



OAG 10th Annual Scientific Session

October 27-29, 2006
Niagara-on-the-Lake, ON

INCORPORATING YOUR MEDICAL PRACTICE IN ONTARIO

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Presentation to
Ontario Association of
Gastroenterology

Niagara-on-the-Lake, October 29, 2006

“The GI Practice in Evolution”



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BACKGROUND

“The GI Practice in Evolution”



Evolution of Statutory Background

- **2000-2001 Amendments to Ontario Business Corporations Act (“OBCA”)**
 - ❖ Authorized use of corporations by regulated professionals, on conditions (previously only architects and engineers)
- **2002 Amendments to Regulations under the Regulated Health Professions Act (“RHPA”)**
 - ❖ Enabled issuance of Certificates of Authorization to professional corporations (“PC”)
- **2005-2006 Amendments to OBCA and Regulations under OBCA and RHPA governing Physician and Dentist Professional Corporations**
 - ❖ Allowed the issuance of non-voting shares to family members and trusts for minor children
 - ❖ Consequential amendments to ensure control rests with the professional member



Why Incorporate?

- **Asset Protection from suppliers, landlords, lenders**
- **More Flexibility in Commercial Arrangements and salary/bonus/dividend decisions**
- **Professional Corporations have existence surviving death of member or departure of partner in the business (OBCA 3.3)**
- **Current Tax Benefits**
 - ❖ Deferral of tax using “small business deduction”, year end selection
 - ❖ Income splitting
 - ❖ Potential use of “capital gains exemption” on sale of practice
- **Estate Planning**
- **Some precedent through the use of:**
 - ❖ management corporations (non-professional services, such as premises, non-professional staff, equipment and supplies)
 - ❖ technical services corporations (non-professional technical services to patients of a practice, such as hygiene and laboratory services)



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The Process of Incorporating a Medical Practice

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How Do I Do It?

- **Step 1: Incorporation of a corporation through the Companies Branch of the Ministry of Government Services**
 - ❖ Service providers: lawyers, accountants, corporate services firms (cyberbahn, dye & durham)
 - ❖ Ontario Medical Association has an online service for members (www.oma.org)
 - *Legal and accounting advice is still required in order to capture the benefits of incorporating in the first place and to avoid creating new issues*



How Do I Do It?

- **Step 2: Apply to *The College of Physicians and Surgeons of Ontario* for a “*Certificate of Authorization for a Corporation to Practice Medicine*”**

❖ Package is available online at:

http://www.cpso.on.ca/Info_physicians/members/inc.htm



How Do I Do It?

- **Step 3: Organize the Corporation**
 - ❖ Minute book
 - ❖ Appointing directors
 - ❖ Issuing shares to shareholders
 - ❖ Setting up bank accounts
 - ❖ Stationary, cheques, etc.



How Do I Do It?

▪ **Step 4: Transfer of Existing Practice Into Corporation**

- ❖ Requires agreements based on legal and accounting advice
- ❖ May require dealings with third parties
- ❖ May require assignment/renegotiation of contracts
- ❖ Can be structured on a tax-deferred basis with deferred consideration funded over time or integrated with estate planning
- ❖ Timing of transfer is important concerning CCA pools and initial equity position of corporation
- ❖ Structure to ensure no GST on the transfer and to minimize/avoid PST



How Do I Do It?

▪ **Step 5: Keep it Alive and Make Sure it Works as Intended**

- ❖ Reflect the existence of the corporation in day-to-day affairs and in all contracts and relationships (e.g. with hospitals)
- ❖ Corporations are separate legal persons
 - Very different from sole proprietorship
 - Meaningful differences from partnerships
 - The member needs to become “employed” by the corporation – pay is subject to statutory withholdings and remittances
- ❖ Attend to required filings with College
 - Annual filing package at:
http://www.cpsso.on.ca/Info_physicians/members/inc.htm
 - Duty to promptly file notice of changes in name, constating documents, shareholdings



How Do I Do It?

- ❖ Attend to governmental registrations and annual/periodic filings and information slips (tax and otherwise)
- ❖ Flow of funds must reflect corporation and shareholders – OHIP payments due to the medical professional should be streamed to corporate bank account



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THE DETAILS - IT'S NOT THAT EASY

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Incorporation Details

▪ Selection of Name

- ❖ Prescribed rules under OBCA and RHPA
- ❖ “*Gastro Inc.*” and “*The Tummy Doctor*” are not acceptable corporate names or “trade names”
 - Unlike dentists, who can practice using a trade name, provided the corporate name complies with the regns.
- ❖ Must include “*Professional Corporation*”
- ❖ Must include the surname of at least one doctor shareholder as registered with College
 - May also include first name/initials
- ❖ Must indicate the health profession to be practiced (i.e. medicine)
- ❖ Cannot include anything else
- ❖ So that leaves us with
 - **“J. Smith Medical Professional Corporation”**



Incorporation Details

- **Business restricted to the particular discipline (multidisciplinary practices not allowed) and ancillary investment/deployment of surplus assets**
- **Directors and Officers must be shareholders who are members of the College**



Incorporation Details

- **Voting Shareholders limited to Members of the College**
 - ❖ Includes control through voting agreements and unanimous shareholder agreements
- **Non-Voting Shareholders limited to:**
 - ❖ Member of the College
 - ❖ “Family Members” (the member’s spouse, child or parent)
 - ❖ A trust for minor children of the member
 - ❖ **Not eligible: holding companies (so limited options to extract surplus income/assets without tax consequences), trusts including other beneficiaries, certain discretionary trusts**



Tax Benefits Subject to Many Issues

- Income attribution
- “professional services corporation” rules affecting previously-employed doctors
- “Associated corporation” and “specified investment business” rules affecting available deferral
- Lack of “integration” for earnings flowed through the company
- Restrictions on capital gains exemption
- Employee-taxation issues (e.g. car expense)
- Other taxes might become applicable (e.g. EHT)
- Partnerships of professional corporations have to share deferrals and can't chose non-Dec. 31 year end



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ISSUES AND CONCERNS

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Asset Protection is Limited

- **Professional liability and regulation flows through to all member/shareholders**
 - ❖ Professional, fiduciary and ethical obligations (including professional misconduct, broadly defined) owed by practicing members flow through
 - ❖ Limitations on the physician's certificate to practice flow through to corporation



Asset Protection is Limited

- ❖ Duties to patients trump director's duties to the corporation
- ❖ Acts of the company deemed to be those of professional member shareholders, employees and agents
 - Liability of non-professional family members likely limited to shareholding interest unless take part in the management of the business
 - Limited liability partnerships in certain provinces may address certain concerns



Asset Protection is Limited

- **While commercial liability does not flow through, it can extend to members through guarantees, assignment of pre-existing contracts to the corporation without a release for the original party, and a substantial body of caselaw on “*piercing the corporate veil*”**
 - ❖ E.g. *Wildman* case (Ont. CA October 2006)
- **Extensive number of statutes and legal principles imposing personal liability on directors**
 - ❖ Governmental remittances, for e.g.



Costs

- **Incorporation/organization/administration fees**
- **Advice concerning structuring share capital for legal, tax and estate-planning concerns**
- **Agreements and implementation of transfer of practice to the company**
- **Insurance needs increase due to additional parties**



Issues

- **Maintaining control and ability to direct sale of all shares regardless of ownership by family members**
 - ❖ Shareholder agreements and share provisions enabling repurchase and powers of attorney for voting
 - ❖ Family law agreements and concerns
 - ❖ Conflict of interest/consent issues while shares owned by minors/trusts for minors – need clear provisions
 - ❖ Creditors of family member shareholders



Issues

- **Reorganizations and reallocations as needs change and issues arise – not as flexible as a fully-discretionary trust**
 - ❖ Minor children reaching age of majority
 - ❖ Marriage, divorce, death, illness
 - ❖ Extraction of surplus or appreciating assets (e.g. real estate) or concern re whether activities are “ancillary” to medical practice or to maintain eligibility for CGE
 - ❖ Use of multiple non-voting equity classes might be necessary to “sprinkle” dividends and distributions of capital



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