, and whether the co-operative has a lien on the loan.