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Factors to consider when choosing a jurisdiction for incorporation

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- Number of Directors
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Process of Incorporation

• Most jurisdictions require either articles of incorporation or letters patent for incorporation

• Other jurisdictions use a certificate of incorporation (British Columbia, Alberta, Nova Scotia, Northwest Territories and the Yukon)

• In addition to the above requirements, a memorandum of association must also be submitted to the Registrar as part of the application’s for those not-for-profit corporations that are incorporating in Nova Scotia, Quebec, Prince Edward Island and Alberta (*Companies Act only*)

Letters Patent

• The issuance of letters patent is a discretionary function, which can make the process of incorporation for companies who choose this method a more onerous process

• Examples of jurisdictions which use letters patent for incorporation are the federal jurisdiction, Ontario, Quebec, Prince Edward Island, and New Brunswick

Articles of Incorporation

• The issuance of articles of incorporation is not a discretionary function, which makes the process less difficult and less time consuming as the letters patent process

• Examples of jurisdictions which use articles of incorporation for incorporation are Newfoundland, Manitoba and Saskatchewan

• Incorporation under the new CNCA, will be ‘as of right’, rather than the discretionary letters patent system currently in place under the CCA, which will make the incorporation process faster and more efficient
Incorporation Fees

• One of the most important factors for any non-profit corporation when deciding to incorporate is the cost of incorporation.

• Below are the current government incorporation fees for non-profit corporations in Canadian jurisdictions:

<table>
<thead>
<tr>
<th>Jurisdiction</th>
<th>AB</th>
<th>BC</th>
<th>MB</th>
<th>NL</th>
<th>NS</th>
<th>ON</th>
<th>QC</th>
<th>SK</th>
</tr>
</thead>
<tbody>
<tr>
<td>Fee</td>
<td>200</td>
<td>175</td>
<td>70</td>
<td>70</td>
<td>45</td>
<td>45</td>
<td>45</td>
<td>45</td>
</tr>
</tbody>
</table>

• You may also be required to register extra-provincially. Currently, the extra-provincial registration fees are:

<table>
<thead>
<tr>
<th>Jurisdiction</th>
<th>AB</th>
<th>BC</th>
<th>MB</th>
<th>NL</th>
<th>NB</th>
<th>NS</th>
<th>ON</th>
<th>QC</th>
<th>SK</th>
<th>YT</th>
</tr>
</thead>
<tbody>
<tr>
<td>Fee</td>
<td>175</td>
<td>100</td>
<td>70</td>
<td>0</td>
<td>0</td>
<td>35</td>
<td>155</td>
<td>145</td>
<td>60</td>
<td>0</td>
</tr>
</tbody>
</table>

Time Delays

• Another important factor when deciding to incorporate is the time it takes. Below are the standard processing delays (in business days) that it takes to obtain a certificate of incorporation following the submission of articles of incorporation (Source: http://www.corporationcentre.ca/docen/home/faq.asp?id=incbg5)

<table>
<thead>
<tr>
<th>Jurisdiction</th>
<th>Standard Processing</th>
<th>Expedited Processing (additional fees)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Federal</td>
<td>30 days</td>
<td>0</td>
</tr>
<tr>
<td>Alberta</td>
<td>10 days</td>
<td>5 days</td>
</tr>
<tr>
<td>British Columbia</td>
<td>40 days</td>
<td>20 days</td>
</tr>
<tr>
<td>Manitoba</td>
<td>30 days</td>
<td>15 days</td>
</tr>
<tr>
<td>New Brunswick</td>
<td>30 days</td>
<td>15 days</td>
</tr>
<tr>
<td>Newfoundland</td>
<td>30 days</td>
<td>0</td>
</tr>
<tr>
<td>Nova Scotia</td>
<td>30 days</td>
<td>15 days</td>
</tr>
<tr>
<td>Ontario</td>
<td>60 days</td>
<td>15 days</td>
</tr>
<tr>
<td>Saskatchewan</td>
<td>40 days</td>
<td>15 days</td>
</tr>
<tr>
<td>Yukon</td>
<td>30 days</td>
<td>15 days</td>
</tr>
</tbody>
</table>

Naming Issues

• Each jurisdiction has different conventions and rules with respect to naming not-for profit corporations, though are largely similar

• For example, in Alberta there may be a requirement to use a legal element, while in other jurisdictions a legal element is prohibited

• In Quebec, a corporation may not declare or use in Quebec a name which is not in conformity with the Charter of the French Language. Section 63 of the Charter provides that “the name of an enterprise must be in French”.

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Objects/ Purposes

• Some statutes set out the purposes for which a non-profit corporation may incorporate under the relevant legislation

• Where the grant of letters patent is discretionary, the applicable Ministry may decline to register a corporation with objects that, in its opinion, do not fall within the purpose of the Act
  – For example, in Quebec, a non-profit corporation may only be incorporated for “national, patriotic, religious, philanthropic, charitable, scientific, artistic, social, professional, athletic or like purposes not for pecuniary gain.” *Companies Act*, R.S.Q., c. C-38, section 218

• In jurisdictions with articles of incorporation, the corporate activities or purposes must fall within those set forth in the legislation, but incorporation is generally not discretionary
  – For example, in Newfoundland a corporation without share capital may be incorporated “for undertakings restricted to those of a patriotic, religious, philanthropic, charitable, educational, scientific, literary, historical, artistic, social, professional, fraternal, sporting or athletic nature or the like.” *Corporations Act*, R.S.N.L. 1990, c. C-36, section 420

• However, the articles of incorporation do not need to set out the corporate purposes. Instead, the articles must set out any restrictions on the undertaking that the corporation may carry on

By-Laws

• Content
  – The various non-profit statutes contain different requirements regarding the content of by-laws
    ▪ For example, the Saskatchewan Act does not provide a list of matters that must be included in the by-laws.
    ▪ Several other provincial statutes specify the matters that must be included in a corporation’s by-laws
    ▪ For example, non-profit corporations incorporated in British Columbia, Nova Scotia, Prince Edward Island, the Yukon, the Northwest Territories, Nunavut, and under Alberta’s *Societies Act* must have by-laws relating to certain matters enumerated in the relevant provincial legislation


### Amendments

- Another important consideration is the process of enacting and amending by-laws, as by-law amendments are a relatively frequent occurrence.
  - Saskatchewan:
    - unless the articles, by-laws or a unanimous member agreement otherwise provide, the directors of a Saskatchewan corporation may, by resolution, make, amend, or repeal any by-laws that regulate the business or affairs of the corporation. The amendment must then be submitted to the members for approval by ordinary resolution at the next meeting of members. The members may, by ordinary resolution, confirm, reject or amend the change.
- By-law amendments are effective from the date of the resolution of the directors. If the approval of the members is not subsequently obtained, the by-law ceases to be effective and no subsequent resolution of the directors having the same purpose or effect is effective until confirmed by the members.
- Manitoba, New Brunswick, Newfoundland, Ontario and Quebec:
  - By-laws are valid from the time they are enacted by the directors.
- Alberta, Nova Scotia, the Northwest Territories and the federal jurisdiction:
  - require membership and government approval before a by-law becomes effective.

### Number of Directors/Individuals needed for incorporation

- Each jurisdiction has a different requirement for how many people are required in order to incorporate.
- Some jurisdictions also have constraints on the number of directors allowed.
- For example, in Saskatchewan, charitable corporations are required to have a minimum of three directors, at least two of whom are not officers or employees of the corporation or its affiliates.
- In British Columbia five or more persons must file the constitution and by-laws of the proposed society with the registrar.
- Bill 65 in Ontario allows one or more individuals and/or corporations to incorporate a not-for-profit corporation by filing articles of incorporation.
Standard of Care for Directors

- Statutory provisions regarding director liability is yet another consideration when choosing a jurisdiction for incorporation
- Legislation in some jurisdictions provides for an objective standard of care for directors, while directors in other jurisdictions remain subject to the common-law subjective standard

For example, subsection 109(1) of Saskatchewan’s Non-profit Corporations Act provides as follows:
- Every director and officer of a corporation, in exercising his or her powers and discharging his or her duties, shall:
  - act honestly and in good faith with a view to the best interests of the corporation; and
  - exercise the care, diligence and skill that a reasonably prudent person would exercise in comparable circumstances
- The Canada Not-for-profit Corporations Act, Manitoba’s Corporations Act, Newfoundland’s Corporations Act and the proposed Ontario Not-for-profit Corporations Act provide for a substantially similar objective standard

Residency Requirements

- Some jurisdictions require that a percentage of the directors must reside in the province, within Canada, or both
- In Saskatchewan, at least one director must reside in Saskatchewan and at least 25% of directors must be resident Canadians
- Under the Manitoba Corporation’s Act, at least twenty-five percent of a corporation’s directors must be residents of Canada, or at least one director if the board is comprised of only three directors
- Nova Scotia’s Societies Act requires that every society must also appoint and have a recognized agent resident within the province to accept service of any notice, summons or other document
Membership Restrictions and Remedies

- Every jurisdiction has a different approach to membership rights
- The CNCA contains enhanced membership rights and previously unavailable remedies
- The BC Society Act provides that a society may have non-voting members, but their number must not exceed the number of voting members. Also, a member of a society is not, in his or her individual capacity, liable for any debt or liability of the society.

- The Saskatchewan Non-profit Corporations Act allows any person to access a charitable corporation’s corporate records, while the records of membership corporations are available only to members of the corporation. Unless the articles or by-laws otherwise provide, membership interests are not transferable. There are also a number of remedies available for members.

Potential Future Corporate Changes

- Modern corporate legislation also contains detailed provisions regarding fundamental changes to the corporation, such as amalgamation and continuance
- While many non-profit corporations may never plan to undertake such actions, the inclusion of these provisions provides corporations with more flexibility
  - For example, Saskatchewan’s Non-profit Corporations Act, 1995 allows for a variety of corporate actions, including vertical and horizontal short-form amalgamation.
  - In contrast, P.E.I. corporations without share capital cannot amalgamate or continue into another jurisdiction.
Under the federal jurisdiction, it is not possible to amalgamate under the CCA, however under the CNCA, there are detailed provisions which allow for amalgamations and import/export continuance

BC's *Society Act* allows for two or more societies to apply to amalgamate and form a new society. Unlike other provinces, in BC each amalgamating society is dissolved and a completely new society must be incorporated

The *Manitoba Corporations Act* contains extensive provisions related to fundamental changes, which provide more flexibility for corporations through provisions regarding amalgamation and import/export continuance

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**Auditors/Financial Statements**

- The *Alberta Societies Act* does not contain a provision explicitly requiring that a society appoint an auditor. However, the by-laws of an Alberta society must contain provisions for the audit of accounts. The *Societies Act* also requires that audited financial statements be presented at a society’s annual general meeting and signed by the society’s auditor, setting out the society’s income, disbursements, assets and liabilities

- Under the BC *Society Act*, reporting societies are subject to more stringent audit and financial disclosure requirements. A reporting society must appoint an auditor, while a society that is not a reporting society may appoint an auditor. A reporting society must also provide each member with a copy of its financial statement and the auditor’s report at least ten days before the date of its annual general meeting. A non-reporting society must, on member demand, provide the member or the holder with a copy of its latest financial statement
In Ontario under Bill 65, all corporations must appoint an auditor or a person to conduct a review engagement of the corporation. Pursuant to section 75, the members of a public benefit corporation may pass an extraordinary resolution to have a review engagement instead of an audit, if the corporation had annual revenue in that financial year of more than $100,000 and less than $500,000. The members of a public benefit corporation may also resolve to not appoint an auditor and to not have an audit or a review engagement if the corporation had annual revenue in that financial year of $100,000 or less.

New Reforms: CNCA, Ontario Not-for-profit Corporations Act, B.C. Society Act

After several attempts at legislative reform, the Canada Not-for-Profit Corporations Act received Royal Assent on June 23, 2009. When proclaimed in force, the new Act will replace Parts II and III of the CCA. The CNCA represents a much needed modernization of the legislation governing federally incorporated not-for-profit corporations. The CNCA has been modeled on the Canada Business Corporations Act in order to keep the new legislative scheme familiar and user-friendly.

The B.C. Ministry of Finance is currently undertaking a review of the B.C. Society Act, which will bring significant changes and modernization to the Act. The British Columbia Law Institute developed a consultation paper of recommendations, which has led to a collaborative response by sector experts that is still in the process of being completed. To find out more information on Provincial Government consultation, visit http://www.fin.gov.bc.ca/society_act_review.htm