

LEGAL FICTIONS FOR FICTION WRITERS

Legal Disclaimer: This information is provided for educational purposes only. Consult a qualified lawyer in your jurisdiction for all legal opinions for your specific situation.

SOLE PROPRIETORSHIP

- Writer and business are the same legal person
- Business registration is often required to do business in a province or state. Sometimes a business may be exempt from registration if one is doing business in one's name.
- Doing business includes having a business address in the province, state or territory, or selling works on a regular basis, or engaging in other conduct aimed at generating a profit.

BENEFITS OF SOLE PROPRIETORSHIP

- Minimal paperwork to establish business
 - May need to register operating name or names if one is using a name other than one's own.
 - No filing of Articles of Incorporation & Bylaws or Memorandum & Articles, (the constitutional documents that create the corporation, describe the structure and provide guidelines for corporate operations)
 - No Board of Directors and no special filings of financial statements or other information required for corporations.
- Less transparency, less control on operations

DRAWBACKS OF SOLE PROPRIETORSHIP

- All profits and losses from the writing business are reported on the writer's personal tax return.
- Writer must pay self-employment tax. (In 2018, 15% on the first \$47,629 of taxable business income and 20.5% on the next \$47,629)
- Writer is personally responsible for any liability of the business including copyright infringement, contract disputes, defamation, etc. All of the writer's property is at risk.
- Business dies when the writer dies.

BENEFITS OF INCORPORATING

- Creation of a separate legal entity
- Limited liability
- Lower corporate tax rate- Personal tax rate is generally higher
- Better access to capital and grants
- Continuous existence
- Useful way to structure long term joint ventures or projects requiring collaboration with other authors

SEPARATE LEGAL IDENTITY

The corporation is a legal fiction, an entity, much like a hero or heroine in the novel, which exists separate and apart from the author. The corporation's power and characteristics are defined by written laws and its constitutional documents, which are filed with a corporate register, for the purposes of this talk, Corporations Canada.

LEGAL FICTION-CORPORATION AS A PERSON

- A corporation has the same rights and obligations as a natural person under Canadian law.
- A corporation can register a doing business as name or pen name, acquire and hold property (including intellectual property), earn income, obtain a loan, enter into contracts, sue or be sued, and can be found guilty of committing a crime.
- Although the shareholders may own the corporation, none of the corporation's property belongs to the shareholders. Shareholders, directors and officers must treat the corporation as a separate person.

LIMITED LIABILITY & CAVEATS

- As a general rule, shareholders of the corporation are not responsible for its debts. If the corporation goes bankrupt the shareholders will lose nothing more than their investment in the corporation, even though the shareholders are the owners of the corporation.
- Limited liability with respect to certain parties can be lost by indemnification provisions in contracts, by guarantees of the corporation or sometimes by operation of law.
- If a shareholder acts as a director, there may be circumstances when he or she may be held liable for the debts of the corporation if the director has acted or failed to act in accordance with his duties.

FINANCIAL ADVANTAGES

- Corporations are taxed separately from their owners.
- The corporate tax rate is generally lower than the individual tax rate, which can offer some fiscal advantages to the owner.
- Raising money for corporations is generally easier than raising it for sole proprietorships.
- Financial institutions tend to see loans to corporations as being less risky than those which are given to businesses which are not incorporated.

CONTINUOUS EXISTENCE

- So long as the corporation remains in good standing, it has perpetual existence. A corporation continues to exist even if every shareholder and director to die.
- Structured properly a corporation will always have an officer or director can act on the corporation's behalf and execute any contracts or protect any assets such as licenses or copyrights should the owner die or is incapacitated for a period of time.
- Can be used for estate planning and transitions. Shares in a corporation are personal property and can be transferred.

DRAWBACKS OF INCORPORATING: HIGH START UP COSTS

- Incorporating costs more than operating a business as a sole proprietorship.
- Writers should incorporate under the Canada Business corporations Act (“CBCA”) because:
 - corporate name can be used across Canada;
 - greater flexibility in terms of the location of the registered office or the location of where annual meetings are held
 - cost of incorporating online is \$200.
- Some of the costs are directly attributable to setting up the corporation, but others include ongoing professional fees for legal and accounting services necessitated by the administrative requirements.

DRAWBACKS OF INCORPORATING: ADMINISTRATIVE REQUIREMENTS

A federally incorporated business must file certain documents with Corporations Canada including:

- Articles of incorporation (which outlines the share structure of the corporation) and any amendments thereto.
- annual financial and controlling interest filings
- notices of any changes in the Board of Directors & in the address of the registered agent

In addition, a corporation must create and maintain

- a minute book containing the articles of incorporation, the bylaws (which are the rules governing the holding of meetings of the shareholders and directors and other internal operations), and minutes of meetings
- accounting records
- Share register with shareholder details

DRAWBACKS: MORE COMPLEX STRUCTURE

Because a corporation is a separate legal entity with no physical form, its activities must be carried out by individuals who have an interest in the corporation and who are entitled to act on its half. These individuals can be divided into three categories:

1. Shareholders – Own the corporation. They make decisions by voting and passing resolutions, generally at shareholders meetings. They elect the Board of Directors.
- 2, Directors – supervise the management of the corporation's business. A corporation must have at least one director. Directors are responsible for appointing the corporation's officers. A corporation cannot be a director.
3. Officers – a corporation's officers or positions such as president ,secretary, chief financial officer. Although a corporation's officers are appointed by directors their duties are normally set out in the bylaws. In general, officers are responsible for managing and carrying out the corporation's day-to-day business.

ACTORS WITHIN A CORPORATION: SHAREHOLDERS

- Shares represent an ownership interest in the corporation. They are property much like a car, house, or book.
- Any legal person can hold shares in a corporation including individuals, trusts, or another corporation. A person becomes a shareholder by buying the shares either from the corporation or from an existing shareholder.
- Unless the articles of incorporation provide otherwise, each share in the corporation entitles the shareholder to one vote.
- The shareholder's liability in a corporation is limited to the amount they paid for their shares.

ACTORS WITHIN A CORPORATION: DIRECTORS

- The Board of Directors supervises all of the activities of the corporation and makes decisions regarding those activities. A corporation must have at least one director. For corporations involved in book retailing, a majority of directors must be Canadian residents
- The number of directors is specified in the corporation's Articles of Incorporation. Shareholders elect directors at the shareholders' meeting. The length of any director's mandate will be set corporation's bylaws.
- A director must be at least 18 years old, not have been declared incapable under the laws of any Canadian province or territory, or by a court in a jurisdiction outside of Canada, be an individual (a corporation cannot be a director) and not be bankrupt.

ACTORS WITHIN A CORPORATION: OFFICERS

- Officers handle the day-to-day operations of a corporation. The officers are appointed by the Board of Directors and act under their supervision.
- Officers can bind the corporation. Their authority comes from the bylaws and resolutions adopted by the Board of Directors. Generally, corporations have a president, treasurer and secretary. The president is the executive officer; the treasurer handles finances and the secretary keeps the corporate records and handles share transactions.

DUTY OF CARE

- In carrying out their functions, the directors and officers must exercise at least the level of care and diligence that a reasonable person would exercise in similar circumstances and must act earnestly at all times in good faith and in the best interests of the corporation as opposed to their own personal interests.
- Officers and directors within the scope of their authority, must always remain informed about the corporation's activities and ensure that the corporation's activities are legal and in the best interests of the corporation.

STEPS TO INCORPORATING:NAME

- Every corporation must have a name. It must be distinctive, not be misleading or likely to be confused with names used by other organizations or businesses. The name may be a number or words and must indicate that the entity is a corporation.
- Using numbered company name eliminates the need to conduct a NUANS name search.
- If you want a name consisting of words that you must first conduct a NUANS name search before incorporating
- You can get a preapproval of your corporate name before filing the articles of incorporation or request and approval at the time of filing.

INCORPORATE : COMPLETING ARTICLES OF INCORPORATION

- The articles of incorporation establish the structure of your corporation. It is possible to amend the articles of incorporation or change the structure once you are operating by filing the requisite documents.
- The articles can be in the official language of your choice. They must include the following: the proposed corporate name
 - the corporation's province or territory in Canada
 - the share structure and any restrictions on share transfer
 - the number of directors
 - any restrictions you might want to set for your business or business activities

REGISTERED OFFICE ADDRESS AND FIRST BOARD OF DIRECTORS

- A corporation must keep its records and official documents at the registered office address which should be an address where you are sure to receive any documents that are sent to the corporation. The registered address is part of the public record and must be kept up-to-date.
- Once the articles of incorporation are filed with Corporations Canada, the first Board of Directors must meet to adopt the bylaws, appoint officers to act on behalf of the corporation and ensure that the officers arrange for employment and other contracts with the writer to ensure that the corporation has what it needs to conduct its business.
- The officers will need to obtain a business number and establish an account with Canada Revenue Agency and may need to complete provincial and territorial registration.

PROVINCIAL REGISTRATION

- The corporation will have to register in any province or territory where he carries on business. Registration is different from incorporation. A corporation may incorporate only once, but it can carry on business in a number of jurisdictions.
- Carrying on a business in a province or territory means that in that region the corporation:
 - operates a business;
 - has an address PO Box or phone number; or
 - offers services or products in order to make a profit.
- The cost of business registration is nominal and may be done as part of the federal incorporation process for certain provinces, including NS

USEFUL GOVERNMENT LINKS

- Canada Revenue webpage on small business <https://www.canada.ca/en/revenue-agency/services/tax/businesses/small-businesses-self-employed-income.html>
- Canada Revenue Checklist for New Small Businesses <https://www.canada.ca/en/revenue-agency/services/tax/businesses/small-businesses-self-employed-income/checklist-small-businesses.html>
- Corporate Records and other obligations <https://www.ic.gc.ca/eic/site/cd-dgc.nsf/eng/cs06645.html>
- Naming a corporation and link to NUANS Name Search <https://www.ic.gc.ca/eic/site/cd-dgc.nsf/eng/cs07447.html>
- CBCA Incorporate Page <https://www.ic.gc.ca/eic/site/cd-dgc.nsf/eng/cs06939.html>
- Canada Intellectual Property Links <https://www.canada.ca/en/services/business/ip.html>
- ISBN Canada <https://www.bac-lac.gc.ca/eng/services/isbn-canada/Pages/isbn-canada.aspx>
- SOCAN (Music Rights) <http://www.socan.com/>