



# Little Black Book Of

# PROFESSIONAL CORPORATIONS

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## *Note From The Author*

*As a professional, your focus is on delivering client care to your patients or service to your clients and growing your business, not dealing with legal issues.*

*This “Little Black Book of Professional Corporations” is designed as a general guide to help answer some of the most common questions I receive from professionals when deciding whether to incorporate a professional corporation in Ontario.\* This decision should be based on a number of considerations for your particular situation, and with the advice of professional advisors such as your lawyer, tax accountant, and financial advisor. Be informed so you can make the best possible decisions.*

*“The only thing to do with good advice is to pass it on. It is never of any use to oneself.”*

*~ Oscar Wilde*

*\* Other provinces and territories in Canada may have similar legislation. Consult a legal advisor in your jurisdiction for more information.*

**Question:**

What is a professional corporation as opposed to a regular corporation?

**Answer:**

In generally terms, a professional corporation (PC) allows certain professionals such as doctors, dentists, optometrists, lawyers, and accountants (just to name a few)<sup>1</sup> to practice their profession through a corporate entity, rather than personally. PCs are created by provincial/territorial statutes. In addition, PCs must also comply with regulatory requirements from the profession's governing body such as, for example, the College of Physicians and Surgeons of Ontario (CPSO) or Law Society of Ontario (LSO).

<sup>1</sup> This is not an exhaustive list.

**Question:**

Which professionals can incorporate a PC?

**Answer:**

In Ontario, PCs are governed under the *Ontario Business Corporations Act* (OBCA). Section 3.1(2) of the OBCA provides that:

"Where the practice of a profession is governed by an Act, a professional corporation may practise the profession if,

(a) that Act expressly permits the practice of the profession by a corporation and subject to the provisions of that Act; or

(b) the profession is governed by an Act named in Schedule 1 of the Regulated Health Professions Act, 1991<sup>2</sup> one of the following Acts or a prescribed Act:

1. *Chartered Professional Accountants of Ontario Act, 2017.*
2. Repealed: 2017, c. 8, Sched. 3, s. 74.
3. *Law Society Act.*
4. *Social Work and Social Service Work Act, 1998.*
5. *Veterinarians Act.* 2000, c. 42, Sched., s. 2; 2010, c. 6, Sched. A, s. 69; 2010, c. 6, Sched. C, s. 67; 2017, c. 8, Sched. 3, s. 74"

<sup>2</sup> Schedule 1 of the *Regulated Health Professions Act* contains a list of self-governing health professions.

**Question:**

Are there specific requirements for incorporating a PC?

**Answer:**

Although there is some flexibility in structuring and organizing a PC, unless an exemption<sup>3</sup> applies, Section 3.2(2) of the OBCA requires all PCs to meet the following conditions:

1. All shares of the corporation shall be legally and beneficially owned, directly or indirectly, by one or more members of the same profession.
2. All officers and directors of the corporation shall be shareholders of the corporation.
3. The name of the corporation shall include the words "Professional Corporation" or "société professionnelle" and shall comply with the rules respecting the names of professional corporations set out in the regulations and with the rules respecting names set out in the regulations or by-laws made under the Act governing the profession.
4. The corporation shall not have a number name.

5. The articles of incorporation of a professional corporation shall provide that the corporation may not carry on a business other than the practice of the profession but this paragraph shall not be construed to prevent the corporation from carrying on activities related to or ancillary to the practice of the profession, including the investment of surplus funds earned by the corporation.

<sup>3</sup> Physicians and Dentists are currently still the only professions that are allowed to have family member(s) or individual acting as trustee for a child of a voting Physician or Dentist shareholder, to hold non-voting shares in a PC. These special exemptions are made by the Lieutenant Governor in Council who has the power to make special regulations. See section 3.2(6) of the OBCA.

**Question:**

How should I structure and organize my PC?

**Answer:**

The share structure of a PC is one of the most important aspects of incorporation and often varies depending on the profession, timing, and circumstance of the professional. We recommend seeking tax advice from your accountant to determine the proper share structure. This can assist with preventing any unnecessary additional costs to amend the articles after incorporation.

**Question:**

Why do I need a certificate of authorization?

**Definition:** A **certificate of authorization** is a document obtained from your respective college or regulatory body, which allows you to practise under your professional corporation.

**Question:**

Do I have to renew the certificate of authorization every year?

**Answer:**

A. The OBCA and *Regulated Health Professions Act* requires all PCs to obtain a certificate of authorization from their respective college or regulatory body in order to practice your profession under the corporation. Failure to comply with the statutory requirements is an offence.<sup>4</sup>

<sup>4</sup> For example, if you hold yourself out as a health professional corporation without a valid certificate of authorization, you may be liable to a fine of up to \$50,000 for a first offence and up to \$200,000 for a second or subsequent offence. See section 40(3) of the *Regulated Health Professions Act*.

**Answer:**

A certificate of authorization is required to be renewed annually and a renewal fee applies. The renewal dates are different depending on your profession as are the fees. Consult your regulatory body or college to determine the renewal deadline and renewal fee.<sup>5</sup>

<sup>5</sup> Some colleges offer a discount for early renewal.

**Question:**

My colleagues have set up a PC, should I incorporate as well?

**Answer:**

Although setting up a PC has many advantages, such as paying lower taxes, deferring taxes, avoiding certain liability, protection against creditors, access to the small business capital gains exemption on the sale of your corporation, and income splitting,<sup>6</sup> the decision to incorporate a PC depends largely on your personal circumstances, in terms of timing, income, and your tax planning strategy. Consult with your tax advisors such as your accountant and financial advisor to determine if you are ready to incorporate a PC.

<sup>6</sup> Currently, only physicians and dentists have the ability to income split with their family members. The recent 2018 federal tax changes have limited the use of income splitting. Consult your accountant for the latest tax changes and advice.



**Question:**

I am a sole proprietor. Is it necessary to do an asset rollover?

**Definition:** An **asset rollover** is a tax deferral method that allows an individual business owner to transfer certain eligible property from their business into a corporation without paying capital gains on the transfer.

**Question:**

Is there any benefit in keeping my PC given the recent 2018 federal tax changes?

**Answer:**

This depends on your specific situation and requires a discussion with your tax accountant. If you own eligible property such as equipment, office furniture, and goodwill (ie. a book of business), an asset rollover is often considered to defer a capital gains taxes which would otherwise apply due to the deemed disposition tax rules. Even if you think there is no value in your business, the CRA may think otherwise. Asset rollovers are done based on the fair market value of the eligible property.

**Answer:**

Although the federal government has tightened some of the tax rules, it has not eliminated all of the benefits of having a PC. For professionals earning a high income, the tax savings from the marginal corporate tax rate<sup>7</sup> and tax deferral strategies may be sufficient enough reasons to keep the PC in tact. However, your circumstances may be very different from others. It is important to discuss the various tax strategies with your tax accountant prior to making any corporate restructure decisions.

**Question:**

Do I have to make annual resolutions every year for my PC?

<sup>7</sup> For example, a healthcare professional earning \$220,000 or more per year in personal income would be subject to the top marginal personal tax rate of 53.53%. In contrast, the current combined corporate tax rate for small businesses in Ontario is 22.5% on business income earned by a health professional corporation up to \$500,000 (as of January 1, 2019).

**Answer:**

Keeping your PC current with annual resolutions are akin to filing annual tax returns. Ontario corporations are required to comply with the OBCA, including maintaining the records of the corporation at its registered office or such other place as designated by the directors.<sup>8</sup> In particular, section 94 of the OBCA provides that directors must call an annual meeting of the shareholders of the corporation not later than 18 months after the corporation comes into existence, and thereafter not later than 15 months after holding the last annual shareholders' meeting.

<sup>8</sup> See subsections 140(1) and 140(2) of the OBCA.

**Question:**

What happens if I do not comply with the OBCA?

**Answer:**

If found guilty, failure to comply with the requirements of the OBCA may result in the corporation being fined up to \$25,000.00. Moreover, every director or officer of the corporation who, without reasonable cause, authorized, permitted or acquiesced in such offence may be guilty of an offence and, on conviction, may be liable to a fine of not more than \$2,000.00, and in extreme circumstances, may face imprisonment for a term of not more than one year, or both.<sup>9</sup>

<sup>9</sup> See section 258 of the OBCA.

**Question:**

When does my PC need to file a Notice of Change to the Ministry?

**Answer:**

Section 4 of the *Corporations Information Act* requires your PC to file a notice of change with the ministry when there is a change in the registered address, change in director, or change in officer of the corporation within 15 days after the change takes place.

In addition, your college or regulatory body also requires your PC to notify them of certain changes such as a change of directors, shareholders, or registered address. Check with your respective regulatory college or body for specific requirements.

**Question:**

My partner and I are planning to incorporate a PC together. Why is a shareholder agreement so important if I trust my partner?

**Answer:**

Having a shareholder agreement properly drafted by a lawyer is one of the smartest and most important things you can do before starting your business together. A shareholder agreement is an agreement between you and your partner, as the owners of the corporation which sets out each of your rights, privileges and obligations along with the foundation of how the corporation will be set up, managed and run. When things are well, there is arguably no need for any agreement. However, in the event of a dispute or disagreement, you can refer to your shareholder agreement which sets out how you agreed to resolve the particular matter(s) in question.

**Question:**

As a shareholder, am I protected with limited liability by incorporating my PC?

**Answer:**

Unlike other corporations, a professional practicing through a PC is not protected with limited liability. The opposite is true. The liability of a professional that practices through a PC is the same as if the professional were to practice as a sole proprietor, that is to say, the liability is unlimited. As such, protection from liability is certainly not one of the reasons for incorporating a PC.<sup>10</sup>

<sup>10</sup> See section 3.4 subsections (1), (2), and (3) of the OBCA.

**Question:**

What if my PC is a partner in an limited liability partnership (LLP), am I protected from liability through my PC?

**Answer:**

The liability of a shareholder of a PC that is a partner in a partnership, such as an LLP, is not affected by the existence of the PC structure. Where your PC is a partner in an LLP, as a shareholder of the PC, you will have the same liability in respect of the LLP as you would have if you were directly a partner in your personal capacity.<sup>11</sup>

<sup>11</sup> See section 3.4(6) of the OBCA.

**Question:**

I am a shareholder in a PC with two of my fellow colleagues, will I be liable for any professional liability claims of my other colleagues?

**Answer:**

If you are a shareholder in a PC with colleagues, you may be jointly and severally liable with the PC for all professional liability claims in respect of, for example, errors and omissions, while you held shares in the PC.<sup>12</sup> A shareholder agreement can resolve some of these issues.

<sup>12</sup> See section 3.4(4) of the OBCA.

## About The Author



# Michael E. B. Taing

Michael is the managing lawyer for Healthcare Professionals and practices in the Corporate/Commercial and Real Estate practice groups at Hummingbird Lawyers LLP.

Michael's practice focuses on advising healthcare professionals including dentists, physicians, optometrists, pharmacists and other regulated healthcare professionals with their corporate/commercial and real estate matters. As the managing lawyer for healthcare professionals, Michael oversees the legal needs of his clients and works closely with all practice groups at the firm.

Michael's corporate/commercial practice includes incorporating and organizing professional corporations and holding companies, corporate reorganization and restructure, compliance with laws and regulatory college requirements, purchase and sale of professional practices, amalgamations, asset rollovers, shareholder and partnership agreements, commercial financing, commercial lease negotiations and assignments, and other commercial agreements.

In addition to his corporate/commercial practice, Michael is often called upon to advise on complex real estate matters involving court orders, liens, matrimonial home designations, divorce and separation issues, and title clean up in estate matters. Michael's real estate practice also includes the purchase and sale of commercial and residential property, financing relating to both institutional and private lenders, title transfers, survivorship applications, and other matters relating to real property.



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