



**The Law Society
of Manitoba**

INCORPORATED 1877 | INCORPORÉ EN 1877

CORPORATE COMMERCIAL

Chapter 2

Corporations

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TABLE OF CONTENTS

TABLE OF CONTENTS	1
A. THE CREATION OF THE CORPORATION.....	3
1. Advantages and Disadvantages	3
2. Federal or Provincial Incorporation	4
3. Incorporation	6
4. Organization.....	21
5. Maintenance.....	25
6. Special Statute Corporations	30
B. CORPORATE FINANCE AND SECURITY CERTIFICATES.....	33
1. Background	33
2. No Par Value.....	33
3. Shares Must be Fully Paid	34
4. Stated Capital	34
5. A Corporation's Own Shares.....	35
6. Dividends	37
7. Security Certificates	37
C. DIRECTORS AND SHAREHOLDERS	40
1. Directors	40
2. Shareholders	50
3. Conclusion	56
D. SHAREHOLDER AGREEMENTS	57
1. Introduction.....	57
2. Pooling Agreements	58
3. Voting Trust Agreements	58
4. Unanimous Shareholder Agreements	58
5. Shareholder Remedies.....	68

E.	FUNDAMENTAL CHANGES, REGISTRATION AND DISSOLUTION	72
1.	Registration of Bodies Corporate.....	72
2.	Dissolution of Bodies Corporate	74
3.	Continuance	77
4.	Amalgamations	78
F.	PRECEDENTS	83
1.	Links to Companies Office and Corporations Canada Forms and Guidelines	83
2.	Checklist for Incorporation	84
3.	Sample Share Rights and Restrictions	86
4.	Shareholder Agreement Checklist	89
5.	Shareholder Agreement Drafting Checklist	94
6.	Unanimous Shareholder Agreement.....	106
7.	Sample Reporting Letter to Client.....	126

A. THE CREATION OF THE CORPORATION

1. Advantages and Disadvantages

a) Limited Liability

A corporation is a legal entity separate from its owners (shareholders). **Its rights and obligations are found in legislation and the common law.** For the purposes of this chapter the main pieces of legislation are *The Corporations Act* (MCA) and the *Canada Business Corporations Act* (CBCA).

Generally speaking, the owners have no direct relationship with and are not personally liable to pay creditors of the corporation (CBCA s. 45(1) and MCA s. 43(1)).

Although freedom from personal liability is no longer absolute (CBCA ss. 38(4), 146(5), 226(5) and MCA ss. 36(4), 140(5), 219(5)), limited liability remains an important consideration insofar as ordinary debts of the corporation are concerned.

b) Transferability

There is free and ready transfer of ownership of the corporation by the sale and transfer of the shares which represent the ownership.

However, this feature of transferability may well be undesirable in some situations because control of the corporation can easily be shifted, and “unacceptable” parties brought in as shareholders.

These undesirable aspects of transferability can be eliminated in several ways; one of the more common ways is to restrict the transfer of shares in the articles of incorporation. The problem can also be avoided by the shareholders of the corporation entering into an agreement which places certain restrictions on the transfer of shares.

c) Perpetual Existence

The corporation will continue to exist in perpetuity, as long as all required filings to maintain its existence are made, or until action is taken to liquidate and dissolve the corporation.

Because corporations survive shareholders, many shareholders prefer to have an agreement among the shareholders of the corporation with buy-sell provisions to cover illnesses, incapacitations, resignations, and death.

d) Tax Treatment

The income of a Canadian-controlled private corporation (a “CCPC”, as defined in *Income Tax Act* (ITA) s. 125(7)) is taxed at a much lower rate than the income of a public corporation.

The ITA provides for a system of integration of tax payable on income flowed through a corporation so that income taxed as earned by the corporation and income taxed as earned by the individual when paid out by the corporation is roughly equal to the tax that would be payable if the income were earned by the individual directly. This is achieved through a dividend gross-up and dividend tax credit as provided in the ITA.

In certain circumstances, some measure of tax saving is possible if income can be left in the corporation and not paid out to shareholders.

e) Formal Structure

The formal structure of corporations makes them readily adaptable to larger, faster growth. However, the formalities and costs incident to the corporate status in some cases make the corporation form of doing business undesirable to the “small” businessperson.

2. Federal or Provincial Incorporation

a) General

A federally incorporated corporation has the power to carry on business anywhere in Canada, subject to provincial laws, which, except for Ontario and Quebec, generally require the registration of federally incorporated corporations doing business within the province.

In Manitoba, a federally incorporated corporation must register under Part XVI of the MCA within 30 days after commencing its business or undertaking within the province.

Any other extra-provincial corporation must also register under Part XVI before commencing its business or undertaking within the province (MCA s. 187(3)). All extra-provincial corporations, all federal corporations, and all Manitoba corporations must comply with the filing and disclosure requirements contained in Part X of the MCA concerning annual returns and special returns.

Similarly, a corporation incorporated in Manitoba cannot carry on business in another province without first registering in that province. However, such registration may not be accepted if the desired name is not available for use in that province. A federally incorporated corporation can use its name in every province of Canada as a matter of right.

The major considerations in determining the jurisdiction of incorporation will be the location of the business, the type of business, and the potential for future growth. If the proposed business is to be carried on in several provinces, a federal corporation may be advisable. On the other hand, if it is anticipated that the business of the corporation will be carried on within one or two provinces only, then incorporation in one of those provinces and registration in the other would likely be advisable.

b) Some Differences Between the CBCA and MCA

There are only a few significant differences between the CBCA and MCA. Under both statutes, articles of incorporation and articles of amendment are granted as a matter of right provided the statutory requirements have been met and they are not otherwise contrary to law (CBCA ss. 7, 8 and 262 and MCA ss. 7, 8 and 255).

The following are some of the more significant differences:

- The CBCA requires that 25% of the directors are resident Canadians (generally, Canadian citizens ordinarily resident in Canada, see CBCA ss. 105(3) and 2(1)). The MCA provides that 25% of the directors of a corporation must be residents of Canada, thereby excluding the requirements of Canadian citizenship or landed immigrant status (MCA ss. 100(3) and 100(3.1)).
- The MCA requires that notice of the execution or termination of a unanimous shareholder agreement is filed with the Director within 15 days of its execution or termination (MCA s. 140(6)). The CBCA has no such provision.

- Both the CBCA and the MCA require that share rights be specified in the articles of a corporation and permit a corporation to provide for more than one class of shares in the articles. However, in the CBCA, if the articles provide for more than one class of shares, at least one class of shares shall have the rights set out in (CBCA s. 24(3)).
- The MCA provides that a resolution in writing signed by all directors is as valid as if it had been passed at a meeting of directors and it is “effective from the date specified in the resolution, but that date shall not be prior to the date the first director signed the resolution” (MCA s. 112(1)). The CBCA has a similar provision (CBCA s. 117(1)), but it does not provide an effective date for the resolution.

3. Incorporation

a) General

Incorporating a corporation involves more than just satisfying the initial requirements of the CBCA or the MCA. Once the articles of incorporation are filed, pursuant to either the MCA or the CBCA, the corporation will continue to be governed by and must operate under that statute throughout its existence.

If subsequently, it appears that any amendment is required to the articles of incorporation, articles of amendment must be filed, and this will require time and expense. Amendments may also trigger a minority shareholder's rights, including the right to have that minority shareholder's shares purchased at fair market value. Therefore, it is advisable to carefully consider all questions before the articles of incorporation are prepared and registered. MCA s. 6, which is almost identical to CBCA s. 6, reads as follows:

- 6(1)** Articles of incorporation shall be in the form the Director requires and shall set out, in respect of the proposed corporation,
- (a) the name of the corporation;
 - (b) the place in Manitoba where the registered office is to be situated, and the address, giving the street and number, if any;
 - (c) the classes and any maximum number of shares that the corporation is authorized to issue, and
 - (i) if there will be two or more classes of shares, the rights, privileges, restrictions and conditions attaching to each class of shares, and
 - (ii) if a class of shares may be issued in series, the authority given to the directors to fix the number of shares in, and to determine the

designation of, and the rights, privileges, restrictions and conditions attaching to, the shares of each series;

- (d) if the issue transfer or ownership of shares of the corporation is to be restricted, a statement to that effect, and a statement as to the nature of such restrictions;
- (e) the number of directors or, subject to clause 102(a), the minimum and maximum number of directors of the corporation, and in every case the names in full of each first director and his residence address giving the street and number, if any; and
- (f) any restrictions on the businesses that the corporation may carry on.

6(2) The articles may set out any provisions permitted by this Act or by law to be set out in the by-laws of the corporation.

b) Articles of Incorporation

Incorporation under both the CBCA and the MCA is accomplished by delivering articles of incorporation, in duplicate, together with the required fees to [Corporations Canada](#) and the [Companies Office](#), respectively. Both websites provide links to fillable corporate forms and guidelines for their completion. Provided the statutory requirements have been met and the articles of incorporation are not otherwise contrary to law, the certificate of incorporation must be issued (CBCA s. 8 and MCA s. 8).

However, the onus for ensuring that the articles comply with the law rests solely on the incorporator.

Corporations Canada and the Companies Office will only check documents to ascertain that they are legible and in the form required and that all paragraphs have been completed. The corporation comes into existence on the date shown on the certificate of incorporation (CBCA s. 9 and MCA s. 9).

Forms and their requirements are no longer prescribed by regulation but are set by the Director of the Companies Office in Manitoba. On January 15, 2020, Corporations Canada adopted a digital-first approach to forms for business and not-for-profit corporations. This means that PDF forms for most online services are no longer available for download. They are now [available on request](#).

One or more individuals or bodies corporate may incorporate a corporation under CBCA s. 5(1) Incorporators. The CBCA provides that the individual (defined as a natural person) may only incorporate a corporation if that individual is not less than eighteen years of age, "is not incapable" or does not have the status of bankrupt (CBCA s. 5(2)). The MCA s. 5(1) is similar in that it provides that one or more persons, being a body corporate or a natural person may incorporate a corporation. MCA s. 5(2) prohibits any person who is less than 18 years of age or has the status of a bankrupt from incorporating a corporation. Incapacity is not mentioned in the MCA section.

c) Corporate Names

It is mandatory under both the CBCA and MCA that all corporate names (other than numbered corporations) be reserved before filing the articles of incorporation.

Under the CBCA a name is reserved by ordering directly online from Corporations Canada or by requesting a name search through one of the several national name search houses which use the services of the automated name search system ("[NUANS](#)") developed and owned by the Government of Canada. Once a name is reserved on this system, the reservation report is valid for 90 days and cannot be renewed. If the reservation report expires you must order and pay for another report to submit your request.

*NUANS is a search system whose database includes the Federal corporations name database, the Canadian trademark name databases, and provincial corporate and business name databases for Ontario, Alberta, New Brunswick, Nova Scotia, and Prince Edward Island. There is a small charge for a NUANS Report. The Government of Canada website has a list of [NUANS members in Manitoba](#) or you can contact [Innovation, Science and Economic Development Canada](#) to inquire about becoming a member.

Under the MCA, a name is reserved by filing a [request for name reservation](#) in the Companies Office or [online](#) . The request is processed through the NUANS system. A Manitoba name reservation request will result in a five-page report. The first two pages list names on record in Manitoba. The next two pages list names in other Canadian jurisdictions. The last page will list trademarks. The report will not include business names that are not registered at the Companies Office.

Reservation of a name is not “protection” or a “guarantee” that the name is automatically available. The use of a name is done at the risk of the user.

Once the requested name is reserved at the Companies Office, it is reserved for 90 days. During this time, the necessary forms must be filed to register the name. The name chosen cannot be identical or confusingly similar to an existing trademark, business, association or corporation. If anyone complains about the name, and that complaint is held valid, the corporation must change the name. See the notice [*“Choosing Your Business Name”*](#) from the Companies Office for some useful advice.

There are certain requirements for corporate names outlined in both the CBCA and MCA and their regulations which have been programmed into NUANS, some of which are:

- The name of the proposed corporation must include the word “Limited”, “Incorporated” or “Corporation”, or the corresponding abbreviation or the French equivalent of these words or abbreviation. A corporation may use and may be legally designated by either the full or the abbreviated form of the name chosen (CBCA s. 10(1) and MCA s.10(1));
- Both Acts (CBCA s. 12(1) and MCA s. 12(2)) and their respective regulations (Canada Business Corporations Regulations, 2001, SOR/2001-512 ss. 25-30 (SOR/2001-512) and Corporations Regulation 385/87 R s. 6 (Man. Reg. 385/87 R) set out a specific list and a description of specifically prohibited names;
- Both Acts (CBCA ss. 10-12 and MCA ss. 10-12) and their respective regulations (SOR/2001-512 Part 2 Corporate Names and Man. Reg. 385/87 R s. 6) have guidelines for determining the acceptability of a name, but generally speaking, the proposed name may not be the same as or similar to that of any known entity if the use of the name would be likely to confuse the public. SOR/2001-512 Part 2 Corporate Names is far more detailed in attempting to define what is “confusing” or “distinctive” or what would be “likely to mislead”.

The following are some of the more general rules for the granting of corporate names:

- The name shall not infer governmental, professional or financial intermediary status unless the appropriate consent has been obtained; e.g., Royal, Crown, Empire, Federal, Bureau, Commission, Research, Trust, Mortgage, Co-Op, Insurance, Bank, Canada Standard or “CS”, fraternal, pension fund, housing, Chamber of Commerce;
- The name shall not be obscene, or connote a business that is scandalous, obscene or immoral (SOR/2001-512 s. 27 and Man. Reg.385/87 R s. 6(6));

- The name must be distinctive (SOR/2001-512 s. 30 and Man. Reg. 385/87 R s. 6(1)). Under SOR/2001-512 s. 17, the CBCA regulation interpretation section, “distinctive” has been defined to mean a name “that distinguishes the business in association with which it is used or intended to be used by its owner from any other business or that is adapted to so distinguish them”;
- SOR/2001-512 s. 19 prohibits a corporate name that is confusing with a trademark, official mark or trade-name. SOR/2001-512 s. 18 provides that a corporate name is confusing with a trademark, official mark or trade-name if the corporate name is the same or if the use of both names is likely to lead to the inference that the corporate business carried on or intended to be carried on is connected with the trademark, official mark or trade-name business, whether the nature of the business of each is generally the same or not.

Under Man. Reg. 385/87 R s. 6(17) a name must not be the same as or similar to the name of any known body corporate, association, partnership or individual so that it is, in the opinion of the Director, likely to confuse or mislead. A corporation cannot have a name if it is one that the Director for any good and valid reason disapproves (MCA s. 12(2)(e)) such as where the proposed name is confusingly similar to a trademark.

In short, proposed names under either Act will be refused if they falsely imply a relationship between two businesses, since the public could be confused by the inference that one company has access to the resources of the other [e.g. “Kodak Canada Ltd.” and “Kodak Photography Ltd.”].

The federal government’s [Name Granting Compendium](#) sets out the name granting policy of Corporations Canada, which is responsible under the CBCA for ensuring that names proposed for Canadian corporations meet the requirements of the Acts and their regulations.

- SOR/2001-512 s. 31 prohibits the use of “deceptively misdescriptive” names which are names that are likely to mislead the public in any language concerning any of the business, goods or services, the conditions under which the goods or services will be produced or supplied, the persons to be employed in the production or supply of the goods or services, or the place of origin of the goods and services. MCA s. 12(2)(f) also prohibits the use of deceptively misdescriptive names and Man. Reg. 385/87 R s. 6(13) provides that a word or expression is deceptively misdescriptive if it misdescribes, in any language,
 - (a) the business, goods or services in association with which the corporate name is proposed to be used;

- (b) the conditions under which goods or services will be produced or supplied or the persons to be employed in the production or supply of those goods or services; or
 - (c) the place of origin of those goods or services.
- If an element of the name of the proposed corporation includes the family name of an individual (with or without their given name or initials), the written consent of the individual (or heir or personal representative) to the use of the name must be filed with the articles, together with a statement that the named individual has or had a material interest in the corporation (CBCA SOR/2001-512 s. 28). Man. Reg. 385/87 R s. 6(4) is similar but does not require that the individual has or had a material interest in the corporation.
 - A corporation shall not have a name that is similar to that of an existing corporation, business or association, if the use of that name by the corporation would be likely to confuse or mislead, unless the existing entity consents in writing to its name being given in whole or in part to the corporation and, if required by the Director, the existing entity undertakes to dissolve/cease carrying on business as the case may be or to change its name within six months after the incorporation of the corporation (MCA ss. 12(3), 12(4)).

Under SOR/2001-512 s. 22(1), if the new corporation's name is confusing with the name of an existing corporation, but the new corporation will be a successor to the existing corporation, the name may not be prohibited as a confusing name if the existing corporation has ceased or will in the immediate future cease to carry on business under that corporate name and it undertakes in writing to dissolve or to change its name before the successor corporation begins carrying on business under the name. The new corporation must include the year of incorporation (or the year of the most recent amendment to the corporate name) immediately before the word "Limited", "Limitée", "Incorporated", "Incorporée", "Corporation", "Société par actions de régime fédéral" or "Société commerciale canadienne" or the abbreviation "Ltd.", "Ltée", "Inc.", "Corp.", "S.A.R.F." or "S.C.C.".

Two years after introducing the corporate name with the year of incorporation (or the year of the most recent amendment to the corporate name) included, a corporation may apply to change its name to delete the reference to the year, and its application for the name without the year is not prohibited for that reason alone (SOR/2001-512 s. 22(2)).

Under Man. Reg. 385/87 R s. 6(18), where a corporation with share capital has a designated number assigned to the corporation by the Director as its name, such name shall consist of the number followed by the word "Manitoba" and ending with

the word "Limited", "Incorporated", "Corporation" or the French form of one of those or its abbreviation.

Under Man. Reg. 385/87 R s. 6(19), where a corporation without share capital has a designated number assigned to the corporation by the Director as its name, such name shall consist of the number followed by the words "Manitoba Association" and ending with the word "Incorporated", "Corporation" or the French form of one of those, or its abbreviation.

The number in each case is assigned by the Director at the time of filing the articles and need not be preceded by a name reservation request. Acquiring a number as a name facilitates immediate incorporation without the delay of reserving and clearing a suitable name first.

It is the applicant's responsibility to create a suitable name for the corporation and is not the responsibility of the department or the Companies Office. Confirmation that a name is reserved does not relieve the applicant from the obligation to ascertain that the name is not confusingly similar to that of an existing trademark or another entity, nor is it to be construed as an undertaking by the department that the reserved name will automatically be available.

Accordingly, when incorporating be aware that:

- The NUANS report will include trademarks, partnership names, and sole proprietorships, but businesses or style names and many foreign names will not necessarily appear in the computer printout. You should also conduct searches of trademarks and business name registrations, and telephone directories and such other directories for similar names;
- Depending upon the name that is submitted for reservation, two computer searches made on the same day for the same name may reveal different results. This is because some names are characterized as "weak" names in that the names are overused. There are thousands of corporations using "weak" terms such as "Maple Leaf", "Imperial", "National", "United", "General", "Canadian", "Associated", and many others. If the name is a "weak" name, you should consider whether it would be desirable to submit variations of the name or perhaps obtain a second NUANS search;
- The presence or absence of hyphens in a name or periods between initials may result in different names being shown on different computer searches. If those variations exist in the proposed name, you may wish to submit the variations when you obtain your NUANS search.

Remember that where a corporation obtains a name that contravenes either the CBCA or the MCA, even if it is by inadvertence or otherwise, and whether it happens when the corporation comes into existence, or is continued, or has received a change of name, the Director may direct the corporation to change the name (CBCA s. 12(2) and MCA s. 12(7)). Your client may be displeased if the name of the corporation must be changed several months into operation, so care should be taken at the outset to reduce this risk.

Under both the CBCA and MCA, a corporation may carry on business under a business name as long as the proposed business name is otherwise acceptable. In Manitoba, that would mean registering the proposed business name under *The Business Names Registration Act*, which would require a business name reservation. (See Corporate Commercial Chapter 1 - Business Entities for more detail).

Because settling on an acceptable corporate name may be a lengthy process, start the process as quickly as possible. The use of a numbered name will expedite incorporation and may be quite acceptable to a client where the corporation will not be carrying on business with the public or where a corporation is needed quickly without there being sufficient time to go through the naming process described above.

d) Registered Office

Under MCA s. 19, a corporation is required to have a registered office in the place within Manitoba that is specified in its articles or in a special resolution.

Under CBCA s. 19(1), a corporation is required to have a registered office in the place in the province in Canada that is specified in its articles. In addition, a notice of registered office form must be sent to the Director at the time of filing the articles indicating the exact address of the registered office (CBCA s. 19(2)).

A corporation may, by special resolution of its shareholders (see the definition in CBCA s. 2(1) Interpretation and MCA s. 1 Definitions), change the place in which the registered office of the corporation is situated to some other place within Canada or Manitoba, as the case may be (CBCA s. 173(1)(b) and MCA s. 19(2)). Both the CBCA and the MCA require a corporation to send the Director a notice of the change of the location of the registered office in the form the Director fixes within 15 days of such change (CBCA s. 19(4) and MCA s. 19(4)). It is only under the CBCA s. 19(2) that a corporation must also send articles of amendment to the Director with the notice of change.

All the records that the corporation is required to prepare and maintain are to be kept at the registered office of the corporation. The CBCA s. 20(5.1) permits certain corporate and accounting records to be kept at a place outside of Canada and the MCA s. 20(5) permits certain corporate and accounting records to be kept at a place outside of Manitoba provided that, in each case, the records are accessible electronically for inspection at the corporation's registered office during regular office hours and the corporation provides the technical assistance necessary to facilitate the inspection.

The MCA s. 20(4) also requires that if the accounting records of a corporation are kept outside Manitoba, the corporation must keep accounting records, adequate to enable the directors to ascertain the financial position of the corporation with reasonable accuracy on a quarterly basis, at the registered office or at another place in Manitoba designated by the directors.

It is important for a corporation to be diligent in filing any notices required when it changes its registered office because any notices or documents required to be sent to or served upon the corporation may be sent by registered mail to the registered office of the corporation shown in the articles or in the last notices filed under CBCA s. 19 or MCA s. 19. If any notice or document is sent in that way, it is deemed to be received or served at the time it would be delivered in the ordinary course of mail, unless there are reasonable grounds for believing that the corporation did not receive the notice or document at that time or at all (CBCA s. 254 and MCA s. 247).

The registered office of the corporation is not to be confused with the concept of corporate residence. Corporate residence is where the central management and control of the corporation is located and is not necessarily the place where its business is being carried on or even within the jurisdiction in which the corporation is incorporated.

e) Capital Structure

Subject to the articles of incorporation, the basic attributes of a share of a corporation should address:

- the right to vote at meetings of the shareholders;
- the right to receive any dividends declared by the corporation; and
- the right to receive the remaining property of the corporation upon a dissolution.

Shares which include all of the above rights are frequently designated as “common shares,” although such a designation is not required.

Because such attributes are so basic to the concept of a share, MCA s. 24(4) states that unless the articles otherwise provide, each share of a corporation entitles the holder to vote at all meetings of the shareholders except meetings at which only holders of a specified class are entitled to vote, to receive any dividend declared by the corporation and to receive the remaining property of the corporation upon a dissolution.

CBCA ss. 24(3) and 24(4)(b) provide that the right to vote at any meeting of the shareholders of the corporation, the right to receive any dividend declared by the corporation and the right to receive the remaining property of the corporation upon dissolution must be attached to at least one class of shares, although not necessarily to the same class. However, where a corporation has only one class of shares, the rights of the holders are equal in all respects and include these rights.

Shares of a class which confer on the holder some preference over the holders of shares of another class are generally referred to as preference shares, although such a designation is not required. No one particular preference is required for a share to be considered a preference share.

The degree and kinds of preferences which may attach to a share are almost limitless. Preference shares may carry restrictions, conditions and limitations as well as special rights and preferences.

The classes of shares that the corporation is authorized to issue must be set out in the articles of incorporation. When drafting the articles, a decision must be made as to whether there will be more than one class of shares and, if so, the terms and conditions attached to each class must be set. There are no restrictions on the number of classes which may be created, but if the articles provide for more than one class, they must set out the rights, privileges, restrictions and conditions attaching to the shares of each class (CBCA s. 24(4)(a) and MCA s. 24(3)).

The articles of incorporation may limit the number of shares of any class that may be issued by the corporation or may permit an unlimited number to be issued.

Keep in mind that:

- under the MCA and the CBCA, the incorporation fee is not affected by the number or classes of shares provided for in the articles;
- any subsequent amendment to the articles to change the authorized share capital will require time and expense; and

- depending on the nature of the change, the authorization to amend the articles for that purpose may require a separate vote of each or some of the classes of shares of the corporation, and even if the vote is favourable, in certain cases any dissenting shareholder may have the right to require the corporation to repurchase the dissenting shareholder's shares at their fair value in accordance with the Act (CBCA s. 190 and MCA s. 184(3)). (Note: The Acts state "fair value", and whether that equates to "fair market value" would have to be determined from the case law.)

For these reasons, it may be desirable for the articles filed at the time of incorporation to include additional classes of shares that may be required in the future so as to avoid the need to incur the time and expense to comply with the procedural requirements associated with amending the articles of the corporation.

f) Rights and Restrictions Attached to Shares

As previously stated, unless the articles otherwise provide, each share of a corporation entitles the holder: to vote at all meetings of the shareholders, except meetings at which only holders of a specified class of shares are entitled to vote (as set out in the CBCA or the MCA); to receive any dividend declared by the corporation and; to receive the remaining property of the corporation upon a dissolution (CBCA ss. 24(3), 24(4)(b) and MCA s. 24(4)). In all other respects, the attributes of shares are determined by the provisions drafted for the share rights which form part of the articles of incorporation.

The following are some of the more common rights and restrictions attached to shares.

i. Voting

The right to vote at all meetings of shareholders, except meetings at which only holders of a specified class of shares are entitled to vote, must be conferred on at least one class of shares of a corporation incorporated under CBCA s. 24(4). There is no corresponding section in the MCA, although unless the articles otherwise provide, each share of a corporation incorporated under the MCA carries with it the right to vote (MCA s. 24(4)).

Although the conditions attaching to a class of shares may not confer voting rights upon the holder of those shares, or only conditional, restricted or limited voting rights, all shareholders are entitled to vote on the issues listed in CBCA s. 176(1) and MCA s. 170(1) (except clauses a, b and e if so provided in the articles) which are matters considered to be of fundamental importance to the corporation.

ii. Dividends

Shares may carry the right to a preferential dividend which entitles the holder to the payment of a specified dividend, if and when declared by the directors of the corporation, before any dividend is paid on another class of shares.

In granting such a preference as to the payment of dividends, the corporation cannot guarantee that dividends will, in fact, be declared. The directors must satisfy themselves that the solvency tests contained in CBCA s. 42 and MCA s. 40 have been met before they declare dividends in any instance.

In the absence of anything in the articles to the contrary, preferential dividends are deemed to be cumulative (*Webb v. Earle* (1875), L.R. 20 Eq. 556). If the dividend is not paid in any one year, the dividends accumulate and the cumulative amount must be paid before any dividends can be paid on other classes of shares. However, if the articles specify that any preferential dividends are non-cumulative, then if such share dividend is not paid in any year, it does not have to be made up in any subsequent year before dividends can be paid on other shares.

Preference shareholders cannot demand payment of a dividend until it is declared, even where there are arrears of cumulative dividends (*Re Canada Tea Co. Ltd.*, 1959 CanLII 413 (ON)). However, once declared, the amount due to each shareholder becomes a debt of the corporation for which the shareholder can sue the corporation (*Re Severn and Wye Ry.*, [1896] 1 Ch. 559; *Re Northern Ontario Power Co. Ltd.*, 1953 CanLII 302 (Ont. S.C.)).

If the articles are silent, a preference on dividends will exhaust a preference share's right to participate further (*Will v. United Lankat Plantations Co.*, [1912] 2 Ch. 571, affirmed [1914] A.C. 11 (H.L.)). As well, if the preference shares are participating, dividends must be paid on the common shares before the preference shareholder can share equally in the surplus profits (*Ramsay v. Steel Company of Canada*, 1930 CanLII 602 (UK JCPC)).

iii. Return of Capital

The holders of shares may be entitled to a preference as to the return of capital in the event of dissolution, liquidation, winding up or other distribution of the assets of the corporation. Such a preference must be expressly set out in the terms and conditions attaching to the preference shares and cannot be implied. Where there are no words giving preference shareholders a preference for arrears of dividends in the event of dissolution, liquidation or winding up, the preference shareholders are not entitled to receive such arrears (*Re Canada Tea Co. Ltd.*, 1959 CanLII 413 (ON SC)).

Sometimes the preference shareholders are given the further right to participate with the common shareholders in any distribution of the assets. If it is not expressly stated, the case law is unclear as to whether or not the preference shareholders are entitled to any such further participation (*International Power Co. v. McMaster University / In re Porto Rico Power Co.*, 1946 CanLII 34 (SCC)).

iv. Purchase for Cancellation

The corporation may, unless restricted by its articles and subject to the solvency tests contained in MCA s. 32(2) or CBCA s. 34(2), purchase or otherwise acquire shares issued by it. Such a purchase would be based on a contractual agreement entered into between the corporation and its shareholder and may occur at whatever price the parties may agree upon.

Upon a purchase for cancellation the stated capital account maintained for the class in which shares were purchased must be adjusted (CBCA s. 39(1) and MCA s. 37(1)), and the shares must be cancelled or restored, as appropriate (CBCA s. 39(6) and MCA s. 37(6)).

v. Redeemable Shares

A corporation may, subject to its articles and subject to the solvency tests contained in MCA s. 34(2) or CBCA s. 36(2), redeem any redeemable shares issued by it at prices not exceeding the redemption price as stated in the articles (CBCA s. 36(1) and MCA s. 34(1)).

Redeemable shares are frequently made redeemable at the option of the corporation upon notice and no consent or agreement of the holders of the shares is required in those circumstances. If all of the shares are not redeemed at once, provision is normally made for the selection of the shares to be redeemed by lot or as nearly as may be in proportion to the number of shares of the class registered in the name of each shareholder.

Upon a redemption, the stated capital account maintained for the class in which shares were redeemed must be adjusted (CBCA s. 39(1) and MCA s. 37(1)), and the shares must be cancelled or restored, as appropriate (CBCA s. 39(6) and MCA s. 37(6)).

vi. Retractable Shares

A retractable share is a share which is redeemable at the option of the holder rather than at the option of the corporation.

Shares which are redeemable at the option of the corporation or the holder for a fixed redemption amount, which are freely transferable and which are entitled to priority of payment of the redemption amount upon dissolution of

the corporation, have substantially all of the attributes of a demand note. Accordingly, they are very useful in tax planning situations where it is necessary to issue shares in the corporation equal to a fixed value.

vii. Conversion Privilege

A conversion privilege is simply a right given to a shareholder to convert their own shares into shares of another class. Such a right may be attractive as it allows the investor to convert shares which have a fixed rate of return into shares which participate fully in the growth of the corporation when financially appropriate. In some cases, the right to convert may only arise if stated conditions are met.

viii. Pre-Emptive Rights

CBCA s. 28(1) and MCA s. 28 state that the articles may provide that no shares of a class shall be issued unless the shares have first been offered to existing shareholders holding shares of that particular class, and further specify that those existing shareholders have the pre-emptive right to acquire the offered shares in proportion to their holdings of the shares of that class, at such price and on such terms as those shares are to be offered to others.

g) Restrictions on Share Transfers

As previously discussed, in the small, closely-held corporation it is often desirable to retain control within a limited group of individuals and their families. This can be achieved in a number of ways; one of the more common ways is to impose a restriction on the transferability of the shares of the corporation in the articles of incorporation.

Any restriction on the transfer of shares of the corporation must be set out in the articles of incorporation. The most common form of restriction would be to state that no shares of the corporation shall be transferred without the unanimous consent of the directors of the corporation. A similar effect could be obtained by providing that no shares of the corporation shall be transferred without the unanimous consent of all of the shareholders of the corporation.

h) “Private Company” Clauses

Most provincial securities acts provide exemptions from registration requirements to the “private company” which is defined in *The Securities Act* as being:

. . . a company in whose instrument of incorporation or articles,

- (a) the right to transfer its shares is restricted;
- (b) the number of its shareholders, exclusive of persons who are in its employment and exclusive of persons who, having been formerly in the employment of the company, were, while in that employment, and

have continued after the termination of the employment to be, shareholders of the company, is limited to not more than fifty, two or more persons who are the joint registered owners of one or more shares being counted as one shareholder; and

- (c) any invitation to the public to subscribe for its securities is prohibited.

If it is desirable to fall within the definition of “private company” as set out in *The Securities Act*, the articles should contain a restriction on the transfer of shares in the manner set out above. In addition, the provision in the articles restricting the number of shareholders and prohibiting any invitation to the public to subscribe for securities would be set out in the “Other provisions” section of the articles, and should follow the wording of *The Securities Act* verbatim.

Where it is known at the outset that the corporation’s securities will not be distributed to the public, it is essential to include these provisions as a matter of course. If that intention changes and the corporation later wants to solicit the sale of its shares to the public, it will be necessary to amend the articles to remove this restriction. Any solicitation to sell shares to the public must be done in a manner that complies with securities laws and rules.

i. Special Clauses

The articles may contain any provisions permitted by the Act or by common law to be set out in the by-laws of the corporation (CBCA s. 6(2) and MCA s. 6(2)). These special clauses would be contained in the “Other provisions” section of the articles of incorporation. Some of the more common special clauses are:

- **Special Majorities for Directors or Shareholders Actions**

If appropriate, the articles may require a greater number of votes of directors or shareholders than that required by the Act (CBCA s. 6(3) and MCA s. 6(3)) to effect any action.

- **Pre-Emptive Rights Clause**

The articles may provide for pre-emptive rights in favour of existing shareholders to acquire additional shares to be issued by the corporation (CBCA s. 28(1) and MCA s. 28(1)).

- **Clause Restricting Corporation from Acquiring its own Shares**

MCA ss. 32 and 33 and CBCA ss. 34 and 35 contemplate that the articles may restrict the corporation from purchasing or otherwise acquiring its own shares.

- **Lien on Shares**

The articles may provide that a corporation has a lien on a share registered in the name of the shareholder for a debt of that shareholder.

- **Rotating Board**

CBCA s. 106(3) and MCA ss. 101(2) and (3) provide that directors may be elected to hold office for a term expiring not later than the close of the third annual meeting of the shareholders following their election. This provision allows for a rotating board which, if desired, may be expressed in the articles.

- **Special Quorum**

CBCA ss. 114(1) and (2) and MCA ss. 109(1) and (2) contemplate that the articles may provide special directions as to where the directors are to meet and upon what notice and may specify the quorum required for a meeting of the directors.

- **Cumulative Voting**

MCA s. 102 and CBCA s. 107 set out that the articles may provide for the cumulative voting of the shareholders of the corporation when electing the board of directors, and the sections delineate the requirements of a cumulative voting provision.

For example, if it was agreed between X and Y that X, holding 10 voting shares, would be entitled to one representative on the board of directors and Y, holding 20 voting shares, was entitled to two representatives, the articles could provide for a board of three directors and the cumulative voting provision would give X 30 votes, which X would cast in favour of X's representative on the board, and Y would have 60 votes to distribute between Y's two representatives.

4. Organization

a) Duties and Powers of First Directors

Under the CBCA, each director named in the notice filed with the articles, and under the MCA, each director named in the articles, holds office from the issue of the certificate of incorporation until the first meeting of the shareholders (CBCA s. 106

and MCA s. 101). These directors are known as the “first director(s).” After a corporation comes into existence it is the duty of the first directors to hold a meeting to organize the corporation at which they may (CBCA s. 104 and MCA s. 99(1)):

- make by-laws;
- adopt forms of security certificates and corporate records;
- authorize the issue of securities;
- appoint officers;
- appoint an auditor to hold office until the first meeting of shareholders;
- make banking arrangements; and
- transact any other business.

b) Meeting of First Directors

The organizational meeting of the first directors usually deals with all of the matters in MCA s. 99(1) and CBCA s. 104.

In addition, there are certain records which must be prepared and maintained by the corporation (CBCA s. 20 and MCA s. 20). The initial records should be established as part of the organizing function. These include the preparation of records containing the articles and the by-laws and all amendments thereto, and a copy of any unanimous shareholder agreement, minutes of meetings and resolutions of shareholders, a register of directors setting out their names, addresses and occupations with the dates of their appointment and retirement, and a securities register in compliance with MCA s. 46 and CBCA s. 50.

c) By-Laws

The by-laws constitute the general rules which govern the internal affairs of the corporation and should be distinguished from resolutions which are passed for the purpose of authorizing a particular act of the corporation.

The directors are given the authority, unless the articles, by-laws or a unanimous shareholder agreement otherwise provides, to make, amend or repeal any by-laws that regulate the business or affairs of the corporation (CBCA s. 103(1) and MCA s. 98(1)). The directors must submit a by-law or an amendment or repeal thereof to the shareholders at the next meeting of the shareholders, and the shareholders may by ordinary resolution, confirm, reject or amend the by-law, amendment or repeal (CBCA s. 103(2) and MCA s. 98(2)). A by-law, amendment or repeal is effective from the date made by the directors until confirmed or amended or rejected by the shareholders (CBCA s. 103(3) and MCA s. 98(3)).

The Acts provide that the directors, without any authorization from the shareholders, have the power to conduct the banking and borrowing transactions of the corporation as well as the power to delegate this authority, provided that the articles, by-laws or a unanimous shareholder agreement do not otherwise provide (CBCA s. 189 and MCA s. 183). However, many banks will require a corporation to have a specific banking by-law, which is usually enacted as by-law No. 2. Assuming that at the time of their meeting the first directors know where they want to bank, they could pass the appropriate banking resolutions appointing the particular bank as banker for the corporation and authorizing the signing authorities.

Some of the more common matters dealt with in the general organizational by-law of the corporation, which is usually enacted as by-law No. 1, are:

- that the affairs of the corporation shall be managed by the board of directors and stating the number or the minimum and the maximum number of directors;
- specifying a quorum for directors' meetings;
- specifying the notice required to be given for directors' meetings;
- specifying the kind of vote required for decisions at directors' meetings (e.g., show of hands or ballot);
- specifying the offices, such as President, Vice-President and Secretary of the corporation;
- specifying the quorum for transaction of business at shareholders' meetings;
- specifying the kind of vote required for decisions at meetings of shareholders;
- specifying signing authority for contracts, documents or other instruments in writing (e.g., two directors or two officers).

d) First Resolution of Shareholders

After the first directors have held their organizational meeting, including the issuance of shares, the first directors will call a meeting of the shareholders. Such a meeting must be called not later than 18 months after the corporation came into existence (CBCA s. 133 and MCA s. 127). At the first meeting of the shareholders, the shareholders must, by ordinary resolution, elect directors to hold office for a term expiring not later than the close of the third annual meeting of the shareholders following the election (CBCA s. 106(3) and MCA s. 101(2)).

In addition, the shareholders must consider the approval of the by-laws enacted by the first directors at their meeting (CBCA s. 103(2) and MCA s. 98(2)), and must either appoint an auditor to hold office until the close of the next annual meeting or,

assuming it is not a public corporation, resolve not to appoint an auditor (CBCA ss. 162, 163 and MCA ss. 156, 157). Any decision not to appoint an auditor must be unanimous and must include the agreement of holders of shares who are not otherwise entitled to vote (CBCA s. 163(3) and MCA s. 157(3)). In the event the shareholders resolve not to appoint an auditor for the corporation, they should nonetheless approve the appointment of accountants.

e) Appointment of Officers

Upon being elected at the first meeting of the shareholders, the new board of directors should then proceed to appoint the officers of the corporation for the next year.

f) Miscellaneous

The records that must be prepared and maintained by the corporation are set out in the Acts (CBCA s. 20 and MCA s. 20). These documents should be prepared at the time of organization of the corporation and, where appropriate, inserted in the minute book of the corporation. In addition, all of the registers and ledgers of the minute book should be appropriately annotated and the share certificates should be prepared and inserted in the minute book. The banking documents should be prepared, in duplicate, with one copy inserted in the minute book and the original retained for execution and delivery to the bank. If a corporate seal will be adopted by the corporation, the corporate seal should be ordered.

When these matters are completed, it is advisable to have all of the appropriate parties attend at your office to execute the corporate documentation. You should also ensure that the executed share subscriptions are accompanied by the proper consideration for the purchase of the shares, as determined by the directors of the corporation (CBCA s. 25 and MCA s. 25).

g) Transfer of Assets to the Corporation

At the time a corporation is organized, whether any assets will need to be sold or transferred to the corporation should be considered. If an individual has been carrying on business in their personal capacity and such business is to be carried on by the corporation after its incorporation, the assets of the business (including the goodwill of the business) will need to be transferred or sold to the corporation.

It is important to obtain advice from the corporation's tax advisors prior to undertaking these steps as failure to properly structure the transfer or sale assets to the corporation can have significant tax consequences.

5. Maintenance

a) Meetings and Resolutions Generally

Once it comes into existence and is organized, the affairs of the corporation are governed by the actions of its directors and shareholders by way of resolution. Resolutions may be passed at a meeting of the directors or shareholders, or, in place of a meeting, resolutions may be passed by the written consent of all of the directors and shareholders (CBCA s. 117 and s. 142 and MCA s. 112 and s. 136).

It is not uncommon that minutes of a meeting of the directors or shareholders are prepared at a later date by the solicitor for the corporation, acting upon the advice of the individual who acted as secretary of the meeting as to the business conducted and the resolutions passed at the meeting. Minutes of a meeting, unlike written resolutions in place of a meeting, are just considered the written evidence of the events and decisions made or actions taken at the actual meeting. Accordingly, and provided that the meeting was actually held on the date stated and the resolutions recorded therein were actually passed, minutes can in a sense be backdated to the date of the meeting. One is simply recording at a later date in written form what took place at the meeting.

b) Annual Meetings

The directors of the corporation must call an annual meeting of the shareholders not later than fifteen months after holding each preceding annual meeting (CBCA s. 133 and MCA s. 127).

Upon being elected at the annual meeting of the shareholders, the new board of directors should then proceed to appoint the officers of the corporation for the next ensuing year.

c) Annual Returns

Division I of Part X of the MCA ss. 121-124 and s. 8 of the regulations require every corporation that is required to be registered under the MCA to file an annual return each year by the last day of the month following its anniversary month *as of* the last day of its anniversary month. Its anniversary month is the anniversary of its incorporation, registration or amalgamation, as the case may be.

Where the corporation has no director or officer residing in the province or has its registered office outside of the province, it must file a power of attorney with the Director. The power of attorney must appoint a person residing in the province to act as the corporation's attorney within the province for accepting service of any process (MCA s. 186).

d) Annual Financial Statements

i. General

The provisions concerning financial disclosure of closely-held corporations are contained in Part XIV of the CBCA and Part 8 of SOR/2001-512 and in Part XIII of the MCA and Part III of Man. Reg.385/87 R.

The regulations provide that the financial statements required to be submitted to the annual meeting of the shareholders under CBCA s. 155 and MCA s. 149, shall be prepared following generally accepted accounting principles as set out in the [*Canadian Institute of Chartered Accountants Handbook*](#).

ii. Role of the Accountant

A corporation can (and where it is closely held, it usually does) dispense with the audit requirement by obtaining the unanimous consent of all of the shareholders to approve the appointment of accountants as opposed to auditors.

The role of the accountant will then be to assist in the preparation of the financial statements (or simply review them depending upon the sophistication of the accounting department of the particular corporation), to provide advice on accounting matters, to prepare accounting records and to prepare or assist in the preparation of tax returns.

iii. Joint Policy Statement

The auditor is required to report on contingencies of the corporation, that is, situations or events which may arise after the effective date of the balance sheet which will jeopardize or enhance the asset position of the corporation. To report effectively on the contingencies, the auditor must be able to communicate directly with the solicitor for the corporation and this result is achieved by joint policy statements.

A joint policy statement was issued by the Canadian Bar Association and the Auditing Standards Committee of the CICA in 1978. Renegotiated in 2016 with the [*Auditing and Assurance Standards Board*](#) (replacing the *1978 AuG-46* and *2010 Interim Guidance* as of December 1, 2016) the [*Joint Policy Statement \(JPS\) on Audit Inquiries*](#) addresses communication between lawyers and auditors. JPS clarifies the roles of the lawyer, the client and the auditor in the preparation of the client's financial statements.

WHY LAWYERS NEED THE JPS

The auditor's report on financial statements is a statutory requirement for many corporations. Auditing procedures may include communicating with the corporation's lawyer who is regarded as uniquely qualified to comment on the claims that might affect the statement. The JPS helps ensure clarity around how lawyers and auditors communicate while still protecting solicitor-client privilege.

FREQUENTLY ASKED QUESTIONS ABOUT THE JPS

The [FAQ document](#) and [flowchart](#) were prepared to help the legal profession implement the JPS protocols in practice.

Under the joint policy statement, the corporation will submit an inquiry letter to its accountant who will send it directly to the law firm at least five business days prior to the desired effective date of the response. If the law firm is not able to respond within that timeframe, it should advise the client and the auditor as soon as practicable as to the date when the response will be available.

The responsibility rests with the corporation to list all claims and possible claims with respect to which the law firm's advice or representation has been sought, and to request the lawyer's response with respect to same. The response letter should confirm the accuracy of the claims listed by the corporation and should specify any claims in the lawyer's records which have been omitted in the inquiry letter.

The law firm will not indicate in the response letter any possible claims which are omitted from the inquiry letter, although it is the law firm's obligation to discuss with the client any possible claims, with a view to ensuring that the client is aware that it is its responsibility to inform the auditor of same and make the necessary disclosures. The law firm must examine its records and determine whether it can confirm the reasonableness of the client's evaluation of claims and possible claims, based on its own knowledge of the matter.

Where a law firm disagrees with the reasonableness of, or lack of clarity in, the client's evaluation of possible claims, it should not include its own evaluation of the claim in the response letter. Rather, it should set up a meeting with the client to discuss the matter. Where appropriate, the law firm will suggest to the corporation that the auditor be involved in those discussions. The law firm should make every effort to bring its disagreement to the client's attention as soon as possible.

If, following discussion, the client and law firm reach an agreement on a revised evaluation, the auditor will request that the client prepare a supplementary or amended inquiry letter to enable the law firm to confirm the revised evaluation. If, following discussion, the client and law firm do not reach an agreement, the auditor may prepare a memorandum of the discussion and request that the client and the law firm confirm its accuracy.

e) Changes in Registered Office, Directors, and Shareholders

i. Registered Office

A corporation may, by special resolution of its shareholders, change the place in which the registered office of the corporation is situated to another place within Canada (CBCA s. 173(1)) or Manitoba, as the case may be (MCA s. 19(2)). Under the CBCA, a notice of change of location of the registered office in the prescribed form must be filed with the Director within fifteen days of such change (CBCA s. 19(4)) together with [articles of amendment](#). This can be done through [Corporations Canada's](#) online registry system.

Under the MCA, articles of amendment are not required when a corporation changes its location or changes its address but notice of the change must still be filed with the Director. A special resolution by an MCA corporation can be used to change the location of the registered office to another place in Manitoba or to change the address of the registered office within the place specified in the articles. The directors of the corporation may also change the address of the registered office within the place specified in the articles. No matter how it is accomplished, a notice of change of location or change of address for the registered office must be filed with the Director within fifteen days of such change (MCA s. 19(4)).

ii. Change of Directors

Whenever there is a change in the directors of the corporation or if a corporation receives a notice of change of address of a director under CBCA s. 113(1.1), the corporation must send a notice to the Director, in the form the Director requires, within fifteen days after the change (CBCA s. 113(1)). The MCA s. 108 also requires the corporation to send a notice to the Director within fifteen days after any change is made among the directors of the corporation,

but there is no section specifically requiring directors to notify the corporation of their change of address.

iii. Change of Shareholders

A change in the shareholdings of the corporation may result from, inter alia, a death of the shareholder, a share transfer, a purchase for cancellation by the corporation, or a redemption of shares by the corporation. When a share transfer takes place, you must ensure that the directors or shareholders of the corporation approve the transfer, if approval is required, approve the cancellation of the old share certificate and the issuance of a new share certificate, and that the transfer is properly annotated in the ledgers and registers of the minute book of the corporation.

The corporation may send a notice of change of shareholder setting out the change to the Director, although such a notice is not required to be filed. If such a notice is not filed, the change should be reflected in the corporation's next annual return filing.

iv. Change of Officers

Whenever there is a change in the officers of a corporation, the corporation may send a notice of change of officers to the Director setting out the change in the form the Director requires. If such a notice is not filed, the change should be reflected in the corporation's next annual return filing.

f) Significant Control Register

Under the CBCA, a corporation is to prepare and maintain at its registered office a register of individuals with significant control over the corporation. The register is to contain certain information listed in s. 21.1(1). The register must be updated at least once each financial year of the corporation (CBCA s. 21.1(2)).

The terms "individual with significant control", "joint ownership or control" and "significant number of shares" are defined in CBCA s. 2.1. Individuals with significant control over a corporation include individuals who are the registered holders, beneficial owners or directly or indirectly control a "significant number" of shares. Individuals with significant control also include individuals who have direct or indirect influence that, if exercised, would result in control in fact of the corporation.

A "significant number of shares" of a corporation is a number of shares that carry 25% or more of the voting rights attached to all of the corporation's outstanding voting shares or 25% or more of all of the corporation's outstanding shares measured by

fair market value. If a corporation or other entity (such as a trust or partnership) has ownership or control over a significant number of shares, consideration should be given to who controls that corporation, partnership or trust because those individuals must be included on the register.

When incorporating a corporation, a significant control register should be prepared including the individuals with significant control of the corporation immediately following the incorporation and organization of the corporation.

MCA ss. 2.1(1) and (3) define an “individual with significant control” as each of the individuals who have any interests or rights in respect of a significant number of shares of the corporation (25% or more of the voting shares or 25% of the corporation’s outstanding shares measured by fair market value); who have direct or indirect influence over the corporations, that if exercised would result in control in fact of the corporation; and who may be such an individual as prescribed by the regulations.

MCA s. 21.1(1) requires the corporation to prepare and maintain at its registered office a register of “individuals with significant control” including: their name, date of birth and latest known address; their jurisdiction of residence for income tax purposes; the date on which they became or ceased to be such an individual; and a description of their interests and rights in respect of the shares of the corporation. Subsection (2) provides that the corporation must at least once during each financial year of the corporation take reasonable steps to ensure that it identifies all “individuals with significant control” and that the corporation’s register of those individuals is accurate, complete and up to date.

6. Special Statute Corporations

a) General

Special statute corporations are corporations which are governed by statutes other than the CBCA and the MCA. They carry on specialized types of businesses and because of this are required to comply with rules that are different from those rules governing ordinary corporations.

Special statute corporations fall into three separate categories:

- (1) corporations without share capital, often referred to as not-for-profit corporations (these are governed by Part XXII of the MCA, and other applicable provisions of the MCA);

- (2) regulated corporations, which are corporations whose businesses are supervised by government; and
- (3) corporations which are incorporated by a special act of the legislature or parliament.

b) Corporations Without Share Capital

Corporations without share capital are corporations which have no shares and no shareholders and which do not make distributions of profits.

The affairs of these corporations are managed, like all corporations, by their directors. Such corporations have no owners, and have members rather than shareholders. The members of such corporations are generally the individuals who benefit in some way from the existence of the corporation or who have an interest in seeing the corporation carry out its purpose.

Corporations without share capital are incorporated under the *Canada Not-for-profit Corporations Act* and Part XXII of the MCA, which set out the requirements and particulars for incorporation.

c) Registered Charities

A not-for-profit organization (which need not be a corporation without share capital) can apply for registration as a charitable organization under the *Income Tax Act (Canada)*. If the organization is registered as a charity, it is exempt from paying income tax under the Act and donations to the organization are tax deductible.

On June 1, 2019, the Canada Revenue Agency (CRA) launched a [suite of digital services](#), which includes the requirements for becoming a registered charity, a charities and giving glossary, and an online application form that replaces Form T2050 Application to Register a Charity under the *Income Tax Act*.

A registered charity must be created for [charitable purposes](#) and must devote its resources (funds, personnel, and property) to charitable activities. The term charitable is not defined in the *Income Tax Act* so the common law applies. The CRA lists some [case law](#) where charitable status was considered.

Accordingly, if you are incorporating a corporation without share capital that intends to register as a charity under the *Income Tax Act*, be sure to restrict its undertaking to a recognized charitable object.

d) Regulated Corporations

Regulated corporations are corporations that deal with the general public on a quasi-fiduciary basis. For reasons of public policy, their business is monitored by the government and they are incorporated under specific statutes that set out different requirements for incorporation.

The statutes also limit the powers and business of the corporation and provide for the supervision and licensing of the business of the corporation by various governmental bodies. Credit unions, insurance companies, trust companies and loan companies are all regulated corporations.

e) Statute or “Special Act” Corporations

These corporations are not incorporated under the provisions of the MCA, the CBCA or other public statutes, but are created by a specific act of the legislature of the province of Manitoba or the parliament of Canada.

Professional organizations, public and private foundations, non-profit organizations and religious institutions often incorporate in this manner. One reason is that the corporation may require specific powers that are not available to a corporation incorporated under a public statute. For example, if a statute incorporating a professional organization requires all practising members of a certain profession to be members of the professional organization, then such statutory powers are easily enforced.

In Manitoba, Special Act corporations are required to register under *The Corporations Act* (in the same manner as federal and extra-provincial corporations do) unless it is a type of body corporate to which *The Corporations Act* does not apply, or where the provisions of the Special Act itself render *The Corporations Act* or its registration requirements inapplicable to the body corporate.

B. CORPORATE FINANCE AND SECURITY CERTIFICATES

1. Background

One of the most important factors to consider when forming a new corporation or reorganizing an existing corporation is the capital structure or capitalization of the corporation. The capital structure of a corporation (and indeed of any enterprise) allocates these three elements:

- risk of loss;
- power of control;
- participation in profits and right to assets on winding-up.

These elements are allocated by the creation of various classes of shares and the rights which are conferred on these shares. The basic legal aspects of corporate finance are outlined in Part V of the MCA.

The articles of incorporation must set out the authorized capital of a corporation. The Acts do not require that a specified number of shares and the maximum consideration for their issue be set out (CBCA s. 6 and MCA s. 6). Therefore, it is possible to provide for an unlimited number of authorized shares of different classes. This allows for substantial flexibility for directors to issue additional shares without further approval of shareholders.

The authorized capital of a corporation may contain more than one class of shares and it may also contain one or more series of a class of shares (CBCA s. 6(1)(c) and MCA s. 27(1)). If a class of shares may be issued in series, the articles of incorporation should set out the authority given to the directors to fix the number of shares in and to determine the designation of, and the rights, privileges, restrictions and conditions attaching to, the shares of each series.

2. No Par Value

Section 24(1) of the MCA provides “shares of a corporation shall be in registered form and shall be without par value.” Under the previous legislation, directors of a corporation could issue shares in the capital stock of a corporation and fix any value to those shares regardless of the actual consideration received for them. That fixed value was known or referred to as the par value of the shares. The amount allocated to the share capital account of the

company would be equal to the par value of the shares times the number of shares issued by the directors. Any excess consideration received on those shares over the stated par value (premium) would be allocated to a shareholders' equity account referred to as contributed surplus. Any deficiency or discount on shares issued (shares issued for less than the fixed par value), where permitted, would be allocated to a discount on shares account which appeared as a contra account to the respective share capital account.

The value ascribed to par value shares was arbitrary and misleading.

3. Shares Must be Fully Paid

A share cannot be issued by a corporation until consideration for the shares is fully paid in property or past service that is not less in value than the fair equivalent of money that the corporation would have received if the share had been issued for money (CBCA s. 25(3) and MCA s. 25(3)). When shares are issued the directors should, by resolution, fix the value of any property received or past services rendered and state that shares are issued for that equivalent value.

Whether or not issued shares are fully paid is determined based on a reading of MCA s. 25(4) and s. 113(1) or CBCA s. 25(4) and s. 118. For the purpose of s. 25 in both Acts, property does not include a promissory note or a promise to pay (s. 25(5) in both Acts) and therefore, notwithstanding that a promissory note may be accepted as payment in full in law, a share cannot be issued until actual payment is received.

It is advisable to retain evidence in the minute book of the corporation of the consideration received by the corporation for the share(s) (for example, a copy of the cheque issued by the shareholder in payment of the consideration for the shares).

4. Stated Capital

a) Stated Capital Account

Each of MCA s. 26 and CBCA s. 26 deal with accounting for the issue of shares and refer to stated capital and stated capital accounts. These terms are not defined in the MCA or the CBCA but it would appear that stated capital is the sum of the individual stated capital accounts. The stated capital figures should reflect the total value received for shares that have been issued.

Section 26(1) requires a corporation to maintain a separate stated capital account for each class and series of shares it issues. Section 26(2) requires the full amount of any consideration received for shares issued to be added to the appropriate stated capital account.

Although the intent of the stated capital figure is to indicate what the share capital of the corporation is, one must still be wary of the figure on most current financial statements. Consider:

- have all shares been issued for cash?
- if shares were issued for property or services, are there any director's resolutions affixing the cash equivalents? If not, how is the value fixed?
- has the company ever acquired another company or is it the continuing company on any prior amalgamation?

Where the amount of stated capital is material, (for example, to determine the paid-up capital ("PUC") in acquiring shares in a company), it may be a necessary precaution to get a warranty from the vendor as to the amount of the PUC.

b) Adjustment to Stated Capital Account

Various transactions can affect the stated capital account of a corporation, including the purchase or redemption of shares and the reduction of stated capital. MCA s. 37 and CBCA s. 39 provide a means to account for changes to the stated capital account by requiring the appropriate stated capital account to be adjusted.

MCA s. 37(4) and CBCA s. 39(9) deal with the adjustment between stated capital accounts upon a conversion of issued shares of a class into shares of another class or a change under ss. 167 and 185 or MCA s. 234 or CBCA ss. 173, 191 or 241. For instance, in a re-organization of capital to effect an estate freeze, growth shares representing the fair market value of the corporation may be changed into fixed value preference shares which retain the same paid-up capital as the growth shares. MCA s. 37(4) and CBCA s. 39(4) allow a paper shuffle - you deduct the amount for the stated capital account maintained for the growth share account and simply add it to the stated capital account maintained for the preference shares. There is no additional consideration received by the corporation.

MCA s. 37(6) and CBCA s. 39(6) provide that shares purchased or otherwise acquired by a corporation shall be cancelled, or where its articles limit the number of authorized shares, they may be restored to the status of authorized but unissued shares of the class.

5. A Corporation's Own Shares

a) Owning Shares

A corporation cannot own its own shares except as provided in MCA s. 30(2) and ss. 31 to 34 or s. 30(2) and CBCA ss. 31 to 36. In addition, a corporation shall not hold shares in itself or in its holding body corporate (defined in MCA s. 1(4) and CBCA s. 2(4)) nor shall it permit any subsidiary (defined in MCA s. 1(5) and CBCA s. 2(5)) to acquire shares of the corporation. Holding shares does not include holding shares in the capacity of a legal representative or trustee.

b) Purchase or Redemption of Shares

A corporation may purchase or otherwise acquire shares issued by it for cancellation (CBCA s. 34 and MCA s. 32), subject to any limitation in its articles and subject to a solvency test set out in CBCA s. 34(2) and MCA s. 32(2).

The solvency test provides that a corporation shall not make any payment where there are reasonable grounds for believing that:

- the corporation is or would be, after making the payment, unable to pay its liabilities as they become due; or
- the realizable value of the corporation's assets would, after the payment, be less than the aggregate of its liabilities and stated capital of all classes.

The solvency test is relaxed pursuant to CBCA ss. 35 and 36 and MCA ss. 33, 34 and 48 where the corporation purchases shares to:

- (a) settle or compromise a debt or claim asserted by or against the corporation;
- (b) eliminate fractional shares;
- (c) fulfill the terms under a non-assignable agreement by which the corporation has an option or is obliged to purchase shares owned by a director, an officer or an employee of the corporation.

In these cases the corporation may effect the purchase unless there are reasonable grounds for believing that after the payment: (a) the corporation will be unable to pay its liabilities as they become due, or (b) the realizable value of the corporation's assets would be less than the aggregate of its liabilities and the amount payable to holders of shares who on a redemption or liquidation have a right to be paid prior to the holders of the shares to be purchased or acquired.

- **Where the corporation acquires shares to satisfy the claim of the dissenting shareholder under CBCA s. 190 or MCA s. 184, or in order to comply with an order under CBCA s. 241 or MCA s. 234:** No payment shall be made by the corporation where there are reasonable grounds for believing that after such a payment it will (a) be unable to pay its liabilities as they become due or (b) the realizable value of the corporation's assets would be less than the aggregate of its liabilities (MCA ss. 184(26) and 234(6) and CBCA ss. 190(26) and 241(6)).

- **Where a corporation redeems its own redeemable shares at prices not exceeding the redemption price (or formula) stated in the articles (CBCA s. 36(1) and MCA s. 34(1)):** Such a redemption may not be made where there are reasonable grounds for believing that after making a payment (a) the corporation would be unable to pay its liabilities as they become due or (b) the realizable value of its assets would be less than the aggregate of its liabilities and the amount payable to holders of shares who on a redemption have the right to share rateably with or in priority to the holder of the shares being redeemed (CBCA s. 36(2) and MCA s. 34(2)).
- **Where a corporation issues securities in excess of the number authorized by its articles,** the purchaser of such a security may compel the issuer to purchase the security and deliver it to such purchaser (CBCA s. 52(1) and MCA s. 48(1)). MCA s. 48(3) and CBCA s. 52(3) provide that such a purchase is not a purchase to which the above sections apply, and accordingly such a purchase need not comply with any solvency test.

6. Dividends

Dividends are the means by which profits of a corporation are distributed to shareholders. Dividends can be a fixed percentage or a specific or variable amount expressed as a monetary amount or an arbitrary amount decided from time to time. Dividends are declared by the board of directors.

Before dividends may be paid the corporation must meet the solvency test found in MCA s. 40 and CBCA s. 42.

7. Security Certificates

a) Types of Securities

MCA Part VI and CBCA Part VII deal with security certificates, registers and transfers. Every shareholder is entitled to choose a security certificate or a non-transferable written acknowledgement of the right to obtain a security certificate (MCA s. 45(1) and CBCA s. 49(1)). Note that for the purposes of Part VI and Part VII, security and security certificate have a different (and narrower) definition than under securities law generally.

A security is a negotiable instrument unless its transfer is restricted and such restriction is properly noted on the certificate (CBCA s. 48(3)). In Manitoba under MCA s. 44 the transfer or transmission of securities is governed by *The Securities Transfer Act*.

b) Contents of Certificates

The requirements with respect to security certificates are set out in MCA s. 45 and CBCA s. 49:

- A security certificate must be signed manually by at least one director or officer or on behalf of a registrar or transfer agent. Any additional signature may be printed or otherwise mechanically reproduced.
- The face of each certificate must state:
 - (a) the name of the corporation;
 - (b) the words “[Incorporated/Amalgamated/Continued] under the Laws of Manitoba” or words of like effect (under the CBCA the words “[Incorporated/Amalgamated/Continued] under the *Canada Business Corporations Act*” are required);
 - (c) the name of the person to whom it was issued; and
 - (d) the number and class of shares and the designation of any series that the certificate represents.
- In order to be enforceable against a transferee the fact that a share certificate is subject to share transfer restrictions, liens, unanimous shareholder agreements, or an endorsement under CBCA s. 190(10) must be noted conspicuously on the security certificate unless the transferee has actual knowledge of such restrictions.
- A share certificate of a corporation authorized to issue shares of more than one class or series must state:
 - (a) the rights, privileges, restrictions and conditions attaching to such shares; or
 - (b) that the shares are subject to certain rights, privileges, restrictions and conditions a copy of which will be furnished to a shareholder on request, without charge.

c) Securities Records

A corporation must maintain a register of the securities it issues in registered form showing with respect to each class or series of securities:

- the names, alphabetically arranged, and the latest known address of each person who is or has been a security holder;
- the number of securities held by each security holder; and
- the date and particulars of the issue and transfer of each security.

(See MCA s. 46(1) and CBCA s. 50(1)).

d) Transmission of Securities

Pursuant to CBCA s. 51(7) or MCA s. 47(7) an executor, administrator, heir or legal representative of a deceased shareholder is entitled to become a registered holder upon filing with the corporation or its transfer agent:

- original grant of probate or a certified copy of same;
- affidavit or declaration of transmission stating the particulars of transmission;
- the security certificate properly endorsed if it is to be transferred to other than the legal representative;
- any other assurance required by the corporation under *The Securities Transfer Act* s. 87 or CBCA s. 77.

C. DIRECTORS AND SHAREHOLDERS

1. Directors

Generally speaking, the management of the business and affairs of the corporation is vested in the hands of the directors of the corporation, unless removed by a unanimous shareholder agreement.

a) Powers

MCA s. 97(1) states:

Subject to any unanimous shareholder agreement, the directors shall manage, or supervise the management of, the business and affairs of a corporation.

CBCA s. 102(1) is identical.

A unanimous shareholder agreement must be an agreement that restricts, in whole or in part, the powers of the directors to manage the business and affairs of the corporation (MCA s. 140(2) and CBCA s. 146(2)).

Not every agreement among shareholders is a “unanimous shareholder agreement” within the provisions of the MCA or CBCA for this purpose. If an agreement among shareholders governs buy-sell provisions on death or rights of first refusal, but does not deal with the management of the business or affairs of the corporation, the agreement does not meet the definition of a “unanimous shareholder agreement” and, therefore, it does not reduce the power of the board of directors to manage the business and affairs of the corporation.

It is a general rule that any limitations on the powers of the directors are to be regarded as matters of internal economy and are of no concern to outsiders dealing with the company who have no notice of the limitation. An outsider dealing with the company is entitled to assume, unless they have notice to the contrary, that where the directors purport to exercise any powers conferred upon them on conditions, the conditions have been duly complied with and that the powers are being bona fide exercised in the interests of the company.

This rule is the great safeguard for all who deal with corporations. In practice, it means that where a document such as a deed or bill of exchange appears on its face to have been regularly executed by the directors or officers of the company, the company on

its part will not be allowed to say that there was no proper authority for so doing. It would seem, indeed, that directors impliedly warrant that the necessary preliminaries have been observed and may be liable, on this implied warranty of authority, to persons acting on this presumption.

This indoor management rule is codified and expressed in both CBCA s. 18 and MCA s. 18.

The provisions of MCA s. 183(3) and CBCA s. 189(3) are an example of the restraint placed on the directors' authority to deal with the property of the corporation. Before the sale, lease or exchange of all, or substantially all, of the property of the corporation can take place, other than in the ordinary course of the business of the corporation, the shareholders must approve the disposition as set out in CBCA ss. 189(4) to (8).

The subsections require that there be a special meeting of shareholders at which holders of all of the shares of the corporation have a right to vote in this instance, whether or not they ordinarily carry the right to vote. The holders of each class of shares must vote in favour of the disposition by special resolution. Because this restraint on the directors' authority is in the legislation, where the transaction involves the sale, lease or exchange of all, or substantially all, of the property of the corporation, persons dealing with the corporation and its officers, should, as a necessary precaution, obtain evidence that the transaction has been approved by the required special resolution.

b) Duties and Responsibilities

The duty of care of directors and officers is codified in MCA s. 117 and CBCA s. 122. Directors and officers are required to "(a) act honestly and in good faith with a view to the best interests of the corporation and (b) exercise the care, diligence and skill that a reasonably prudent person would exercise in comparable circumstances."

The directors or officers have a duty to act in the best interests of the corporation. They owe a fiduciary duty to the corporation.

A director cannot delegate their fiduciary duties. There is no provision in the Acts for a director to appoint a substitute.

However, the Acts do permit the directors, as a body, to appoint a managing director or a committee of directors from their number and delegate powers to them. As with any delegation, the directors may only delegate the powers they have. The limits on the authority of the directors is set out in MCA s. 110(3) and CBCA s. 115(3).

c) Qualifications

MCA s. 100 and CBCA s. 105 set out the qualifications of directors and, in effect, specify that anyone may be a director, provided the person is over 18 years of age, is an individual and is not a bankrupt, and in the case of the CBCA, is not of unsound mind as found by a court.

It should also be noted that there is no legislative requirement for a director of a corporation to be a shareholder unless the articles so provide (MCA s. 100(2) and CBCA s. 105(2)).

d) Election, Appointment and Remuneration

The first directors of a corporation are those named in the articles of incorporation and they hold office until the first meeting of shareholders (MCA s. 101(1) and CBCA s. 106(2)). Thereafter, directors are elected by the shareholders of the corporation, by ordinary resolution, to hold office for a term, expiring not later than the close of the third annual meeting of shareholders following their election (MCA s. 101(2) and CBCA s. 106(3)).

However, a director not elected for an expressly stated term ceases to hold office at the close of the first annual meeting of shareholders following the director's election or, if no directors are elected at such meeting, until a successor is elected (MCA ss. 101(4) and (5) and CBCA ss. 106(5) and (6)). As well, directors can be elected for staggered terms (MCA s. 101(3) and CBA s. 106(4)).

What happens if the shareholders fail to elect the required number of directors? First of all, if such failure is due to a disqualification, incapacity or death of a candidate and the number of directors who were, in fact, elected constitute a quorum, the directors elected may exercise all the powers of the directors (MCA s. 101(6) and CBCA s. 106(7)).

MCA s. 106(2) and CBCA s. 111(2) state:

If there is not a quorum of directors, or if there has been a failure to elect the number or minimum number of directors required by the articles, the directors then in office shall forthwith call a special meeting of shareholders to fill the vacancy and, if they fail to call a meeting or if there are no directors then in office, the meeting may be called by any shareholder.

If the directors fail to call a meeting of shareholders to fill the vacancy or the shareholders fail to call a meeting, the directors who are elected, being insufficient in number to constitute a quorum, remain incompetent to transact the business of the corporation.

A director ceases to hold office when the director dies or resigns, is removed from office (or becomes disqualified by reason of being of unsound mind as found by a court in the case of a CBCA company) or becoming a bankrupt (MCA s. 103(1) and CBCA s. 108(1)).

The effective date of a director's resignation is at the time the written resignation is sent to the corporation, or at the time specified in the resignation, whichever is the later (MCA s. 103(2) and CBCA s. 108(2)). As a result, the liabilities imposed on a director of a corporation, will cease on the effective date of the resignation. If a director wants to ensure relief from liability, make sure that the director's resignation notice and a notice of change of directors is filed with the Director (pursuant to MCA s. 108 and CBCA s. 113)).

The directors are vested with the authority to designate the offices of the corporation, appoint officers and specify their duties and delegated powers, subject always to the articles, by-laws or any unanimous shareholder agreement. A director may hold any office in the corporation and any two or more offices of a corporation may be held by the same person (MCA s. 116 and CBCA s. 121).

Both Acts permit the formation of one-person corporations because there is no minimum number of directors or shareholders required. As a result, corporations can exist with only one shareholder, who is the one director of the corporation, and who can hold the offices of both president and secretary.

Unless the articles, by-laws or any unanimous shareholder agreement otherwise provide, an officer continues in office until the directors decide otherwise. Corporate by-laws should be consulted because they often may provide that an officer remains in office only until the next annual meeting of the corporation.

MCA s. 120 and CBCA s. 125 authorize the directors of the corporation to fix the remuneration of the directors, officers and employees of the corporation.

e) Removal from Office

Subject to the provisions for cumulative voting set out in MCA s. 102 and CBCA s. 107, the shareholders of the corporation may remove a director, by ordinary resolution, at a special meeting called for the purpose (MCA s. 104 and CBCA s. 109). Where the holders of a particular class or series of shares have the exclusive right to elect a director, that director so elected may only be removed by the shareholders of that class or series (MCA s. 104(2) and CBCA s. 109(2)).

Officers may be removed by the directors subject to any rights such officers may have at common law regarding master and servant, including any employment agreement.

f) Filling Vacancies

If a vacancy on the board of directors arises other than as a result of an increase in the number or minimum number of directors, or the failure to elect the number or minimum number of directors required by the articles, but a quorum of directors remains, then, notwithstanding that that quorum may not represent the required majority of residents or Canadians, as required under MCA s. 109(3) and CBCA s. 114(3), the remaining directors may fill the vacancy (MCA s. 106(1) and CBCA s. 111(1)).

If there is no quorum of directors or, as above stated, there has been a failure to elect the number or minimum number of directors required by the articles, then a meeting of shareholders must be called in order to fill the vacancy (MCA s. 106(2) and CBCA s. 111(2)). Where the holders of a special class or series of shares have an exclusive right to elect one or more directors, and a vacancy occurs among those directors, such exclusive authority must be respected in the filling of such vacancy as set out in MCA s. 106(3) and CBCA s. 111(3).

Note that under MCA s. 106(4) and CBCA s. 111(4), the articles may provide that a vacancy among the directors shall only be filled by a vote of the shareholders, or by a vote of the holders of any class or series of shares having an exclusive right to elect one or more directors if the vacancy occurs among the directors elected by that class or series. A director appointed or elected to fill a vacancy holds office only for the unexpired term of their predecessor (MCA s. 106(5) and CBCA s. 111(5)).

With respect to vacancies in an office, the directors have the authority to fill any vacancy, just as they have the authority to appoint the officer in the first place, unless that authority is restricted by some agreement among the shareholders (MCA s. 116 and CBCA s. 121).

With respect to election, removal and filling of vacancies in the board of directors of the corporation, notice of these changes must be given to the Director within fifteen (15) days of the change (MCA s. 108 and CBCA s. 113).

g) Number of Directors

Unless the corporation has issued securities which were distributed to the public and remain outstanding and are held by more than one person, then the corporation can have as few as one director and as many as it chooses. If, however, the corporation has issued securities which are part of a distribution to the public and are held by more than one person, then the corporation must have not fewer than three directors "at least two of whom are not officers or employees of the corporation or its affiliates" (MCA s. 97(2) and CBCA s. 102(2)). The Acts therefore permit one-person corporations where one person can be the sole shareholder, director and officer of the corporation.

The number of directors is established initially in the application for the articles of incorporation and a flexible number of directors can be authorized (that is, a minimum number and a maximum number) as well as a fixed number (MCA s. 6(1)(e) and CBCA s. 6(1)(e)). Where there is a flexible board, the shareholders, at the annual meeting of the corporation, will, in effect, determine the number of directors by the number they elect; however, the shareholders will be required to elect at least the minimum number. If the shareholders fail to elect the minimum number, the election is ineffective and may be void, subject to the provisions discussed above as to the filling of vacancies.

Any increase or decrease in the number of directors, or minimum or maximum number of directors under MCA s. 107, is required to be approved by the shareholders of the corporation by a special resolution and, under CBCA s. 112, by amending the articles of the corporation. However, compliance with MCA s. 102(h) or CBCA s. 107(h) is required if the articles require cumulative voting. Further, no decrease in the number of directors can shorten the term of an incumbent director.

As a result, while by-laws of corporations may provide for the number of directors, these by-laws are not finally determinative in governing the number of directors. While it might be advisable to refer to the number of directors in the by-laws of the corporation so as to have a ready reference, it is the articles, under the CBCA, and a special resolution, under the MCA, which govern the number of directors.

h) Meetings and Residency Requirements

MCA s. 109 and CBCA s. 114 set out the requirements as to meetings, quorum and residency for directors. Unless the articles or by-laws otherwise provide, there are no geographic restrictions on the place where a meeting of directors can be held. Subject to the articles and by-laws, a majority of the number of directors, or a minimum number of directors, constitutes a quorum at any meeting of directors and, notwithstanding any vacancy among the directors, a quorum of directors may exercise all the powers of the directors. Therefore, as long as there is a quorum of directors in office, the directors can function.

MCA s. 100(3) provides that 25% of the directors of a corporation must be residents of Canada and the CBCA s. 105(3) provides that 25% of the directors must be resident Canadians. Further, MCA s. 109(3) provides that the directors shall not transact business at a meeting of directors unless 25% of directors present are residents of Canada and CBCA s. 114(3) provides that the directors shall not transact business at a meeting of directors unless 25% of directors present are resident Canadians.

MCA s. 109(4) and CBCA s. 114(4) provide an exception and a saving provision where a director who meets the above qualifications and who is unable to be present, approves, in writing or by telephone, electronic or other communications facilities, the business transacted at the meeting and the required majority would have been present had that absent director been present.

By MCA s. 109(6) and CBCA s. 114(6), a director may waive notice of a meeting and attendance at the meeting will automatically constitute a waiver of notice by the attendee unless the attendance is for the express purpose of objecting to the transaction of business.

By MCA s. 109(9) or CBCA s. 114(9) a director may participate in a meeting of directors or of a committee of directors by means of telephone, electronic or other communications facilities which permit all persons participating in the meeting to communicate adequately with each other during the meeting, and a director so participating is deemed to be present at the meeting.

As a result, conference calls and electronic or other communication facilities may be employed to facilitate directors' participation in meetings. This type of participation is subject to: (1) all the directors consenting; (2) the meeting being in accordance with any applicable regulations; and (3) the by-laws not providing to the contrary.

Further, and to support the concept of a one-person corporation, MCA s. 109(8) and CBCA s. 114(8) provide that where there is only one director in a corporation, that director may constitute a meeting.

MCA s. 112 and CBCA s. 117 permit a resolution of the directors to be adopted without convening a meeting if all of the directors sign the resolution. However, MCA s. 112 provides that the resolution "is effective from the date specified in the resolution, but that date shall not be prior to the date on which the first director signed the resolution." So, for example, under the MCA, a decision of the directors to declare a dividend cannot, by signed resolution, be declared effective prior to the date the first director signs the resolution. CBCA s. 117 contains no such provision for an effective date.

i) Conflict of Interest

At common law, there are severe limitations on the extent to which a director can deal with the company and there is a body of law dealing with the validity of these transactions and the liability of the director, in the circumstances.

MCA s. 115 and CBCA s. 120 contain the rules requiring disclosure by a director or officer of a corporation where such director or officer is a party to a material contract or has a material interest in any person who is a party to a material contract with the corporation.

In the circumstances, the officer or director is required to disclose their interest promptly and, under MCA s. 115(5), may vote on the resolution. Note that in some cases the resolution is not valid unless it is approved by not less than two-thirds of the votes of the shareholders of the corporation to whom notice of the nature and extent of the director's interest in the contract or transaction is declared and disclosed in reasonable detail.

CBCA s. 120(5) uses different language and prohibits a director from voting in respect of a contract in which the director has a material interest unless the contract is of the type listed in that section.

j) Liability of Directors

MCA s. 113 and s. 114 and CBCA s. 118 and s. 119 set out the legislated liabilities that are imposed on directors.

However, the common law also imposes liabilities on directors because of the director's fiduciary relationship to the corporation. Directors who abuse power or come short of fulfilling their obligations have been found liable in actions for breach of trust or misfeasance.

Generally, directors cannot be made liable for nonfeasance or for negligence but they can be liable for gross negligence. The definition of gross negligence becomes somewhat blurred and is often equated with doing any act which is *ultra vires*. Traditionally, *ultra vires* acts have been held to be the payment of dividends out of capital, the use of the corporation's funds to buy its shares or to make advances to shareholders or, as it is put generally, to use the corporation's funds "for purposes which the company cannot sanction."

It appears that to protect the directors against these *ultra vires* transactions, provisions indemnifying directors have been enacted in by-laws. The statutory authority for such indemnification is found in MCA s. 119 and CBCA s. 124.

MCA s. 113 and CBCA s. 118 provide that directors who vote for or consent to a resolution authorizing the issue of shares for a consideration other than money are jointly and severally liable to the corporation to make good any amount by which the consideration received is less than the fair equivalent of the money that the corporation would have received if the share had been issued for money on the date of the resolution.

Further, directors of a corporation who vote for or consent to a resolution to purchase, redeem or acquire shares of the company contrary to MCA ss. 32, 33 or 34 or CBCA ss. 34, 35 or 36, or a commission contrary to MCA s. 39 or CBCA s. 41, or the

payment of a dividend contrary to MCA s. 40 or CBCA s. 42, or a payment of an indemnity contrary to MCA s. 119 or CBCA s. 124, or payment to a shareholder contrary to MCA s. 184 and s. 234 or CBCA s. 190 and s. 241, are jointly and severally liable to restore to the corporation any amount so distributed or paid and not otherwise recovered by the corporation.

Any director satisfying a judgment in respect of these matters is entitled to contribution from the other directors and is entitled to apply to a court for an order compelling a shareholder or other recipient to pay or deliver to the director any money or property that was paid or distributed to the shareholder in contravention of the sections mentioned above. With respect to the issue of shares for a consideration which is less than the fair equivalent of money, the director is relieved of liability by proving that the director did not know and could not reasonably have known that the share was issued for a consideration less than the fair equivalent of money (MCA s. 113(6) and CBCA s. 118(6)).

An action to impose liability, under MCA s. 113 or CBCA s. 118, must be commenced within two (2) years of the date of the resolution authorizing the action complained of (MCA s. 113(7) and CBCA s. 118(7)).

MCA s. 114 and CBCA s. 119 specifically impose joint and several liability on directors to employees for up to six months' wages. The section sets out certain conditions precedent to a recovery and also contains a limitation of two (2) years on any proceedings. Further, a director who is required to pay is entitled to contribution from the other directors, and, in Manitoba, is entitled to the preference that the employee would have been entitled to in liquidation and dissolution or bankruptcy proceedings, and is entitled to an assignment of any judgment that the employee may have had. Federally, the director has similar rights, although the sections are worded differently.

With respect to the issue of liability, especially with respect to those items referred to in MCA s. 113(2) and CBCA s. 118(2), the provisions of MCA s. 118 or CBCA s. 123 set out that a director who is present at a meeting is deemed to have consented to any resolution passed or action taken, unless that director requests that a dissent be entered in the minutes of the meeting, sends a written dissent to the secretary of the meeting before the meeting is adjourned, or sends a dissent, by registered mail, to the corporation immediately after the meeting is adjourned.

If the director votes in favour of the resolution, that director cannot dissent, and a director not present at a meeting will be deemed to have consented to any resolution passed at the meeting, unless a dissent is placed in the minutes of the meeting or sent by registered mail or delivered to the corporation within seven (7) days after the director becomes aware of the resolution.

There is a further exculpatory provision in each Act (MCA s. 118(4) and CBCA S. 123(4)), which provides that if a director exercises the care, diligence and skill that a

reasonably prudent person would have exercised in comparable circumstances, the director will not be liable. This includes relying in good faith upon the financial statements of the corporation, that have been represented to the director by an officer of the corporation or in a written report of the auditor of the corporation, to fairly reflect the financial condition of the corporation, or relying in good faith upon the report of a person whose profession lends credibility to a statement made by that professional.

However, due diligence by a director who is a professional may not entitle the director to such relief. It therefore follows that where lawyers accept responsibilities as directors, those responsibilities are full and no lawyer should expect to be excused by a court merely because the lawyer was doing a client a favour by sitting on the client's board of directors.

A unanimous shareholder agreement may restrict the powers of the directors to manage or supervise the management of the business and affairs of the corporation. The parties to the unanimous shareholder agreement who are given that power will then have all the rights, powers, duties and liabilities of a director, including any defences available to the directors, and the directors are relieved of their rights, powers, duties and liabilities to the same extent by virtue of MCA s. 140(5) and CBCA s. 146(5).

k) Indemnification

MCA s. 119 and CBCA s. 124 provide that the corporation will indemnify its directors and officers, provided the director or officer acted honestly and in good faith with a view to the best interests of the corporation or, in the case of criminal or administrative action or proceedings, the director had reasonable grounds for believing that their own conduct was lawful. The indemnity is not automatic and, usually, the indemnification is found in the by-laws of the corporation.

MCA s. 119(3) and CBCA s. 124(5), however, provide that if the director or officer is successful in defending proceedings they are automatically entitled to indemnity from the corporation in respect of costs. MCA s. 119(4) and CBCA s. 124(6) permit the corporation to purchase insurance to cover the corporation's obligations for indemnification, so long as the liability does not relate to the director's failure to act honestly and in good faith in the best interests of the corporation. The legislation does not allow officers or directors to be insured against liability for their own dishonesty or bad faith.

2. Shareholders

a) Shareholders' Rights

Shareholders have traditionally had the right to elect the directors of the corporation, who then manage the business and affairs of the corporation, and to elect auditors, to act as watchdogs on the financial activities of the corporation, to make sure that the directors are acting honestly and in the best interests of the corporation. Shareholders have had only a limited influence on the day-to-day activities of the corporation. Their traditional role is to provide the capital to finance the operations of the corporation and to receive, as reward for their investment, the entitlement to share in the profits of the corporation. The management of the corporation is left to the directors who are responsible to use the capital to generate profit for the corporation.

Both Acts expand on the traditional role for shareholders. Under the Acts, the shareholders, through a unanimous shareholder agreement, can, in effect, manage the business and affairs of the corporation in substitution for the directors (MCA s. 140 or CBCA s. 146); make proposals to make, amend or repeal a by-law (MCA s. 98(5) or CBCA s. 103(5)); make a proposal in respect of any matter at a meeting of shareholders (MCA s. 131(1) or CBCA s. 137(1)) and require a meeting of shareholders to be called (MCA s. 137 or CBCA s. 143).

b) Minority Shareholders' Rights

i. Dissenting Shareholders

MCA s. 184 and CBCA s. 190 provide that where a corporation resolves to make certain fundamental changes as set out in the section, a shareholder may dissent and be paid by the corporation the fair value of the dissenting shareholder's shares "determined as of the close of business on the day before the resolution was adopted or the order was made."

The procedure set out in those sections is that the dissenting shareholder sends the corporation a written objection to the resolution at or before the shareholders' meeting where the vote on the resolution will be held. If the resolution is adopted, then within ten (10) days of the adoption, the corporation must send notice that the resolution was adopted to any such dissenting shareholder.

Within twenty (20) days of receiving the notice, the dissenting shareholder must send the corporation written notice demanding payment of the fair value of their shares, and within thirty (30) days after sending that notice, the dissenting shareholder must send the corporation the certificates representing the shares. A shareholder who fails to comply with this procedure may lose the right to claim under the section pursuant to MCA s. 184(9) or CBCA s. 190(9).

Upon the dissenting shareholder sending notice of demand for payment, they cease to have any rights as a shareholder other than the right to be paid fair value unless:

- (a) the notice is withdrawn before the corporation makes an offer to pay fair value, or
- (b) the corporation fails to make such an offer and the dissenting shareholder withdraws the notice, or
- (c) the action in respect of which the shareholder is dissenting does not proceed and the shareholders revoke the resolution(s) related to that action.

The corporation, upon receipt of the notice demanding payment of fair value, must, within seven (7) days, make a written offer to pay the dissenting shareholder what the directors of the corporation consider to be the fair value. Such fair value must be accompanied by a statement showing how the fair value was determined, unless the corporation is financially unable to make such payment. The dissenting shareholder then has the right to accept the offer and be paid, or to refer the matter to a court to determine fair value if the dissenting shareholder disagrees with the offer.

While the regime appears to be a fair and reasonable approach in that the corporation gives the dissenting shareholder the opportunity to be bought out at fair value, in practice the dissenting shareholder is not always in a position to reasonably take advantage of these provisions. If the dissenting shareholder does not hold many shares in the corporation and there is not sufficient money at stake, the corporation can play hardball and force the dissenting shareholder to accept a minimal amount because the expense of the court proceedings does not warrant an appropriate challenge.

In terms of procedure, where any fundamental change in the corporation is proposed, it is very important to carefully review MCA s. 184(1) or CBCA s. 190(1) to make sure that shareholders are made aware of their rights of dissent before the shareholders are called upon to approve such fundamental change.

ii. Derivative Action

MCA s. 232 and CBCA s. 239 give a shareholder (along with a number of other persons included within the term “complainant”, as defined in MCA s. 231 or CBCA s. 238) the right to apply to a court for leave to bring an action in the name and on behalf of the corporation for the purpose of prosecuting, defending or discontinuing an action.

Therefore, if a shareholder feels that the directors of the corporation are not appropriately looking after enforcing or defending the corporation’s rights, the shareholder can step up and pursue the matter on behalf of the corporation. Since the term “complainant” encompasses not only the corporation in which the complainant holds shares, but also any of its affiliates, a double derivative action can be undertaken whereby the shareholder of a holding corporation has the right to initiate a derivative action in the name of the corporation’s subsidiary, even though the shareholder does not hold any shares directly in that subsidiary.

As previously stated, if the treatment of a shareholder by the corporation is oppressive, or unfairly prejudicial, or unfairly disregards the shareholder’s interests, an action can be taken by the shareholder, under MCA s. 234 or CBCA s. 241. A shareholder also has the right to apply to the court to rectify the records of the corporation, under MCA s. 236 or CBCA s. 243. As a result of these provisions, the individual shareholder has a number of remedies in order to enforce fair and equitable treatment, notwithstanding that the majority of the shareholders may be in favour of a particular proceeding that may not otherwise treat the shareholder equitably.

c) Meetings of Shareholders

The provisions dealing with meetings of shareholders and shareholders’ rights generally are found in MCA Part XI – ss. 126 to 140 and CBCA Part XII – ss. 132 to 146.

i. Place of Meetings

MCA s. 126 specifies that meetings of shareholders are to be held at a place within Manitoba provided in the by-laws or, if not set out, such place within Manitoba as the directors may determine. If all of the shareholders entitled to vote at the meeting so agree, a meeting may be held outside of Manitoba. The articles of the corporation may, in fact, specifically provide for meetings to be held at one or more places outside of Manitoba. The MCA does not define any other geographic limitation and, therefore, it appears that a Manitoba corporation could hold a meeting outside of Canada should the articles so provide or the shareholders agree. CBCA s. 132 provides that meetings are to be held within Canada and, if all the shareholders agree, may be held outside of Canada.

ii. Date, Record Date and Annual and Special Meetings

MCA s. 127 and CBCA s. 133 requires the directors to call an annual meeting of shareholders not later than eighteen (18) months after the corporation comes into existence and, subsequently, not later than fifteen (15) months after the holding of the last preceding annual meeting. A special meeting of shareholders may be called at any time and, as noted, the shareholders themselves can call a meeting pursuant to MCA s. 137 or CBCA s. 143.

The concept of fixing a record date is dealt with in MCA s. 128 and CBCA s. 134. Where stock is widely traded and the identity of shareholders may change from day-to-day, it is important to have a record date that determines the identity of shareholders for the purpose of the calling of meetings and distributing the required notice for meetings.

The directors of a corporation may fix a record date in advance of a meeting for determining the shareholders, upon appropriate advertising and notice as required. If no record date is fixed, the record date for the determination of shareholders will be the close of business on the day immediately preceding the day on which notice of a meeting is given. If no notice of the meeting is given, the day on which the meeting is held will be the record date. The record date is also used to determine which shareholders are to receive dividends from the corporation and, for example, in widely held corporations, this record date becomes important for that reason as well.

iii. Notice

MCA s. 129 dictates that notice of the time and place of a meeting of shareholders shall be not less than twenty-one (21) days nor more than fifty (50) days before the meeting. Each shareholder entitled to vote at the meeting, each director and the auditor of the corporation are entitled to receive notice. If a meeting of shareholders is adjourned for less than thirty (30) days, unless the by-laws otherwise provide, no further notice is required other than by announcement at the meeting. If the meeting is adjourned for an aggregate of thirty (30) days or more, notice of the adjourned meeting must be given.

MCA s. 129(5) and CBCA s. 135(5) define the business at a meeting to be "special business" if the meeting is a special meeting of shareholders or, if it is an annual meeting, the business that is conducted is other than the consideration of the financial statements, the auditor's report, the election of directors and the re-appointment of incumbent auditor. The notice of the meeting must specify what special business is to be transacted "in sufficient detail to permit the shareholder to form a reasoned judgment thereon," and

if a special resolution is to be submitted, the text of that special resolution must be included with the notice. MCA s. 130 and CBCA s. 136 permit a shareholder to waive notice.

Unless the by-laws otherwise provide, MCA s. 133 and CBCA s. 139 state that a quorum of shareholders is present at a meeting if the holders of a majority of shares entitled to vote at the meeting are present in person or by proxy. If a quorum is present at the opening of the meeting, unless the by-laws otherwise provide, the shareholders present may proceed with the business of the meeting, notwithstanding that a quorum is not present throughout the meeting. If a quorum is not present, the shareholders “may adjourn the meeting to a fixed time and place, but may not transact any other business.”

MCA s. 133(4) and CBCA s. 139(4) specifically authorize a one-shareholder meeting or one-proxyholder meeting.

MCA s. 134 and CBCA s. 140 authorize a corporation to recognize an individual as representing a corporate shareholder if such individual is authorized to do so by a resolution of the directors or governing body of the corporate shareholder. Thus, as far as corporate shareholders are concerned, the corporation can either appoint a proxy, or appoint a representative by resolution.

MCA s. 136 and CBCA s. 142 authorize a resolution signed by all of the shareholders in lieu of a meeting. That section of the MCA specifies that such a resolution is effective from the date specified in the resolution, which cannot be prior to the date on which the first shareholder signs the resolution. CBCA s. 142 contains no similar provision regarding an effective date.

The CBCA and MCA permit shareholders to participate in their meetings electronically, subject to: (1) the corporation making available the communication facility; (2) the meeting being held in accordance with any regulations; and (3) the by-laws not providing to the contrary (CBCA ss. 132(4) and (5) and MCA ss. 126(4) and (5)). MCA s. 126.1 allows for meetings to be entirely by telephonic, electronic or other communication facility that permits all participants to communicate adequately with each other provided the by-laws so provide and the meetings are held in accordance with any applicable regulations.

Shareholders may also vote electronically subject to: (1) the corporation making the communication facility available; (2) the vote being held in accordance with the regulations, if any; and (3) the by-laws not providing to the contrary (MCA s. 135(3) and CBCA ss. 141 (3) and (4)).

iv. Proxies

MCA Part XII and CBCA Part XIII deal with proxies.

MCA s. 142 and CBCA s. 148 authorize a shareholder, by means of a proxy, to appoint a proxyholder to attend meetings of shareholders and vote the shareholder's shares at the meeting. Such proxyholder need not be a shareholder.

Pay particular attention to MCA s. 142(3) and CBCA s. 148(3) which provide that "a proxy is valid only at the meeting in respect of which it is given or any adjournment thereof."

For example, a security holder would want to remove the shareholder's right to vote their shares if they have pledged the shares as security. The security holder would want to be able to vote the shares at meetings if the shareholder defaults. The security holder's remedy would be to get a power of attorney from the shareholder authorizing the security holder to sign a proxy on behalf of the shareholder. Such a power of attorney is authorized by MCA s. 142(2) and CBCA s. 148(2). The security holder could then use the power of attorney to appoint themselves or another to be the proxy for the debtor shareholder for each meeting as needed from time to time.

Where a corporation has made a distribution to the public, the provisions of MCA s. 143 and CBCA s. 149 as to mandatory solicitation, require the corporation, concurrently with giving notice of the meeting of shareholders, to send a form of proxy to each shareholder. By MCA s. 144, where such solicitation takes place, management must also provide a "proxy circular in the form required under *The Securities Act*." Under CBCA s. 150 the proxy circular must be "in prescribed form."

3. Conclusion

In the simplest terms and under usual circumstances, directors run the corporation; shareholders own the corporation. Therefore, day-to-day activity is organized by the directors, but fundamental changes must be approved by the shareholders. In matters of corporate law, strict adherence to governing legislation must prevail and no shortcuts should be tried.

Do not have shareholders approving resolutions that directors ought to be doing and do not have directors making fundamental changes which only shareholders can do (other than referring such matters to the shareholders for their approval). With the application of ingenuity and logic, it should be possible for the corporation to extricate itself from just about any entanglement it might get into through the inadvertent failure to follow these simple rules.

D. SHAREHOLDER AGREEMENTS

1. Introduction

The term shareholder agreement is used to refer to any agreement between one or more shareholders of a corporation. The corporation may be a party to a shareholder agreement and in certain circumstances an outsider, such as a manager, may also be a party. Shareholder agreements may range from agreements which regulate the operation of a corporation in detail to agreements which cover one particular subject of interest, such as the disposition of a shareholder's shares.

Shareholder agreements alter by contract the arrangements which would otherwise be permitted by the statutes governing corporations and the common law. For example, corporate law permits the free transferability of shares (see *Greenhalgh v. Mallard*, [1943] 2 All E.R. 234 (C.A.), per Greene, M.R. and the various corporate statutes), subject to such approval required by the articles of the corporation. The free transferability of shares may be restricted by a shareholder agreement which limits share transfers to persons and circumstances permitted by the agreement. A restriction on the transferability of shares in a shareholder agreement does not bind the corporation unless the corporation is a party to the agreement (*Re Belleville Driving & Athletic Assoc.* (1914), 31 O.L.R. 79 (S.C. App. Div.)).

A second general principle of corporate law is that shareholders are free to vote their shares as they see fit, in their best interests. Agreements among shareholders as to the manner in which they will vote their shares are lawful both at common law (see *Motherwell v. Schoof*, 1949 CanLII 240 (Alta. S.C.T.D.)) and under the various corporate statutes.

At common law, the validity of shareholder agreements was subject to the qualification that such agreements could not fetter the powers of the directors. There was authority that even an agreement to which all shareholders were parties was subject to the same limitation; the agreement could not bind the directors in the management of the company (see *Atlas Development Co. v. Calof*, 1963 CanLII 834 (MB QB); *Ringuet v. Bergeron*, 1960 CanLII 67 (SCC)).

The principle that shareholders may agree as to the manner in which they will cast their votes has been codified in the MCA and the CBCA. However, the principle that directors' discretion cannot be restricted has been changed to some extent by the MCA and the CBCA (see below under Unanimous Shareholder Agreements).

2. Pooling Agreements

Both the CBCA and the MCA statutorily recognize the right of shareholders to agree on the manner in which their shares will be voted (CBCA s. 145.1 and MCA s. 140(1)). As its name suggests, a pooling agreement frequently provides that certain of the shareholders will pool their votes together for a certain purpose, such as the election of directors. Such agreements cannot fetter the discretion of the directors.

Pooling agreements are frequently used in larger corporations where a number of shareholders desire to consolidate their votes to assume a position of control or authority in the corporation.

3. Voting Trust Agreements

A voting trust is similar to a pooling agreement except that the shares of the corporation are held by and in the name of a trustee for the duration of the agreement. The parties to the voting trust agreement own interests in the agreement and not in the shares. The agreements frequently contain instructions for the manner in which the trustee must vote the shares or for a method of determining the instructions. A voting trust agreement cannot limit the power of the directors to manage the corporation.

4. Unanimous Shareholder Agreements

a) May Fetter Directors' Powers

Notwithstanding the common law prohibition against shareholder agreements which fetter the discretion of the directors, under the CBCA and the MCA, a unanimous shareholder agreement ("U.S.A.") may validly and legally restrict the powers of the directors.

CBCA s. 146(1) states:

An otherwise lawful written agreement among all the shareholders of a corporation, or among all the shareholders and one or more persons who are not shareholders that restricts, in whole or in part, the powers of the directors to manage or supervise the management of the business and affairs of the corporation is valid.

MCA s. 140(2) is similar:

Only a U.S.A. can restrict in any way the powers of the directors in the management of the corporation. Other shareholder agreements are subject to the common law prohibition against fettering the directors' discretion.

As its name suggests, a unanimous shareholder agreement must be among all the shareholders of the corporation, both voting and non-voting. Pursuant to CBCA s. 146(2) and MCA s. 140(3), where all of the shares of a corporation are beneficially owned by one person, that person may make a declaration that restricts in whole or in part the powers of the directors and such declaration is deemed to be a U.S.A.

Pursuant to CBCA s. 122 and MCA s. 117, the directors (and officers) must act honestly and in good faith, with a view to the best interests of the corporation. However, pursuant to CBCA s. 122(2) and MCA s. 117(2), the directors and officers are required to comply, *inter alia* with the terms of any U.S.A.

b) Statutory Requirements

The minimum statutory requirements for a U.S.A. are as follows:

- the agreement must be in writing;
- the agreement must be among all of the shareholders of the corporation, both voting and non-voting;
- the agreement must be otherwise lawful;
- the agreement must restrict in whole or in part, the powers of the directors to manage the business and affairs of the corporation; and
- in Manitoba, pursuant to MCA s. 140(6), notice of the U.S.A. together with the date of its execution must be filed with the Companies Office within 15 days. There is no such notice requirement in the CBCA.

c) Parties to a U.S.A.

When drafting a U.S.A. or any type of shareholder agreement, it is important to understand clearly for whom you are acting, as the interests of parties in a shareholder agreement are not always the same. Each party signing a shareholder agreement should be advised in writing to obtain independent legal advice.

There is usually an air of cooperation and goodwill at the time of drafting the agreement, which may not necessarily continue beyond the signing of the agreement and it is wise to ensure each person is separately represented throughout the proceedings.

Interestingly, neither the CBCA nor the MCA make it clear whether the shareholders of record or the beneficial owners of the shares must be the parties to the U.S.A. The particular statutory provisions (CBCA s. 146(1) and MCA s. 140(2)) refer to an "agreement among all the shareholders of a corporation..." However, CBCA s. 146(2) and MCA s. 140(3), which deal with the declaration of a single shareholder, state that "a person who is the beneficial owner of all of the issued shares" may make a written declaration which is deemed to be a U.S.A.

Based upon the rules of statutory interpretation, it is arguable that in the case of a U.S.A. in a corporation with more than one beneficial shareholder, the draftsman is entitled to rely upon the shareholders of record. If they are parties to the agreement, that should be sufficient for the agreement to be among all shareholders and to fall within the definition of a U.S.A.

As a matter of practice, where you are aware that a shareholder of record is a trustee, it is wise to include the beneficial owners of the shares as parties to the U.S.A. In the alternative, a representation should be obtained from each shareholder of record that the shareholder has acquired the shares on his, her or its own behalf (or for or on behalf of a disclosed person). Frequently, in the case of corporate shareholders, where the controlling parties of such shareholders are known, such controlling parties are made parties to and subject to the U.S.A.

After considering whether the beneficial owners of the shares should be parties, or whether controlling parties should be included in the agreement, consider whether or not the corporation should be a party to the agreement. A corporation which is not a party to a U.S.A. is not required to strictly comply with the terms thereof, notwithstanding the statutory duty of directors and officers to comply with a U.S.A. It is good practice for the corporation to be a party to the agreement so it has notice thereof. The corporation must be a party where the U.S.A. imposes obligations on it, such as the maintenance of life insurance or the repurchase of shares by the corporation.

d) Rights, Powers and Duties of Shareholders

The directors retain the general power to manage the corporation to the extent that such powers are not abridged by a U.S.A. (CBCA s. 102(1) and MCA s. 97(1)).

CBCA s. 146(5) and MCA s. 140(5) state that a shareholder who is a party to a U.S.A. has all the "rights, powers and duties and incurs the liabilities of a director...."

It has been suggested that where a U.S.A. is in place, the directors of the corporation should still seek an indemnity from the shareholders other than that contemplated in CBCA s. 124 and MCA s. 119, as there is some question whether a U.S.A. can limit the directors' obligations under other statutes such as the *Income Tax Act (Canada)*. Passive shareholders who are not actively involved in the management of the corporation should also seek indemnification from those share-holders who are actively involved in management.

e) Statutory Provisions Subject to a U.S.A.

Pursuant to the CBCA and the MCA, the following matters are specifically subject to a U.S.A.:

- the number of votes of directors or shareholders other than that required by the Acts to effect any action (CBCA s. 6(3) and MCA s. 6(3));
- the directors' power to issue shares (CBCA s. 25(1) and MCA s. 25(1));
- the directors' power to manage the business and affairs of the corporation (CBCA s. 102(1) and MCA s. 97(1));
- the directors' power to make, amend or repeal by-laws that regulate the business or affairs of the corporation (CBA s. 103(1) and MCA s. 98(1));
- the directors' appointment of officers and the delegations of powers to them (CBCA s. 121 and MCA s. 116);
- the directors' power to fix the remuneration of officers, directors and employees (CBCA s. 125 and MCA s. 12);
- additional financial information regarding the position of the corporation and the results of its operation for the shareholders' annual meeting (CBCA s. 155(1)(c) and MCA s. 149(1)(c));

- the directors' power to borrow money, issue debt obligations and guarantees and security interests (CBCA s. 189(1) and MCA s. 183(1)); and
- the events entitling a shareholder to demand a dissolution of the corporation (CBCA s. 214(1)(b)(i) and MCA s. 207(1)(b)(i)).

f) Reasons for a U.S.A.

- Shareholders often enter into a U.S.A. to provide for the control, operation and management of the corporation's business.
- Shareholders may enter into a U.S.A. or any other type of shareholder agreement to control who may be the shareholders of the corporation or who may control corporate shareholders of the corporation. This is a restriction on the free transferability of shares.
- Shareholders may wish to ensure the marketability of their shares in the corporation. This is especially important where there are minority shares which are not usually marketable without a compulsory buy-sell provision.
- A shareholder agreement can provide a mechanism for the transfer of shares in certain circumstances, such as where a shareholder is no longer willing or able to contribute to the business, where there is a dispute among the shareholders or a shareholder becomes bankrupt or dies.
- A shareholder agreement can provide for a method of dispute resolution among shareholders.

g) Terms and Conditions of a U.S.A.

Although precedents may be helpful when drafting, shareholder agreements are peculiar to their facts and extreme care should be taken to ensure any precedents are appropriate for the particular circumstances.

- (i) **Recitals.** Each U.S.A. should contain recitals specifying the purpose of the shareholder agreement and providing background information about the corporation, including its date of incorporation or amalgamation, whether the articles are intended to be amended, its authorized capital and the statute under which it was incorporated or amalgamated.
- (ii) **Term.** If the agreement is silent on the issue of termination, the normal contractual rules regarding termination of a contract of indefinite

duration will apply. A court may, upon application, imply a term that the contract is terminable upon reasonable notice. It is best to avoid any implied terms in a written agreement and accordingly, a termination period or a method of permitting a shareholder to terminate is desirable.

- (iii) **Confirmation of Shareholdings.** The agreement should set out the existing shareholdings as at the day of the agreement and the ownership thereof. If the shares have not yet been subscribed for, the proposed shareholdings after the amendment of the articles or the incorporation of the corporation, should be set out.

It may be desirable to include a copy of the share rights and conditions attaching to the various classes of shares as an appendix or schedule to the agreement.

- (iv) **Restriction on Share Transfer.** Where it is intended that share transfers be governed by the U.S.A., it is wise for the agreement to include a clause which prohibits any party from selling, assigning, transferring, disposing of, donating, mortgaging, pledging, charging, hypothecating or otherwise encumbering or dealing with any shares except subject to the provisions of the agreement.

It may be desirable to provide an exception to this prohibition with respect to transfers of shares to corporations controlled by the shareholder, provided that such corporate shareholder becomes subject to the terms of the U.S.A. Some agreements also provide for an exception where the shares are transferred to a family trust or spousal trust; or

Where the corporation is a party to the agreement, and the shares are endorsed with notice of the agreement, it is not always necessary to amend the articles of the corporation to correspond with the share restriction.

- (v) **Endorsement of Share Certificates.** Each share certificate should be endorsed with a legend giving notice of the U.S.A. It is useful to set out the form of legend in the U.S.A.
- (vi) **Management.** Where the agreement deals with the management of the corporation, certain matters relating to management are often dealt with in the agreement, including:
- the constitution of the board of directors;
 - the election of directors;

- the quorum for the transaction of business at directors' meetings;
- the appointment of officers;
- the remuneration of officers and directors;
- the quorum at shareholders' meetings;
- the selection of auditors or accountants of the corporation;
- the matters which management must put to a vote of shareholders;
- various other important management provisions relating to the financing and business of the corporation, including the enactment, amendment or repeal of by-laws, the declaration or payment of dividends or employee or directors' bonuses, the acquisition or disposition by the corporation of interests in other businesses, the purchase, sale, mortgage or lease of the corporation's real property, the lending or borrowing of money by the corporation, the amendment of signing authority relating to the corporation's bank accounts, the creation or issue of corporate securities, and the execution of certain contracts by the corporation.

The management provisions of a U.S.A. may be extensive and specifically enumerated or the parties may wish only to set out the parties responsible for the overall management of the corporation.

- (vii) **Amendment of By-Laws and Articles.** The agreement should contain a provision for the by-laws and, if necessary, the articles of the corporation to be amended to conform with the agreement or a covenant by the shareholders to do all things necessary to cause the by-laws and articles to be amended in conformity with the agreement.
- (viii) **Disposition of shares.** There are a number of circumstances which may give rise to a disposition of a shareholder's shares of the corporation:

- **Right of First Refusal**

One popular method of permitted share transfers in a shareholders' agreement is pursuant to a right of first refusal, which is also called a pre-emptive right. Rights of first refusal were specifically approved by the court in *McBride v. Ontario Jockey Club, Limited*, 1927 CanLII 336 (UK JPCPC).

With a right of first refusal, existing shareholders are given the first opportunity to buy shares of a shareholder who wishes to sell, but if the existing shareholders are unable or unwilling to purchase the shares, then a third party is permitted to acquire them. Usually, the

third-party purchaser is required to be bound by the terms of the shareholder agreement.

A right of first refusal typically provides that a shareholder wishing to sell shares must obtain a *bona fide* offer from an arm's length third party which the shareholder is willing to accept. That offer is then presented to the other shareholders, who have the right to buy the shares on the terms and conditions set out in the offer (including terms as to price and terms of sale).

The other shareholders have a fixed period of time in which to accept the offer and the agreement should provide for the mechanics of closing. If the offer is not accepted, the selling shareholder is free to sell to the third party offeror at a price and on terms set out in the offer (or in some cases, on terms no more favourable than those offered to the other shareholders). The sale must be completed within a specific period of time, failing which the right of first refusal is reinstated.

Generally, the offer to the existing shareholders is made pro rata to the shareholders' holdings and there is often a follow-up provision permitting the existing shareholders to purchase any shares not acquired by an existing shareholder or shareholders.

A right of first refusal may not be an effective way of having a shareholder leave a corporation, especially if the shareholder has a minority interest, because minority interests are not usually marketable.

- **Buy-Sell Agreements**

In most shareholder agreements, it is desirable to provide for mandatory transfers of shares in certain circumstances, such as the death of a shareholder, disability, bankruptcy, retirement, termination of employment, or dissension among the shareholders. In these situations, a mandatory buy-sell mechanism can be utilized. The particular type of buy-sell provision will depend on the nature of the business, the number of shareholders and the relative bargaining positions of each.

"Piggyback" Rights or Tag Along Rights. These require a shareholder who wishes to sell to a third party to obtain a similar offer from the third party for the other shareholders or the shareholder must purchase the other shareholders' shares on similar terms. The piggyback right normally arises in situations involving controlling shareholders with respect to minority shareholders, who are thus permitted to share in any premium paid by the third party for the

controlling shareholders' shares. This also improves the marketability of the minority shareholders' shares.

"Carry-along" Rights or Drag Along Rights. These entitle a shareholder, usually the majority shareholder, who wishes to sell shares to an arm's length third party to compel the other shareholders to sell their shares to the third party on the same terms and conditions. Thus, rather than selling only a portion of the shares of a corporation, it allows for the sale of all of the shares of the corporation.

Puts. Because a minority shareholder's interest is not generally marketable, a put provides the minority shareholder with the opportunity, without any obligation, to sell the shares either to the corporation or to the majority shareholder upon the occurrence of certain triggering events, such as termination of employment or the death of the majority shareholder. Even where there are no minority shareholders, puts are often used in the event of the death of a shareholder.

Calls. In a call provision, a shareholder, usually the majority shareholder, may have the right to acquire or reacquire or have the corporation reacquire the shares of minority shareholders in certain circumstances, including the termination of employment of a minority shareholder, the death of a minority shareholder, or the need to reorganize the corporation for tax purposes or to attract venture capital. Calls are also used in the event of the death of a shareholder.

"Shotgun" buy-sell agreements. In these agreements, one shareholder notifies the other that the first shareholder will sell their own shares at a certain price and upon certain terms. The other shareholder must then choose either to sell the shares to the first shareholder or to purchase the shares of that shareholder at the same price and on the same conditions. This mechanism ensures that one shareholder will sell the shares and attempts to ensure a fair price, because if the price offered is too high, the party receiving the offer will sell to the offeror, but if it is too low, the offeree will purchase the shares of the offeror. This mechanism is only appropriate where there are shareholders with equal bargaining strength.

- (ix) **Valuation.** In any buy-sell agreement which doesn't involve an offer from a third party or the arbitrary determination of the price by the selling shareholder, the buy-sell provisions must specifically deal with the valuation of the shares. If there is uncertainty as to the valuation procedure, the agreement may be unenforceable.

Generally, the valuation of shares and determination of the purchase price of shares is done in one of four ways:

- A fixed price negotiated among the shareholders in advance and set out in the agreement. The agreement should contain a formula for adjusting the purchase price on a regular basis;
- The agreement may provide for a specified formula for valuation such as book value, net adjusted book value or capitalization of earnings;
- The price may be determined by an independent third party or third parties, such as an accountant or a valuator. If detailed instructions in the agreement set out the criteria to be used in making the valuation, the purchase price determined by the appraiser should be accurate;
- The purchase price of the shares may be determined by arbitration, usually involving a single arbitrator or a panel of arbitrators.

In each of the above cases, the U.S.A. should specify the date on which the value of the shares is to be fixed. For example, if a right to purchase or sell shares arises as a result of the death of the shareholder, the value of the shares for the purpose of the valuation would typically be fixed at the date of death of the shareholder.

With the valuation of shares, there is generally no application of a discount in determining the market value of a minority interest (see e.g. [*Diligenti v. RWMD Operations Kelowna Ltd.*](#), 1977 CanLII 393 (BC SC)).

- (x) **Disposition on Death.** Shareholder agreements should specifically provide for the manner of disposition of shares of a deceased shareholder. These agreements normally provide for the deceased shareholder's shares to be purchased either by the remaining shareholders or repurchased by the corporation for cancellation. The manner of determination of the purchase price for the shares is usually the same as that for the mandatory buy-sell provisions. However, in connection with the death of a shareholder, the purchase of the shares on death is often funded by life insurance.

It used to be common for a corporation to repurchase the shares on the death of a shareholder and for the corporation to be required to purchase life insurance on the shareholder's life. Now, primarily for income tax reasons, many agreements provide that the shares of the deceased shareholder will be purchased by the surviving shareholders

and that each shareholder must maintain life insurance on the lives of the other shareholders.

When drafting a shareholder agreement, it is particularly critical to consult an accountant or tax practitioner to determine the appropriate manner of purchase on death. An insurance broker or agent should also be involved in discussions of the type and amount of insurance to be purchased, as well as its ownership. An error in the drafting of these provisions could result in drastic tax consequences for the deceased shareholder.

- (xi) **Repayment of Shareholders' Loans, etc.** In connection with any disposition of shares by a shareholder, it is advisable for the agreement to contain provisions for the repayment of the departing shareholder's loans. The agreement should also provide for the release of the shareholder's guarantees of the corporation's obligations. The departing shareholder should also be required to tender a resignation as an officer and director of the corporation at the time of closing of the transaction of purchase and sale of shares. These provisions are advisable to ensure that the relationship with the departing shareholder is completely severed from the corporation.
- (xii) **Amendment.** A shareholder agreement may always be amended if all of the parties to the agreement permit such change. The agreement may provide for certain changes upon less than unanimous agreement. However, unanimous agreement is the norm because the original agreement itself was established by unanimous consent.

5. Shareholder Remedies

a) Generally

There are a number of remedies available to an aggrieved shareholder, other than those set out in the shareholder agreement, if any. The most common remedies set out in the CBCA and the MCA are:

- the dissent and appraisal remedy under CBCA s.190 and MCA s. 184;
- the oppression remedy under CBCA s. 241 and MCA s. 234;
- the liquidation and dissolution remedy under CBCA s. 214 and MCA s. 207;
- the derivative action remedy under CBCA s. 239 and MCA s. 232.

These remedies are very broad and a flexible judicial approach has been taken with respect to them.

There is also an investigation remedy under CBCA s. 229 and MCA s. 222 pursuant to which a security holder may apply to court for the corporation to be investigated if it appears, *inter alia*, that the corporation or its affiliates were formed or the corporation's business or that of any of its affiliates has been carried on with intent to defraud.

Further, there is a statutory remedy under the federal *Winding-up and Restructuring Act* where a shareholder with five no par value shares or shares with a par value of \$500.00 may apply for a winding up of the corporation on the grounds of insolvency.

b) The Dissent and Appraisal Remedy

CBCA s. 190 and MCA s. 184 provide a remedy to shareholders who have dissented from certain fundamental changes to the corporation, including amendment to the articles, extraordinary sale, lease or exchange of the corporation's property, amalgamation, reorganization or continuance in another jurisdiction.

The right of dissent gives rise to the appraisal remedy, whereby the dissenting shareholder is entitled to be paid the fair value of the shareholder's shares by the corporation. The dissenting shareholder must have complied with all procedural requirements to obtain this remedy.

This remedy allows the majority of the shareholders to exercise their control over the corporation while permitting a dissenting shareholder to be bought out at the current fair value.

Much of the case law on share valuation is found in this area.

It is unclear whether one can contract out of the appraisal right under CBCA s. 190. MCA s. 184 specifically makes the appraisal remedy subject to a U.S.A., whereas the CBCA does not. As we have seen, certain sections of the CBCA are specifically subject to a U.S.A. and accordingly, based on the principles of statutory interpretation, it is arguable that the appraisal remedy under the CBCA cannot be abrogated by contract.

c) The Oppression Remedy

The oppression remedy allows a complainant to apply to the court for an order if the court is satisfied that the corporation or any of its affiliates have carried on their businesses or affairs or the directors have exercised their powers in a manner which is oppressive or unfairly prejudicial to, or unfairly disregards the interests of any security holder, creditor, director or officer.

This remedy under CBCA s. 241 and MCA s. 234 is one of the widest available to a complainant, which is broadly defined and includes a security holder, director, officer (present or former), or any other person the court considers proper.

Pursuant to CBCA s. 241(3) and MCA s. 234(3), the powers of the court are extremely broad, as the court may make any interim or final order it thinks fit, including, *inter alia*, an order restraining the particular conduct, appointing a receiver of the corporation, amending the articles, by-laws or U.S.A. of the corporation, appointing directors of the corporation, directing the corporation to purchase a security holders' securities, varying or setting aside a transaction or contract of the corporation, or liquidating or dissolving the corporation.

Oppressive conduct giving rise to an order under these sections may include the issue of shares to dominant shareholders on advantageous terms, the repeated passing of dividends on shares held by a certain group to the exclusion of others, any other action to squeeze out minority shareholders, or the payment of excessive remuneration to officers and directors to reduce or deplete the resources available for distribution to shareholders.

There are procedural requirements set out in CBCA s. 242 and MCA s. 235 in connection with an application under these sections.

d) The Liquidation and Dissolution Remedy

Both the CBCA and the MCA contain provisions (CBCA s. 214 and MCA s. 207) for the court to order the liquidation and dissolution of a corporation or any of its affiliates if the court is satisfied, *inter alia*, that the business or affairs of a corporation or any affiliate have been carried on, or the powers of the directors exercised in a manner which is oppressive or unfairly prejudicial to, or that unfairly disregards the interests of any security holder, creditor, director or officer.

The court may also dissolve the corporation if a U.S.A. entitles a shareholder to demand it after the occurrence of a triggering event or if the court is satisfied that it is just and equitable to do so.

It is apparent that the court's discretion in this remedy is not limited to situations involving actual wrongdoing. The court may make an order under these sections or under the oppression remedy as the sections are cross-referenced in both Acts.

e) The Derivative Action

CBCA s. 239 and MCA s. 232 permit a complainant to apply to the court for leave to bring an action on behalf of a corporation or subsidiary to prosecute, defend or discontinue it on behalf of the corporation or subsidiary.

Presumably this action would only be taken if the directors and officers of the corporation are not prosecuting or defending an action, or are not doing so adequately. There are conditions precedent for such an action set out in CBCA s. 239(2) and MCA s. 232(2).

E. FUNDAMENTAL CHANGES, REGISTRATION AND DISSOLUTION

1. Registration of Bodies Corporate

Every body corporate that carries on its business or undertaking in Manitoba must be registered pursuant to MCA Part XV.

A body corporate is defined in MCA s. 1 as including a company or other body corporate wherever or however incorporated. The requirement to register extends to extra-provincial corporations and also bodies corporate incorporated under the laws of Canada or another country. It also extends to corporations incorporated in Manitoba by or pursuant to a Special Act, unless the Special Act itself, or another provision of the MCA, exempts the corporation from the registration requirement. The requirement for registration does not extend to:

- corporations licensed under *The Insurance Act* as insurers; and
- corporations created solely for religious purposes.

Whether or not a corporation is deemed to be carrying on business in the province of Manitoba is a question of fact to be determined in each particular case. If a corporation has a resident agent or a place of business or office; if its name or a business name and a Manitoba address are listed in a Manitoba telephone directory or included in advertising; or if it holds real property in Manitoba, or if it “otherwise carries on its business or undertaking in Manitoba”, then that corporation will be deemed to be carrying on its business or undertaking within the province for the purpose of requiring it to register (MCA s. 187(2)).

For the purposes of registration, a Manitoba corporation incorporated under the MCA (or a corporation continued in Manitoba) is deemed to be registered as soon as the articles of incorporation or continuance are issued. A federal corporation must be registered within 30 days of carrying on business in the province and an extra-provincial corporation must be registered before it carries on business in this province (MCA s. 187(3)). Failure to register within the prescribed time periods will render the corporation liable to a penalty of \$50.00 for every day that the business or undertaking is carried on. The corporation, and every director, officer, representative or agent of that corporation will be guilty of an offence, and will become liable to that penalty (MCA s. 187(5)).

An extra-provincial body corporate is not capable of commencing or maintaining any action or other proceeding in a court in respect of a contract made in whole or in part in the

province in the course of or in connection with the business or undertaking carried on by it without being registered under the provisions of Part XVI (MCA s. 197(1)). This restriction does not apply to federal corporations nor does the restriction apply to any body corporate defending an action in this province. Furthermore, the restriction does not apply to non-registered corporations suing in tort, such as an action in passing-off. Note that MCA s. 197(3) allows registration after the time a corporation should have been registered, and that such registration “is deemed to authorize all previous acts of the body corporate.”

To register under the Act, the corporation must file with the Director an application in the form the Director requires together with a certificate of status from its home jurisdiction, an approved corporate name reservation request, a power of attorney, and the applicable fees, in which event the Director shall issue a certificate of registration (MCA s. 190), subject to the following restrictions:

- No certificate of registration shall be issued to an extra-provincial body corporate that is organized and operated on a cooperative basis within the meaning of *The Cooperatives Act* without the prior approval of the Registrar of Cooperatives (MCA s. 190(2)).
- Although in the first instance the Director will register a body corporate, that body corporate shall not carry on its business or undertaking under a name that is known to the Director to be identical with that of an individual, association, partnership or corporation or so nearly resembling that name that in the opinion of the Director it is likely to confuse or mislead or that the Director for any other reason disapproves. In such event, the Director will direct the body corporate to change its name to one that the Director approves (MCA s. 191). The Director’s direction is subject to appeal.

However, see [Reference Re: Constitution Act, 1867](#), ss. 91 and 92, 1991 CanLII 8365 (MB CA), which allows a federal corporation operating interprovincially to register a name even if using the same name as a Manitoba corporation.

The Director may also issue supplementary certificates where registered corporations undergo changes such as amalgamation, changes in name or continuance into another jurisdiction.

Where the articles of a body corporate have been forfeited or revoked or where the body corporate dissolves, the Director shall cancel the registration.

Where the registration of a body corporate has been cancelled, the liability of the body corporate or its successors for debts or liabilities is not affected. An action to recover such debts or liabilities, or any action to which the body corporate is a necessary party, or proceedings to realize upon its assets, may be commenced against the body corporate or its successors notwithstanding the cancellation of its registration (MCA s. 194(2)). Similarly, the liability of every director, officer or agent of the body corporate continues and may be enforced as if the registration of the body corporate had not been cancelled (MCA s. 194(6)).

The Director may restore the registration of a body corporate which has been cancelled upon such terms and conditions as the Director sees fit. Thereupon, the body corporate shall be restored to its legal position including all its rights and privileges, actions, property and assets as at the time of the cancellation, in the same manner and to the same extent as if there had been no cancellation, subject to the terms of the restoration order and the rights of third parties acquired subsequent to the cancellation (MCA s. 194(5)).

However, where a body corporate does register in order to maintain an action in this province, that registration is deemed to authorize all previous acts of the body corporate and is to be construed as if that certificate of registration had been granted before the body corporate commenced to carry on its business or undertaking in the province except for the purpose of a prosecution for an offence under this Act (MCA s. 97(3)). In other words, if a corporation carries on business in this province without being registered and then becomes registered in order to sue on a contract, the corporation will have been deemed to have been registered prior to carrying on such business. The validity of such registration is therefore retroactive. However, the corporation may still be liable for a prosecution under the Act for carrying on business without being registered.

2. Dissolution of Bodies Corporate

a) Voluntary Dissolution or Liquidation

Under the MCA and the CBCA there are four relatively simple methods whereby a company can be voluntarily dissolved or voluntarily liquidated.

i. No Shares Issued

Where no shares in the corporation have ever been issued, the corporation may be dissolved by ordinary resolution of all the directors (MCA s. 203(1) and CBCA s. 210(1)).

ii. Shares Issued But no Assets or Liabilities

Where shares have been issued but the corporation has no assets and no liabilities, then the corporation may be dissolved by special resolution of the shareholders or, if there is more than one class of shares, then by special resolution of the shareholders of each class of shares, including shares which are not otherwise entitled to vote (MCA s. 203(2) and CBCA s. 210(2)).

iii. Shares Issued and Assets and Liabilities

Where the corporation has issued shares and has both assets and liabilities, the corporation may be dissolved by a special resolution of the shareholders or if there is more than one class of shares, by special resolution of the

shareholders of each class of shares, including shares which are not otherwise entitled to vote, to pay off all liabilities and to distribute the remaining assets.

Once the corporation has in fact paid all of its liabilities and distributed its remaining assets, then the corporation can apply to the Director for articles of dissolution (MCA s. 203(3) and CBCA s. 210(3)).

Regardless of the method of dissolution, articles of dissolution in the form the Director requires must be sent to the Director. Upon payment of the appropriate fee, the Director will issue a certificate of dissolution. From and after the date shown in the certificate the corporation ceases to exist.

iv. Voluntary Liquidation

The fourth method of dissolving a corporation is by voluntary liquidation (MCA s. 204(1) and CBCA s. 211). The directors of the corporation may propose, or a shareholder of that corporation who is entitled to vote at an annual meeting of shareholders may make a proposal for, the voluntary liquidation and dissolution of the corporation. Where it is the shareholder who makes the proposal, the proposal must be made in accordance with MCA s.131 or CBCA s. 137. A procedure for approving the proposal and carrying out the liquidation and dissolution is provided in MCA s. 204 and CBCA s. 211.

b) Involuntary Dissolutions and Liquidations

i. Summary Dissolution by the Director

The Director may dissolve the corporation by issuing a certificate of dissolution or may apply to the court for an order dissolving the corporation (MCA s. 205(1)):

- where the corporation is in default under the MCA in sending to the Director any notice or document required by the Act for a period of two consecutive years;
- where the Director has reasonable cause to believe that a corporation is not carrying on business or is not in operation under the MCA;
- where the corporation is in default in sending to the Director any fee;
- where the corporation does not have any directors or only has deemed directors under MCA s. 114(1);
- where the corporation does not have the minimum number of directors that the MCA requires (share capital – one director, without share capital – three directors); or
- where less than 25% of the corporation's directors are residents of Canada.

The Director shall not dissolve a corporation under the MCA on these grounds until the Director has:

- given notice of the decision at least 90 days prior to the date of dissolution to the corporation under MCA s. 205(3); and
- except as to the dissolutions related to deficiencies in the board of directors, published a notice under the listings of [Recent Companies Office Filings](#) on the [Manitoba Government Companies Office website](#) of the decision to dissolve the corporation pursuant to MCA s. 205(2).

As of this writing, the Companies Office publishes “Manitoba Corporations which may be dissolved” on the filings lists once a month. Unless cause to the contrary is shown or unless the corporation is successful on an appeal to the court from the decision of the Director, the Director may issue a certificate of dissolution. From and after the date in that certificate, the corporation ceases to exist.

Under CBCA s. 212, the Director may dissolve a corporation by issuing a certificate of dissolution if the corporation has not commenced business within three years of the date shown on its certificate of incorporation, has not carried on business for three consecutive years, is in default for one year in sending any fee or notice to the Director or does not have any directors. The Director may also apply to court for an order dissolving the corporation. The Director must give 120 days notice of the decision to dissolve to the corporation and to each director and publish notice of the decision.

ii. Court-Ordered Liquidation

The Director or any interested person may apply to the court for an order dissolving a corporation pursuant to MCA s. 206 or CBCA s. 213. A shareholder may apply to the court for an order liquidating and dissolving the corporation (MCA s. 207(1) and CBCA s. 214).

c) Revival

Where a corporation is voluntarily dissolved or dissolved by the Director, any interested person may apply to the Director to have the corporation revived by filing a [corporate filing request and articles of revival for MCA revival](#) (see [instruction sheet for MCA revival](#) and MCA s. 202) or [Form 15 - Articles of Revival for CBCA revival](#) (see [instruction sheet for CBCA revival](#) and CBCA s. 209). In addition, under the MCA, where a corporation is dissolved on the order of the court, any interested person may apply to the court to have the corporation revived (MCA s. 201).

Upon receipt of the articles of revival or the order of the court, the Director shall issue a certificate of revival. From and after the date on the certificate, the revived corporation has all the rights and privileges and is liable for all of the obligations that

it would have had if it had not been dissolved, subject to such reasonable terms as may be imposed by the court (under the MCA) or by the Director and subject to certain rights of third parties acquired before the revival (MCA s. 202(2) and CBCA s. 209(4)).

3. Continuance

The MCA permits corporations that are subject to it to apply for permission under MCA s. 182(1) to be continued under the laws of another jurisdiction, subject to acceptance by such jurisdiction. Similarly, the CBCA permits such continuance in another jurisdiction pursuant to CBCA s. 188. In addition, other corporations, whether incorporated under the laws of one of the provinces or under the laws of a jurisdiction outside of Canada, may apply under CBCA s. 187(1) and MCA s. 181(1) to be continued under the CBCA or the MCA.

All corporations incorporated outside Manitoba may apply to the Director under MCA s. 181(1) or CBCA s. 187(1) to be continued under that Act if the laws of the incorporating jurisdiction permit the corporation to transfer to another jurisdiction. Where such a corporation does so, MCA s. 181(3) and CBCA s. 187(2) permit the corporation to amend its articles or other instrument of incorporation in the articles of continuance without making specific reference to the particular amendments.

Continuance under the Act pursuant to MCA s. 181 or CBCA s. 187 is not limited solely to companies incorporated in Canada, but is available to any body corporate as long as such continuance is permitted by the laws of the jurisdiction where the body corporate was incorporated. A corporation incorporated by a Manitoba statute other than MCA (i.e., a “Special Act”) may, with the approval of the Director, apply for a certificate of continuance under the MCA unless the Special Act provides that the MCA does not apply to the corporation.

a) Effect of Continuance

The essence of the concept of continuance is that a corporation may change the jurisdiction under which it is governed without at the same time altering its identity and existence.

For corporations continued under the CBCA or the MCA, CBCA s. 187(7) and MCA s. 181(9) provide that the property, rights, obligations, causes of action, lawsuits and proceedings of every kind, both by and against the body corporate, and the convictions, rulings, orders and judgments affecting the company continue unaffected after the continuation.

b) Export

MCA s. 182(1) and CBCA s. 188(1) permit corporations to apply to the appropriate authority of another jurisdiction requesting that the corporation be continued as if it had been incorporated under the laws of that other jurisdiction. The continuance must have been authorized by a special resolution of the shareholders and the corporation must establish to the satisfaction of the Director that the proposed continuance in the other jurisdiction will not adversely affect the creditors or shareholders of the corporation. In Manitoba, that step is accomplished by filing a [*Corporate Filing Request and an Application for Approval to Continue in Another Jurisdiction*](#).

4. Amalgamations

A statutory amalgamation under the CBCA or the MCA provides for the coming together of two or more corporations existing under the same jurisdiction and provides for their continuance as one corporation.

The CBCA sections starting at s. 182 and the MCA sections starting at s. 175 relating to amalgamations are similar. However, under CBCA s. 184 you can do a vertical short form amalgamation involving a parent corporation and a “grandchild” corporation, but you cannot do so under the MCA.

A review of the operations of the amalgamating corporations should be conducted prior to an amalgamation. Consider the following matters:

- What does the client hope to accomplish by the amalgamation? Will it be accomplished? The most common reasons for amalgamating are to integrate the operations of separate businesses or to complete a leveraged buyout of a corporation.
- What are the tax consequences of the amalgamation? *Income Tax Act (Canada)* s. 87 deals with the tax ramifications of amalgamations. Tax consequences should be reviewed in detail, prior to commencing an amalgamation. Note that an amalgamation triggers an automatic year end for each amalgamating corporation.
- Make certain that valuable licenses or permits will not require renewal because of the amalgamation or be subject to cancellation.
- Review all agreements and obligations of the amalgamating corporations to ascertain what effect an amalgamation will have on them and to ensure that all necessary consents are obtained and notices given.

- Review the financial positions of each amalgamating corporation and a pro-forma balance sheet of the amalgamated corporation to ensure that an officer can give the declaration required by MCA s. 179(2) or CBCA s. 185(2).

Under MCA s. 176 and CBCA s. 182 (but subject to the comments below as to MCA s. 178 and CBCA s. 184), the corporations to amalgamate are to enter into an agreement providing for the amalgamation. Such agreement must prescribe the terms and conditions of the amalgamation and the method of carrying it into effect.

Under MCA s. 177 and CBCA s. 183, the amalgamation agreement must be approved by a special resolution of the shareholders of each of the amalgamating corporations before becoming effective. A resolution approving the agreement must be passed by the shareholders of each corporation, at separate meetings, by at least two thirds of the votes cast at a meeting duly called for that purpose. The directors are required to submit the amalgamation agreement to the shareholders and for this purpose would have to call a special meeting of shareholders with all necessary documentation and procedures.

The shareholders are entitled to one vote for each share held in respect of the approval of the amalgamation, notwithstanding that any or all of such shares may not otherwise carry the right to vote. In addition, under MCA s. 177(4) and CBCA s. 183(4), if the carrying out of the amalgamation agreement would effect a result that if contained in a proposed amendment to the articles would require approval by the holders of shares of a class or series voting separately, then such holders will be entitled to a separate vote on the amalgamation in the manner provided under MCA s. 170 or CBCA s. 176.

The amalgamation agreement may provide that at any time before the issue of a certificate of amalgamation, the agreement may be terminated by the directors of any one or more of the amalgamating corporations. Under MCA s. 184 and CBCA s. 190, a shareholder of an amalgamating corporation has the right to dissent and to be paid the fair value of the shareholder's shares. The directors' right to termination (if provided for in the amalgamation agreement as permitted by MCA s. 177(6) or CBCA s. 183(6)) would permit the directors of an amalgamating corporation to withdraw it from the amalgamation if the number of shareholder dissents for that corporation would result in an extraordinary demand on the cash resources of the corporation to purchase shares from dissenting shareholders, and thus create a serious disadvantage for the amalgamating corporation.

Both the CBCA and the MCA permit the amalgamation of certain corporations without any shareholder approval whatsoever and without the entering into of an amalgamation agreement. The directors of holding corporations and their wholly owned subsidiary corporations are empowered to approve and carry out amalgamations between them. The concept also extends to the amalgamation of one or more wholly owned subsidiaries of the same holding corporation. These provisions are contained in MCA s. 178 and CBCA s. 184.

An amalgamation carried out under this section does not need to comply with the shareholder approval provisions (and will therefore not expose the corporation to the

dissent and appraisal remedy) and does not need to be carried out pursuant to an amalgamation agreement, provided that it is approved by resolution of the directors of each amalgamating corporation.

If the amalgamation is between a holding corporation and one or more wholly owned subsidiary corporations (sometimes referred to as a “vertical short form amalgamation”), the resolutions must provide that:

- (a) the shares of each amalgamating subsidiary corporation are to be cancelled without repayment of any capital or the receipt of any shares of the amalgamated corporation in respect thereof;
- (b) the articles of amalgamation are to be the same as the articles of incorporation of the amalgamating holding corporation thus making the capital of the amalgamated corporation the same as that of the holding corporation; and
- (c) no securities are to be issued by the amalgamated corporation in connection with the amalgamation.

Where two or more wholly owned subsidiary corporations amalgamate (sometimes referred to as a “horizontal short form amalgamation”), the directors’ resolutions must provide that:

- (a) the shares of all but one of the amalgamating subsidiary corporations must be cancelled without repayment of capital or issue of securities in respect thereof;
- (b) the articles of amalgamation shall be the same as the articles of incorporation of the amalgamating subsidiary corporation whose shares are not cancelled; and
- (c) the stated capital of the amalgamating subsidiary corporations whose shares are cancelled shall be added to the stated capital of the amalgamating subsidiary corporation whose shares are not cancelled thus creating the stated capital of the amalgamated subsidiary corporation.

There is no provision for shareholder dissent in respect of an amalgamation under MCA s. 178 and CBCA s. 184. This may be quite appropriate where the amalgamating corporations are wholly owned subsidiaries; however, the same rule applies where one of the amalgamating corporations is the holding corporation and the effect of the amalgamation may be to increase the direct liabilities of the holding corporation which had hitherto been isolated in the wholly owned subsidiary.

Statutory declarations from an officer or director of each of the amalgamating corporations in the form required by [Corporations Canada](#) or the [Manitoba Companies Office](#) (as applicable) are required to be filed together with articles of amalgamation.

Prior to proceeding with the amalgamation, it should be confirmed that each of the amalgamating corporations are governed by the same jurisdiction. If one corporation is

governed under the MCA and another governed under the CBCA, one of the corporations will need to be continued into the jurisdiction of the other before they can be amalgamated. Additionally, it is important to ensure that the annual filings of each amalgamating corporation are up to date prior to amalgamation given that the amalgamation cannot occur if either amalgamating corporation is behind in its annual filings. The date of an amalgamation is usually of importance. Not being able to achieve a particular amalgamation date can have adverse cost consequences.

a) Effect of Amalgamation

Under MCA s. 180 and CBCA s. 186, the amalgamation becomes effective upon the date set out in the certificate of amalgamation with the following consequences:

- The amalgamating corporations are amalgamated and continued as one corporation. The articles of amalgamation are deemed to be the articles of incorporation of the amalgamated corporation and the certificate of amalgamation is deemed to be its certificate of incorporation.
- The amalgamated corporation possesses all of the property and is subject to all the liabilities of each of the amalgamating corporations. It is not necessary for there to be a conveyance of the assets of the amalgamating corporations to the amalgamated corporation since the same result occurs by operation of law.
- Any existing cause of action, claim or liability to prosecution affecting the amalgamating corporations is unaffected by the amalgamation and continues as a liability of the amalgamated corporation. A civil, criminal or administrative action or proceeding pending by or against any amalgamating corporation may continue to be prosecuted by or against the amalgamated corporation. Likewise, a conviction against or ruling, order or judgment in favour of or against an amalgamating corporation may be enforced by or against the amalgamated corporation.

b) Post Amalgamation Procedures

After the certificate of amalgamation has been issued, organizational minutes or resolutions should be prepared to confirm the directors and officers of the amalgamated corporation, confirm the by laws and make any necessary changes, issue share certificates, appoint auditors or accountants, and establish a bank account.

If the name of the amalgamated corporation is not identical to that of one of the amalgamating corporations, a new corporate seal will have to be obtained, if desired. New banking documents should be forwarded to the amalgamated corporation's bank. A supplementary certificate of registration should be obtained in the jurisdictions where the amalgamating corporations carried on business as extra

provincial corporations. If the amalgamating corporations owned real property, application should be made to the appropriate land titles offices to have the title to the property registered in the name of the amalgamated corporation. Any property or liability insurance that was held in connection with the assets in the amalgamating corporations should be transferred into the name of the amalgamated corporation.

F. PRECEDENTS

1. Links to Companies Office and Corporations Canada Forms and Guidelines

Companies Office:

Forms and instruction sheets:

<http://companiesoffice.gov.mb.ca/forms.html>

Corporations Canada:

Forms:

<https://ised-isde.canada.ca/site/corporations-canada/en/federal-corporation-forms-and-instructions>

Guides:

<https://ised-isde.canada.ca/site/corporations-canada/en/business-corporations/resources-business-corporations>

2. Checklist for Incorporation

- 1.** Under which jurisdiction is the corporation to be incorporated?
- 2.** Are the incorporating documents to be in English or French?
- 3.** Name of corporation.
- 4.** Location and address of registered office.
- 5.** How many incorporators are desired and what are their names and addresses?
- 6.** How many directors are desired (or minimum and maximum) and what are their names and addresses?
- 7.** Are any family members to be involved either as directors and/or shareholders?
Should the advice of taxation counsel be sought with respect to estate planning?
- 8.** Share Capital:
 - (i) Is it desirable to have any limit on the number of shares that the corporation is authorized to issue?
 - (ii) Is it advantageous to have more than one class of shares?
 - (iii) What designations, rights, privileges, restrictions and conditions should be attached to the shares?
- 9.** Should the articles contain provisions regarding purchase by the corporation of its shares?
- 10.** Should there be any pre-emptive rights in favour of existing shareholders?
- 11.** Should the shareholders be able to cumulate their votes in the election of directors?
- 12.** Should the shareholders be required to fill vacancies among the directors?
- 13.** Should the directors be elected for a longer period than one year?
- 14.** Should the directors be elected and retired in rotation?
- 15.** Will the corporation be offering its shares to the public?
- 16.** Restrictions on powers, if any.
- 17.** Should the articles contain any provision which may be included in the by-laws?

- 18.** Is part of the funds of the corporation to be raised by bonds, debentures or other methods of borrowing?
- 19.** Should there be a unanimous shareholder agreement?
- 20.** What contracts are to be entered into before incorporation?
- 21.** What contracts are to be entered into after incorporation?
- 22.** What licences are to be obtained or registrations made?
- 23.** What tax liabilities are likely to be encountered? Is it advisable to obtain the advice of taxation counsel and also of an accountant as to setting up of the books of the corporation?
- 24.** Ensure that the clients attend at your offices to execute the documents in the Minute Book.
- 25.** Ensure that the shares issued have been fully paid. Each share subscriber should write a cheque in favour of the corporation for the shares upon executing the share subscription. These cheques should be deposited in the corporation's bank account.
- 26.** Obtain required information for each individual with significant control in respect of the corporation (name, date of birth, latest known address, tax jurisdiction, date on which significant interest was acquired, description of how the individual meets the test for significant control and any other prescribed information) and prepare significant control register.
- 27.** Report to client and prepare statement of account.

3. Sample Share Rights and Restrictions

SCHEDULE "I" TO ARTICLE 6 OF THE ARTICLES OF INCORPORATION OF MANITOBA INC.

There shall be three classes of Shares, the Voting Common Shares, the Non-Voting Common Shares and the Class "A" Shares, which shall have attached thereto the following rights, privileges, restrictions and conditions:

1. The holders of the Class "A" Shares shall in each financial year of the Corporation be entitled to receive, if declared by the Board of Directors of the Corporation on the Class "A" Shares out of the monies or other property of the Corporation properly applicable to the payment of dividends, non-cumulative dividends in an amount to be determined by and in the discretion of the Board of Directors of the Corporation, provided such amount shall not be greater than \$10.00 per Class "A" Share per year. If, in any year, the Board of Directors in its discretion does not declare any dividends on the Class "A" Shares, then the rights of the holders of the Class "A" Shares to any dividend for the year shall forever be extinguished.
2. Subject to the provisions of Paragraph 3, the holders of the Voting Common Shares and the holders of the Non-Voting Common Shares shall in each financial year of the Corporation be entitled to receive, if declared by the Board of Directors of the Corporation out of the monies or other property of the Corporation properly applicable to the payment of dividends, non-cumulative dividends in an amount to be determined by and in the discretion of the Board of Directors of the Corporation. If, in any year, the Board of Directors of the Corporation in its discretion decides to declare a dividend, the same amount of dividend must be declared on each such Share, whether a Voting Common Share or a Non-Voting Common Share, without preference or distinction. If, in any year, the Board of Directors in its discretion does not declare any dividend, then the rights of the holders of the Voting Common Shares and of the holders of the Non-Voting Common Shares to any dividend for the year shall forever be extinguished.
3. No dividends shall be paid on the Voting Common Shares and Non-Voting Common Shares of the Corporation which will result in the Corporation having insufficient net assets (that is, the amount by which the realizable value of its assets exceeds its liabilities) to redeem all issued and outstanding Class "A" Shares at \$100.00 per Class "A" Share.
4. It shall be in the sole discretion of the Board of Directors of the Corporation whether in any financial year of the Corporation any dividend is declared on any class or classes of Shares of the Corporation and it shall be in the sole discretion of the Board of Directors on which class or classes of Shares, if any, a dividend is declared in a particular financial year of the Corporation, provided that the provisions of Paragraphs 1, 2 and 3 shall always be complied with. For purposes of greater certainty, it is hereby stated that a dividend may be paid in money or property or by issuing fully paid Shares of the Corporation.

5. In the event of the liquidation, dissolution or winding up of the Corporation or other distribution of assets of the Corporation among Shareholders for the purposes of winding up its affairs, the holders of Class "A" Shares shall be entitled to receive out of the assets and property of the Corporation before any amount is paid or any property or assets of the Corporation is distributed to the holders of any Voting Common Shares or Non-Voting Common Shares, the sum of \$100.00 per Class "A" Share together with all dividends declared thereon and remaining unpaid. After payment to the holders of the Class "A" Shares of the sum of \$100.00 per Class "A" Share, they shall not be entitled to share in any further distribution of the property or assets of the Corporation. Thereafter, the holders of the Voting Common Shares and Non-Voting Common Shares shall be exclusively entitled to receive rateably, share for share, without preference or distinction, any remaining property or assets of the Corporation.

6. The Corporation shall have the right, at its option at any time, and from time to time, on notice in the manner hereinafter prescribed, or, if a Shareholder so agrees, without any notice, to redeem all or any portion of the Class "A" Shares held by any Shareholder for the sum of \$100.00 per Class "A" Share, together with any declared and unpaid dividends thereon. The prescribed manner of notice of redemption of the Class "A" Shares shall be fourteen (14) or more days' notice from date of mailing given by registered letter directed to the registered holder or holders of the Class "A" Shares to be redeemed at the address of the holders appearing on the books of the Corporation. By the date specified for redemption in the said notice (the "Surrender Date"), a holder of Class "A" Shares to be redeemed shall surrender at the registered office of the Corporation the Certificate or Certificates for the said Shares, duly endorsed, and upon surrender of the Certificate or Certificates, the Corporation shall pay or cause to be paid to or to the order of the holder the sum of \$100.00 per Class "A" Share, together with any declared and unpaid dividends thereon. If by the Surrender Date a holder of Class "A" Shares to be redeemed has not surrendered the Certificate or Certificates for such Shares, his Class "A" Shares called for redemption may be redeemed and for all purposes shall be deemed to be redeemed on the Corporation's depositing the amount due thereon on redemption as aforesaid into any chartered bank in Canada to be paid without interest to or to the order of the holder of such Shares upon surrender of the Certificate or Certificates representing the same, and after such deposit is made, the Class "A" Shares called for redemption shall cease to be entitled to dividends and the holder thereof shall not be entitled to exercise any of the rights of a holder of Shares in respect thereof.

7. Any Shareholder of a Class "A" Share or Class "A" Shares shall be entitled to require the Corporation to redeem at any time all or from time to time any portion of the Class "A" Shares registered in the name of such holder by tendering to the Corporation at its registered office the Certificate or Certificates representing the Class "A" Shares which the said holder desires to have the Corporation redeem, together with a request in writing specifying the desire for redemption, the number of Shares which the holder desires to have redeemed and the effective date on which the holder desires to have the Corporation redeem such Shares (the "Redemption Date"), which Redemption Date, unless otherwise agreed to by the Corporation, shall not be less than fourteen (14) days after the day on which

the request is received by the Corporation. Upon surrender of such Certificate or Certificates and receipt of such request, the Corporation shall on the Redemption Date redeem such Shares by paying or causing to be paid to or to the order of such holder, the sum of \$100.00 for each Class "A" Share to be redeemed, together with an amount equal to all dividends declared thereon and unpaid. The Shares shall be redeemed on the Redemption Date, and thereafter such Shares shall cease to be entitled to dividends and the holder thereof shall not be entitled to exercise any of the rights of a holder of Shares in respect thereof. In the event of default of payment of the redemption price on the Redemption Date, interest shall be paid by the Corporation from the Redemption Date at the rate of twelve (12%) per cent per annum.

8. If less than all of the Class "A" Shares represented by any Certificate or Certificates of a holder are to be redeemed as set out in either of the two (2) preceding Paragraphs, the holder shall be entitled to receive, at the expense of the Corporation, a new Certificate representing the Class "A" Shares comprised in the Certificate or Certificates surrendered as aforesaid which are not to be redeemed.

9. The Corporation shall not at any time redeem or purchase for cancellation any Class "A" Share for an amount less than the lesser of \$100.00 and the quotient obtained when the amount of its net assets (that is, the amount by which the realizable value of its assets exceeds its liabilities) is divided by the number of issued and outstanding Class "A" Shares of the Corporation at the particular time.

10. The Class "A" Shares shall not carry or confer on the holders thereof any further rights to participate in profits or assets of the Corporation other than as expressly hereinbefore provided.

11. A holder of fractional Shares issued by the Corporation shall be entitled proportionately to all the rights and privileges attaching to a whole Share of the same class, including, without limiting the generality of the foregoing, the right to receive the appropriate portion of dividend, to receive the appropriate portion of the redemption amount, if such class of Shares is otherwise redeemable, and the right to exercise voting rights in respect of the fractional Share, if such class of Shares is otherwise entitled to vote.

12. The holders of Voting Common Shares shall be entitled to one (1) vote for each Voting Common Share held by them at all meetings of Shareholders except meetings at which, pursuant to *The Corporations Act* of Manitoba, only holders of a specified class of Shares are entitled to vote. The holders of Class "A" Shares shall be entitled to one (1) vote for each Class "A" Share held by them at all meetings of Shareholders except meetings at which, pursuant to *The Corporations Act* of Manitoba, only holders of a specified class of Shares are entitled to vote. The holders of Non-Voting Common Shares shall not be entitled to vote at any meetings of Shareholders except meetings at which, pursuant to *The Corporations Act* of Manitoba, a right to vote is conferred upon the holders of a specified class of Shares.

4. Shareholder Agreement Checklist

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Introduction

This checklist deals with corporations incorporated under the MCA. It is designed for use in conjunction with the Shareholder Agreement Drafting checklist, which follows.

1. Initial Contact

- 1.1 Arrange interview.
- 1.2 Ask client to bring all relevant information, such as incorporation documents, and financial information (particularly if the corporation is already in existence).

2. Initial Interview

- 2.1 Determine for whom you will be acting. Ensure that there is no conflict of interest. In the case of a corporate client, confirm who is authorized to give you instructions. Find out the names and addresses of the other parties and their solicitors, if any.
- 2.2 Advise client regarding calculation of your account, method and timing of payment, and conditions upon which you undertake to act as a solicitor.
- 2.3 Discuss the background of the parties and their relationship, the business of the corporation, the general nature of the proposed agreement as your client understands it, and your client's objectives and expectations.
- 2.4 If the corporation has not been incorporated:
 - .1 Find out who will be drawing up the incorporation documents.
 - .2 If the corporation is to be a party to the shareholder agreement, consider the need for a pre-incorporation agreement whereby the parties covenant to cause the corporation to enter into the agreement when it is incorporated.
- 2.5 Review and discuss the articles (or proposed articles), including matters such as:
 - .1 The fact that, without a shareholder agreement, the corporation is managed pursuant to *The Corporations Act* and the articles. How does this differ from what the client proposes?

- .2 Whether it is preferable to include certain provisions in the articles or in the shareholder agreement, bearing in mind such considerations as:
 - (a) Amendment procedures in each case.
 - (b) Public nature of the articles.
 - (c) The effect of *The Corporations Act* provision (e.g. s. 117) that directors are obliged to manage, subject to the articles (i.e. if it is proposed that the directors' powers be restricted, this must be done in the articles or in an agreement).
- .3 Whether the articles raise any problems with respect to provisions that might be included in the shareholder agreement.
- 2.6 If you are representing a minority shareholder, ensure that your client is protected as much as is consistent with the interests of efficient management.
- 2.7 Discuss in detail the proposed agreement, referring to the clauses set out in the checklist for Shareholder Agreement Drafting. Include points such as:
 - .1 Management of the corporation and the role of the shareholders:
 - (a) In general, who are the directors and employees, who has banking authority, who is responsible for day-to-day management, and how are major decisions made?
 - (b) If there is a corporate shareholder, how will it be represented, and what will be the effect of various circumstances such as the death of the representative?
 - (c) Is it intended that all shareholders be and remain actively involved in management? If your client is not going to be actively involved, advise your client to keep informed of financial affairs. Consider the desirability of your client being a signing officer.
 - (d) Is your client going to be an officer or director? If so, advise regarding duties and potential liability.
 - (e) Is your client going to be an employee of the corporation? If so, consider the need for a separate employment contract (possibly tied to the shareholder agreement) or for employment clauses in the agreement.
 - (f) Ensure that the directors' discretion to manage, subject to the articles, is not fettered or, if it is fettered, the effect of section 140(5).

.2 Financing:

- (a) In general, how much money is needed for the proposed venture, for what purposes is it to be spent (on what, how much, when), how is the corporation going to be financed, what will be the composition of the share capital, will shareholders put money into the corporation by share purchase or loan and on what terms, how will shareholders get their money out?
- (b) If the client has not already done so, advise the client to discuss financing issues with a financial advisor (e.g. the prospective auditor).
- (c) Consider advising your client to meet with the other parties and draw up a pro forma budget. This might be attached to the shareholder agreement as a statement of intention.
- (d) Discuss methods by which shareholders can get a return from the corporation (e.g. salary, interest payments on loans, repayment of loans, dividends).

.3 Restrictions on transfer of shares:

- (a) In general, what are to be the restrictions and in what circumstances and why such restrictions are needed.
- (b) Advise that transfers of shares cannot be absolutely prohibited.

.4 Consequences of certain types of events:

- (a) In general, discuss various types of events that might occur, and the desired consequences. Determine whether the consequences are to be optional or mandatory.
- (b) Events should include: death, termination of employment, shareholder's desire to sell their interest in the corporation, retirement, incapacity, bankruptcy, default under the shareholder agreement or an employment contract, change in control of a corporate shareholder, etc.;
- (c) Ensure that you have covered all circumstances in which a shareholder can force the corporation or the other shareholders to buy out the shareholder, and in which the corporation or other shareholders can force a shareholder to sell to it or them.

- .5 Where a sale to the corporation or the other shareholders is contemplated:
 - (a) Is the sale to the corporation, the shareholders, or both, and, if both, how is this to be handled (e.g. priority, procedures, timing)?
 - (b) How is the purchase to be funded?
- .6 Valuation (calculation of purchase price, etc. in various circumstances):
 - (a) Values or methods for calculating values should be set out in the shareholder agreement and should be practical, reasonable, and certain.
 - (b) Advise client to consult a financial advisor as to the most appropriate methods.
- .7 Mechanisms for dispute resolution (e.g. a “shotgun” or compulsory purchase clause, dissolution of the corporation, arbitration).
- 2.8 Advise regarding the tax consequences of the proposed provisions, or advise client to get specialized tax advice (particularly with respect to provisions dealing with purchase of the interest of a deceased shareholder) and specialized life insurance advice for funding of deceased buy out.
- 2.9 Ensure that the proposed provisions are workable and reasonable in the circumstances.
- 2.10 Where your client has not already done so, advise the client to discuss the various issues with the other parties and reach a satisfactory solution which will ensure continuing fairness to all parties, then to inform you of the results.
- 2.11 Get instructions to proceed with drafting the shareholder agreement and, if appropriate, an employment contract.

3. After the Initial Interview

- 3.1 Send letter to client confirming the retainer and instructions, setting out the manner in which you will determine your fee for services, stating the conditions upon which you have agreed to act, and summarizing the points discussed.
- 3.2 Open file: place checklist in file and make entries in diary and “BF” systems.
- 3.3 Communicate by letter with counsel representing the other parties, advising them that you are acting for your client. If the other parties have not retained counsel, send letters to them advising them to do so and advising that you are acting only for your client.

- 3.4 Conduct any relevant searches, including a corporate search for each corporate party and detailed searches where the corporation which is the subject of the agreement is already in business.

4. Drafting the Agreement

- 4.1 Prepare an outline of the agreement, indicating the clauses from your precedent file which will be included (see Shareholder Agreement Drafting checklist). Also, prepare an outline of any other documents required, such as an employment contract.
- 4.2 Prepare the first draft.
- 4.3 Review the first draft, checking each segment to ensure that it achieves the client's objectives, and checking the document as a whole to ensure that it is internally consistent. Make necessary corrections and prepare the second draft or third draft.
- 4.4 Go over the second or third draft with client or send to client with a request that client review it and note any changes or questions. Discuss changes or questions.
- 4.5 Make any changes required to the draft and send copies to the other parties or their solicitors for comment. Review any alterations with client.
- 4.6 Prepare the final agreement (and employment contract) and arrange for signing.

5. Closing the File

- 5.1 Send notice of agreement to Companies Office under MCA s. 140(6).
- 5.2 Send a reporting letter and statement of account to your client. Advise that changes in circumstances, legislation (e.g. tax law), insurance requirements, etc. make it essential that the agreement be reviewed from time to time. Ascertain whether your client wants to meet with you for this purpose from time to time and, if so, make entries in your diary and "BF" systems.
- 5.3 Close file.

5. Shareholder Agreement Drafting Checklist

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Introduction

This checklist should be used in conjunction with the Shareholders' Agreement Procedure checklist.

The provisions suggested in this checklist must be considered in relation to the particular facts in the matter at hand, and augmented and revised as appropriate.

1. Date of Agreement

2. Identification of Parties

- 2.1 The individual shareholders.
- 2.2 The corporation (especially if it will be obliged to purchase shares from a shareholder pursuant to the agreement).
- 2.3 Where a shareholder is a corporation, consider adding its shareholders as parties to covenant regarding control of the shareholder corporation.

3. Recitals

- 3.1 General statement of the legal relationship between the parties.
- 3.2 Corporation particulars, such as:
 - .1 Business that will be carried on.
 - .2 Authorized capital, including a list of shares issued to each shareholder.
- 3.3 Reasons for entering into the agreement.
- 3.4 Statement relating the recitals to the rest of the agreement.

4. Interpretation

- 4.1 Definitions:
 - .1 Specific definitions (consider setting out in a schedule).

- .2 Statement that accounting terms not defined shall have the meaning ascribed to them in accordance with generally accepted accounting principles.
- 4.2 Choice of law.
- 4.3 Principles that govern the interpretation of the agreement (e.g. use of the masculine form, insertion of headings for convenience only).
- 4.4 Schedules, such as:
 - .1 Definitions (see item 4.1.1).
 - .2 Escrow agreement (see item 7.1.3).
 - .3 Life insurance policies (see item 12.1).
 - .4 Pro forma budget (see item 5.16).
- 5. Conduct of the Affairs of the Corporation**
- 5.1 Directors:
 - .1 Number (see also Articles of Corporation).
 - .2 Appointment (e.g. each shareholder to appoint one or more nominees, all shareholders to agree on the appointment of a nominee to break any deadlocks).
 - .3 Resignation.
 - .4 Filling vacancies.
 - .5 Removal (i.e. cause for removal, procedure, replacement).
- 5.2 Quorum for the transaction of business:
 - .1 Number constituting a quorum, and whether a nominee for each shareholder is required to be present.
 - .2 What happens when there is not a quorum (e.g. adjournment, with whoever attends the adjourned meeting constituting a quorum).
 - .3 Procedure for breaking a deadlock.
- 5.3 Directors' meetings:
 - .1 Place and time.

- .2 Calling a meeting, including notice requirements.
- 5.4 Shareholders' meetings:
 - .1 Place and time.
 - .2 Calling a meeting, including notice requirements.
 - .3 Quorum and voting.
- 5.5 Officers and employees:
 - .1 Positions.
 - .2 Duties.
- 5.6 Major decisions requiring unanimous approval (may be difficult to get) or special approval of the directors or the shareholders, such as:
 - .1 Sale, lease, transfer, mortgage, pledge, or other disposition of the undertaking of the corporation or a subsidiary.
 - .2 Increase or reduction in the capital of the corporation, issue of additional shares in the capital of the corporation.
 - .3 Consolidation, merger, or amalgamation of the corporation with any other legal entity.
 - .4 Capital expenditures or commitments exceeding a specified amount.
 - .5 Leases of corporation property having a capital value exceeding a specified amount.
 - .6 Borrowing by the corporation or a subsidiary which would result in aggregate indebtedness exceeding a specified amount.
 - .7 Loans by the corporation or a subsidiary to a shareholder or affiliate.
 - .8 Contracts between the corporation and a shareholder or affiliate.
 - .9 Any transaction out of the ordinary course of business.
 - .10 Any change in the authorized signing officers in respect of legal documents or any financial institution.
 - .11 Adoption or amendment of a budget.

- .12 Any agreement by the corporation restricting, or permitting any other party to accelerate or demand payment of corporation indebtedness upon the sale, transfer, or other disposition by a shareholder of the shareholder's shares or loan.
 - .13 Any material amendment to any employment contract made between the corporation and one of the other parties to the agreement, or a representative of one of those other (corporate) parties.
- 5.7 Whether directors' discretion to manage will be fettered under MCA s. 140(5).
- 5.8 Where the shareholders will be running the business, consider:
- .1 Including employment provisions in the shareholder agreement.
 - .2 Having separate employment or management contracts tied to the shareholder agreement so that a default by a shareholder under their employment contract would trigger a default under the shareholder agreement.
- 5.9 Shareholder's duties to the corporation:
- .1 Duty to devote their full energy (or a specified amount of time) to the business of the corporation.
 - .2 Duty not to compete, during the time the person is a shareholder and for a reasonable time thereafter, within a reasonable geographic area.
 - .3 Duty not to disclose any information acquired by reason of the shareholder's association with the corporation, while a shareholder and for a reasonable time thereafter.
 - .4 Methods for authorizing exceptions.
- 5.10 Statement that each shareholder acknowledges that, by reason of unique knowledge of and association with the business of the corporation, the covenants set out in item 5.9 are reasonable and commensurate with the protection of the legitimate interests of the corporation.
- 5.11 Bank and accounts.
- 5.12 Signing officers.
- 5.13 Auditor/accountant.
- 5.14 Books of account, financial statements, accounting principles.

5.15 Indemnification of shareholders:

- .1 Who will become liable for obligations of the corporation?
- .2 Who will incur personal liability in connection with the corporation?

5.16 Pro forma budget (consider attachment as a schedule and inclusion of a statement of intent).

6. Financing

6.1 Initial financial contribution required from each shareholder, distinguishing between subscribed capital (equity) and shareholder loans.

6.2 Mechanisms by which the corporation may raise additional funds for working capital:

- .1 Borrowing from an institutional lender:
 - (a) Whether the corporation is required to try to obtain funds in this manner before turning to the shareholders.
 - (b) Whether the shareholders are required to enter into guarantees of indebtedness of the corporation (consider a provision that liabilities for guarantees shall be shared pro rata and each shareholder will indemnify the others for the shareholder's share of the amount guaranteed).
- .2 Borrowing from the shareholders:
 - (a) Circumstances in which the corporation may do this, how the decision is made, and whether there is a maximum amount that may be demanded.
 - (b) Contribution to be pro rata.
 - (c) Notice requirements.
 - (d) Shareholder's obligation (or option) to advance funds.
 - (e) Where the shareholder is obliged to advance funds, a provision for failure to do so.

6.3 Whether shareholder loans bear interest.

6.4 Provisions regarding repayment of shareholder loans, including whether there is a right to demand repayment.

6.5 Distribution of net profit:

- .1 Statement that distribution will occur except as prohibited by the terms of debt financing, and to the extent permitted by law, after the board has provided (by resolution) for such reserves as are necessary.
- .2 Frequency of distribution.
- .3 Priorities (e.g. repayment of loans, dividends).

7. Restrictions on Transfer/Right of First Refusal

7.1 Right of first refusal to be offered to the corporation (or the other shareholders) setting out:

- .1 The investment offered for sale, which may be required by the agreement to:
 - (a) Include, proportionately, preference shares and loans outstanding.
 - (b) Represent a minimum of a specified percentage of the shareholder's investment.
- .2 The purchase price, which must be within the guidelines set out in the agreement.
- .3 The terms and conditions of the sale, including the method of payment, whether the price may be paid over time and, if so, provisions regarding interest on the unpaid balance, security on the unpaid balance (e.g. in the form of an escrow agreement annexed as a schedule), whether prepayment can be made without penalty, and release of vendor's guarantees, if any.
- .4 The prospective purchaser (where there is an offer from a third party).
- .5 Whether the offer may be accepted in part, or must be accepted in its entirety or not at all.
- .6 The length of time the offer is open for acceptance (as set out in the agreement).

7.2 Where an offer is made to the corporation and the other shareholders as set out in item 7.1:

- .1 The secretary shall, upon receipt:
 - (a) Transmit the offer to each director and shareholder.
 - (b) Call a meeting of the board to consider the offer.
 - (c) Instruct the auditors to determine the investment purchase price.

- .2 The corporation may have the first right to accept the offer, and to the extent that it does so, the shareholders agree to refuse any offers required to be made by the corporation under any Act, the articles, or the agreement.
- .3 If the offer is not wholly accepted by the corporation (or shareholders) within the time set out in the agreement (which is a shorter time than the time during which the offer is open for acceptance):
- (a) The secretary shall so advise the shareholders.
 - (b) The portion of the offer not accepted may be accepted by the other shareholders pro rata within the time set out in the agreement (which is a shorter time than the time during which the offer is open for acceptance).
 - (c) Acceptance by the shareholders shall be by notice to the secretary, and a shareholder may by such acceptance specify any additional portion of the investment offered for sale that the shareholder is prepared to purchase if the other shareholders fail to accept the offer.
 - (d) If any of the shareholders fail to accept the offer, any shareholder who has given notice of preparedness to make an additional purchase may do so, on a pro rata basis.
 - (e) At the expiry of the specified period, the secretary shall advise the corporation of the extent to which the offer is still open.
- .4 If the offer has not been fully accepted by the shareholders by the end of the specified period, the corporation is again entitled to accept the offer with respect to the portion still available and, if it does so, the shareholders agree to refuse any offers required to be made by the corporation under any Act, the articles, or the agreement.
- .5 Prior to the expiry of the period set out in the offer, the secretary shall advise the offeror whether the offer has been accepted in its entirety, and by whom.
- .6 If the offer has not been wholly accepted within the specified time period, the offeror has the right, for a specified period of time, to dispose of the investment to a third party (specify whether this may be to any third party, upon no better terms and conditions than were set out in the offer or to a particular third party, where the terms and conditions offered have first been offered to the other shareholders and have not been taken up), provided that the third party has entered into an agreement with the corporation and the shareholders by which the third party is bound by the agreement.

- .7 Provisions regarding completion of the sale (including where, when, and how).
 - .8 Consider including a set-off where the vendor is indebted to the corporation.
- 7.3 Whether disposition to an affiliate is authorized and, if so, under what conditions (e.g. that the affiliate will remain an affiliate so long as it holds the investment and, prior to ceasing to be an affiliate, will transfer the investment back to the shareholder; that the affiliate is bound by the agreement).
 - 7.4 A defaulting shareholder is not entitled to dispose of the shareholder's investment pursuant to the above provisions unless prior to or concurrently with the transfer that shareholder ceases to be a defaulting shareholder.
 - 7.5 Except as provided in the agreement, no shareholder shall dispose of their investment without meeting the requirements set out in the agreement (e.g. prior written consent of the other shareholders, or of any other party where such consent is required by an agreement between the corporation and that party).
 - 7.6 No shareholder shall encumber their own investment except as provided in the agreement.
 - 7.7 Upon execution of the agreement, the shareholders shall surrender to the corporation each share certificate, which shall be stamped to indicate that transfer is subject to the agreement (it's often advisable to hold shares in the minute book anyway).
- 8. Compulsory Buy-Out (Roulette or Shot-Gun Clause)**
- 8.1 A shareholder may make a compulsory offer to the other shareholders to either sell all of the shareholder's own investment or buy all of the other shareholders' investment at the price and on the terms and conditions set out in the offer.
 - 8.2 Notice requirements and limitation periods are as set out in the agreement.
 - 8.3 The shareholders to whom the offer is made have the option of buying (pro rata) or selling, but failure to give notice of the election within the specified time period shall be deemed to be an acceptance of the offer to sell.
 - 8.4 Provisions for handling a situation in which some shareholders elect to sell and some to buy.
 - 8.5 Provisions regarding completion of the sale (including where, when, and how), and release of guarantees or indemnifications.
 - 8.6 Consider including a set-off where the vendor is indebted to the corporation.

9. Obligation to Join in a Sale

- 9.1 A shareholder may require the other shareholders to join in a sale of the whole of the business to an outsider, by notifying them of an offer.
- 9.2 Notice requirements and limitation periods are as set out in the agreement.
- 9.3 The shareholders to whom the offer is made have the option of buying the investment of the shareholder who gave notice (pro rata) at the offered price, or of joining in the sale of all the investment to the third party.
- 9.4 Provisions for handling a situation in which some shareholders elect to sell and some to buy.
- 9.5 Provisions regarding completion of the sale (including where, when, and how) and releases or indemnifications.
- 9.6 Consider including a set-off where the vendor is indebted to the corporation.

10. Obligation to Purchase

- 10.1 A shareholder may require the corporation or the other shareholders to purchase the shareholder's investment in the circumstances set out in the agreement (e.g. retirement from the work force or from active involvement in the corporation's business).
- 10.2 Price, terms and conditions, and procedure are as set out in the agreement (refer, for example, to relevant portions of item 7).

11. Indemnification and Discharge of Guarantees

- 11.1 Obligation of the shareholders and corporation, where a shareholder has disposed of all of the shareholder's own investment in compliance with the agreement, to use their best efforts to have any guarantee or pledge issued or granted by the shareholder discharged or cancelled, and to indemnify the departing shareholder for liabilities arising with respect to such a guarantee or pledge subsequent to the shareholder's departure.

12. Insurance Policies

- 12.1 Obligation of the corporation to own and maintain life insurance policies of a specified value on all shareholders and representatives of corporate shareholders (such policies to be listed in a schedule to the agreement). (Or, alternatively, obligation of the shareholders and representatives to own and maintain criss-cross life insurance policies.)
- 12.2 Obligation of the shareholders to cooperate (e.g. by attending physical examinations).

- 12.3 Rights of the corporation with respect to the policies, such as:
- .1 To apply any policy dividends to payment of premiums.
 - .2 To collect death benefits.
 - .3 No right to modify or impair any rights or values of the policies, or exercise any rights of ownership, except as provided in the agreement or with the prior written consent of the shareholders.
- 12.4 Rights of the shareholders with respect to the policies, such as:
- .1 To obtain information from the insurer regarding the status of the policy on the shareholder's own life.
 - .2 To pay premiums where the corporation fails to do so, and to be reimbursed.
 - .3 To purchase the policy on the shareholder's life, at the price set out in the agreement (e.g. cash surrender value), on the happening of specified events (e.g. termination of the agreement during the lifetime of the shareholder).
- 12.5 Uninsurability provisions.

13. Sale on Death

- 13.1 Where a shareholder who is an individual dies, the shareholder's personal representatives shall sell, and the corporation or the remaining shareholders shall purchase from the estate, the investment held by the deceased at death.
- 13.2 Where the representative of a corporate shareholder dies, the shareholder shall sell, and the corporation or the remaining shareholders shall purchase from the corporate shareholder the investment held by it at the date of the representative's death.
- 13.3 The purchase price and terms and conditions of payment are as set out in the agreement.
- 13.4 Where the purchase is required to be made by the corporation, and the surplus and capital dividend account is insufficient to authorize the purchase, the parties to the agreement agree to take such steps as necessary to increase the account to an amount sufficient to authorize the purchase.
- 13.5 Where the purchase is required to be made by the remaining shareholders, it shall be on a pro rata basis.
- 13.6 The corporation shall, upon the death of the shareholder or representative, claim and collect the proceeds of the life insurance policy. The proceeds shall be applied as set out in the agreement (e.g. to pay any indebtedness of the corporation to the

deceased, to pay the purchase price, to pay the remaining shareholders who make the purchase).

13.7 Provisions regarding completion of the sale (including where and when).

13.8 At the closing the following shall occur, in the order set out in the agreement:

- .1 The purchasers shall pay the purchase price, or a specified percentage thereof, to the vendor, and deliver any documents that may be required (e.g. promissory notes, escrow agreements).
- .2 The unpaid balance, if any, shall be paid and secured as set out in the agreement.
- .3 The vendor, on receipt of the purchase price or the portion payable pursuant to item 13.3, shall give to the purchasers all share certificates, instruments, conveyances, assignments, and releases as may be reasonably required to complete the sale and to transfer all of the investment.
- .4 Where the purchasers are the remaining shareholders, the corporation shall pay to them a capital dividend equal to the lesser of the purchase price or the proceeds of the life insurance policy (and, in the latter case, the corporation shall elect to have the dividends payable out of its life insurance capital dividend account pursuant to the provisions of the *Income Tax Act*). [**Note:** the tax implications frequently change and tax advice should always be obtained before setting up buy-sell on death].

14. Wills

14.1 As an alternative to items 12 and 13, where the shareholders are all natural persons, consider a provision that each shareholder shall make and maintain a will providing that the others will inherit the shares.

15. Default

15.1 Circumstances that constitute a default, such as:

- .1 Failure to carry out obligations under the agreement after the other shareholders have made a written demand that the failure be cured.
- .2 Failure to defend assiduously a proceeding affecting possession or management of the shareholder's investment after the other shareholders have made a written demand that the failure be cured.
- .3 Bankruptcy, commission of an act of bankruptcy, the appointment of a receiver or receiver-manager with respect to the shareholder's assets, or an assignment for the benefit of creditors or otherwise.

- .4 Change in control of a corporate shareholder.
 - .5 Termination of employment of a shareholder, or a representative of a corporate shareholder, who was employed by the corporation.
 - .6 Incapacity (as defined in the agreement).
 - .7 Retirement (see also item 10).
- 15.2 Consequences of default (indicate if consequences differ for different types of default; indicate alternatives), such as:
- .1 Winding-up of the corporation under the articles.
 - .2 Other parties may waive the specific default.
 - .3 Other parties may pursue any remedy available in law or equity.
 - .4 Other parties may take such actions as may reasonably be required to cure the default, in which case expenses shall be recoverable as provided in the agreement.
 - .5 Implementation of a buy/sell procedure, whereby:
 - (a) The defaulting shareholder is deemed to offer to sell all or a part of their own investment to the corporation or the other shareholders.
 - (b) The purchase price is determined as set out in the agreement (e.g. a discounted value for specified types of default).

6. Unanimous Shareholder Agreement

SHAREHOLDER AGREEMENT INDEX

PARTIES

RECITALS

ARTICLE I - INTERPRETATION

- 1.1 Definitions
- 1.2 Extended Meanings
- 1.3 Headings
- 1.4 Applicable Law
- 1.5 Severability
- 1.6 Entire Agreement
- 1.7 Currency
- 1.8 Interpretation
- 1.9 Preamble
- 1.10 Appendices

ARTICLE II - TERM

- 2.1 Term

ARTICLE III - THE CORPORATION

- 3.1 Jurisdiction of Incorporation and Terms of Articles
- 3.2 Initial By-laws
- 3.3 Business of the Corporation

ARTICLE IV - SHARE OWNERSHIP

- 4.1 Initial Share Ownership
- 4.2 Pre-emptive Rights

ARTICLE V - DISPOSAL OF INTEREST

- 5.1 Restrictions on Transfer
- 5.2 Permitted Transfers
- 5.3 Right of First Refusal
- 5.4 Mandatory Transfers

ARTICLE VI - BOARD OF DIRECTORS

- 6.1 Appointment and Replacement
- 6.2 Remuneration

ARTICLE VII - OFFICERS

- 7.1 Appointment
- 7.2 Remuneration

ARTICLE VIII - FINANCIAL MATTERS

- 8.1 Auditors
- 8.2 Fiscal Year
- 8.3 Borrowing

ARTICLE IX - RESTRICTIONS ON MANAGEMENT OF THE CORPORATION

- 9.1 Unanimous Approval
- 9.2 Special Approval

ARTICLE X - RESOLUTION OF DISPUTES

- 10.1 Resolution by Arbitration
- 10.2 Appointment of Arbitrator
- 10.3 Procedure

ARTICLE XI - ENFORCEMENT OF SHAREHOLDER AGREEMENT

- 11.1 Voting Powers
- 11.2 Legend
- 11.3 Additional Parties
- 11.4 No Right to Dissent

ARTICLE XII - GENERAL

- 12.1 Amendment of Agreement
- 12.2 Notices
- 12.3 Counterparts

THIS SHAREHOLDER AGREEMENT made this day of , 20 .

AMONG:

-

(hereinafter referred to as "A"),

OF THE FIRST PART,

- and -

-

(hereinafter referred to as "B"),

OF THE SECOND PART,

- and -

-

(hereinafter referred to as the "Corporation"),

OF THE THIRD PART.

WHEREAS the Corporation is a corporation incorporated under the provisions of *The Corporations Act* [the *Canada Business Corporations Act*] by Articles of Incorporation filed on , 20 a copy of which is annexed as Schedule "A";

AND WHEREAS the parties hereto have caused the Corporation to be incorporated for the purpose of restricting the transfer of shares in the capital stock of the Corporation and regulating certain other matters in connection with the business and affairs of the Corporation [insert any other purposes];

AND WHEREAS the parties hereto are desirous of fixing and determining between themselves their respective interests, obligations, liabilities and ownership in the Corporation and to record their agreement as to the manner in which the affairs of the Corporation shall be conducted;

AND WHEREAS the Corporation has agreed to become a party hereto for the purpose of acknowledging and agreeing to the terms and conditions contained herein;

NOW THEREFORE THIS AGREEMENT WITNESSETH that in consideration of the premises and of the mutual covenants and agreements herein contained, the parties hereto covenant and agree, each with the other as follows:

ARTICLE I - INTERPRETATION

1.1 Definitions

The following terms and expressions shall have, for all purposes of this Agreement, the meaning set out below:

- (a) **"Agreement"** means this agreement, as amended from time to time;
- (b) **"Auditor"** means the auditor (or the accountant, if no auditor has been appointed) of the Corporation;
- (c) **"Board"** means the board of directors of the Corporation;
- (d) **"Business Day"** means any day other than a Saturday or a Sunday or a day which is a statutory holiday under the laws of Manitoba or of Canada;
- (e) **"Person"** includes individuals, corporations, limited partnerships, general partnerships, joint stock companies, joint ventures, associations, companies, trusts, or other organizations, whether or not legal entities;
- (f) **"Shareholder"** means a party to this Agreement owning Shares of the Corporation; and
- (g) **"Shares"** means the shares in the capital of the Corporation.

1.2 Extended Meanings

Words importing the singular number include the plural and vice versa and words importing gender include all genders.

1.3 Headings

The division of this Agreement into articles and sections and the insertions of headings are for convenience of reference only and shall not affect the construction or interpretation of this Agreement.

1.4 Applicable Law

This Agreement shall be construed and enforced in accordance with the laws of Manitoba and the laws of Canada applicable therein.

1.5 Severability

In the event that any provision of this agreement shall be invalid, illegal or unenforceable it shall not affect the validity, legality or enforceability of any other provision of this Agreement.

1.6 Entire Agreement

This Agreement constitutes the entire agreement between the parties with respect to the Corporation and their participation therein, except as herein stated and in the instruments and documents to be executed and delivered pursuant hereto, and contains all the representations, undertakings and agreements of the respective parties. There are no verbal representations, undertakings or agreements of any kind between the parties respecting the subject matter hereof except those contained herein.

1.7 Currency

Unless otherwise specified, all references herein to currency shall be references to currency of Canada.

1.8 Interpretation

In this Agreement, wherever the context permits or requires, the singular shall be read and construed as plural and vice versa, and words importing the masculine shall include the feminine or neuter, as the case may be, and vice versa.

1.9 Preamble

The preamble hereto is incorporated in and forms an integral part of this Agreement.

1.10 Appendices

The appendices to this Agreement shall consist of the following agreed documents and shall form an integral part of this Agreement:

Schedule "A" - Articles of the Corporation

Schedule "B" - By-laws of the Corporation

[Schedule "C" - Initial Share Ownership]

ARTICLE II - TERM

2.1 Term

This agreement shall come into force and effect as of the date set out above and shall continue in force until the earlier of:

- (a) The date on which only one Shareholder holds Shares in the Corporation; and
- (b) The date this Agreement is terminated by written agreement of the holders of at least [insert percentage] % of the outstanding Shares.

OR

- (b) The date on which the Corporation is dissolved in accordance with the applicable provision of *The Corporations Act* (Manitoba) [the *Canada Business Corporations Act*].

ARTICLE III - THE CORPORATION

3.1 Incorporation

The parties hereto do hereby acknowledge the Articles of Incorporation of the Corporation, a copy of which is annexed as Schedule "A" hereto.

3.2 Initial By-laws

The initial by-laws of the Corporation shall be in the form annexed as Schedule "B" hereto and shall not be amended or repealed except in accordance with this Agreement.

3.3 Business of the Corporation

[Insert a brief summary of the business to be conducted by the Corporation]

ARTICLE IV - SHARE OWNERSHIP

4.1 Initial Share Ownership

All Shares in the capital of the Corporation which are issued or outstanding at the date hereof, the number of such Shares held by the parties and the subscription prices paid into the Corporation by each party are as follows:

Name of Shareholder	Number of Shares	Percentage of total	Aggregate Amount Subscribed
A	50,000	66 2/3%	\$500,000
B	<u>25,000</u>	<u>33 1/3%</u>	<u>\$250,000</u>
	75,000	100%	\$750,000

Each of A and B represent and warrant to the other parties hereto that:

- (a) such party is the registered and beneficial owner of that number and class of the issued and outstanding shares of the Corporation set out opposite such party's name in this Section 4.1, and that such party does not own, and is not entitled to, any

additional shares, option for shares, warrants or any other securities in or from the Corporation as at the date hereof; and

- (b) the shares set out opposite such party's name in this Section 4.1 are free and clear of all claims, liens and encumbrances whatsoever and no person, firm, corporation, partnership, trust or other entity has any agreement or option or right capable of becoming an agreement for the purchase of any such Shares.

OR

4.1 Initial Share Ownership

Each of the parties is, as of the date hereof, the registered and beneficial owner of the number of fully paid Shares set out opposite his name in Schedule "C" annexed hereto. Each of A and B represent and warrant to the other parties hereto that:

- (a) such party is the registered and beneficial owner of that number and class of the issued and outstanding shares of the Corporation set out opposite such party's name in Schedule "C" hereto, and that such party does not own, and is not entitled to, any additional shares, option for shares, warrants or any other securities in or from the Corporation as at the date hereof; and
- (b) the shares set out opposite such party's name in Schedule "C" hereto are free and clear of all claims, liens and encumbrances whatsoever and no person, firm, corporation, partnership, trust or other entity has any agreement or option or right capable of becoming an agreement for the purchase of any such Shares.

4.2 Pre-emptive Right

- (a) Except as the Shareholders shall otherwise agree, as indicated by the favourable vote of the holders of at least 75% of the outstanding Shares, the vote to be expressed by written instrument or at a meeting duly called for that purpose, each offering by the Corporation of Shares shall be made in accordance with this s. 4.2.
- (b) Each offer shall be made to the then Shareholders as nearly as may be in proportion to the number of Shares respectively held by the Shareholders at the date of the offer.
- (c) Each offer shall be made in writing by the secretary of the Corporation, shall indicate the price at which the Shares are being offered (the price to be determined from time to time by the Board), shall state the use of the proceeds of the issue and shall state that any Shareholder who desires to subscribe for Shares in excess of its proportion shall, in its subscription, specify the number of Shares in excess of its proportion which it desires to purchase. If any Shareholder does not subscribe for its proportion, the unsubscribed Shares shall be used to satisfy the subscriptions of the Shareholders for Shares in excess of their proportion. If the subscriptions in excess are more than sufficient to exhaust the unsubscribed Shares, the unsubscribed

Shares shall be divided pro rata among the Shareholders desiring Shares in excess of their proportion in proportion to the number of Shares held by them respectively at the date of the offer, but no Shareholder shall be bound to take any Shares in excess of the amount it so desires.

- (d) If the Shares of any issue shall not be capable, without division into fractions, of being offered to or being divided among the Shareholders in the proportions above-mentioned, the same shall be offered to or divided among Shareholders as nearly as may be in these proportions and any balance shall be offered to or divided among the Shareholders or some of them in such manner as may be determined by the Board.
- (e) If all of the Shares of any issue are not subscribed for within a period of thirty days after the same are offered to the Shareholders pursuant to the provisions of this Section, the Corporation shall, during the following period of sixty days, offer all or any of the Shares not taken up by the Shareholders to any person who is not a Shareholder, but the price at which the Shares may be allotted and sold shall not be less than the subscription price offered to the Shareholders and the terms shall be no less favourable than those offered to the Shareholders, pursuant to this Section.
- (f) Every issue of Shares shall be subject to the condition that the subscriber therefor shall, if not a party hereto, agree to be bound by the terms of the Agreement and become a party hereto in accordance with the provisions of Section 11.3.

ARTICLE V - DISPOSAL OF INTEREST

5.1 Restrictions on Transfer

Except as otherwise provided for herein or as specifically consented to in writing by the parties, the parties hereto shall not, and shall not make any agreement to, directly or indirectly, sell, assign, transfer, give, devise, bequeath, mortgage, pledge, hypothecate or otherwise dispose of, alienate or in any way encumber or create a security interest in, or grant any option on, any of the Shares in the capital of the Corporation that they respectively own or may own for any reason or purpose whatsoever. Any attempt to accomplish or affect any or all of the acts prohibited hereby shall be null and void.

5.2 Permitted Transfers

- (a) At any time and from time to time any party may hypothecate, mortgage, pledge, charge or otherwise encumber or transfer to a creditor all but not less than all of its Shares as security for any loan or other indebtedness, but only on terms that should such creditors wish to realize all or part of such security, they shall comply with the provisions of Section 5.3 hereof and offer the Shares to the other parties to this Agreement.

- (b) At the request of one of the parties, the other parties shall give such consent as may be required under the Articles of Incorporation to permit the transfer of Shares in the capital stock of the Corporation held by such party (the "Transferor") to a spouse or child of a Transferor (the "Transferee") and nothing in this Agreement shall prohibit such a transfer of Shares, provided that the Transferee(s) in each case sign(s) an attornment to this Agreement, in the form and content reasonably required by the Corporation, by which such Transferee(s) agree(s) to be bound by the terms of this Agreement.
- (c) Nothing herein contained shall prevent the legal personal representative or representatives of a deceased Shareholder from becoming registered as a Shareholder or Shareholders in respect of any Shares of the Corporation held by such deceased Shareholder at the time of his death or the transfer of any such Shares standing in the name of the trustee of the estate of a deceased Shareholder upon any change of trustees to the trustees for the time being of such estate, provided that no such transfer shall be required until the proposed transferee has become a party to this Agreement.
- (d) A Shareholder shall be entitled to transfer all of its Shares without consent at any time to a wholly-owned subsidiary provided that, at the time of such transfer, provided that the said subsidiary signs an attornment to this Agreement, in the form and content reasonably required by the Corporation, by which such subsidiary agrees to be bound by the terms of this Agreement.

5.3 Right of First Refusal

- (a) If any Shareholder (the "Offeror") shall desire or be obliged by law or otherwise to transfer into the name of some other person or persons or to sell or dispose of any Shares, the other Shareholders (the "Offerees") shall have the prior right to purchase the Shares to be transferred on the terms and in accordance with the procedure contained in paragraph (b).

[Alternatively, a Shareholder that desires to sell Shares may first require a bona fide offer from an arm's length third party setting out the terms of such sale.]

- (b) The procedure on transfers is as follows:
 - (i) An Offeror shall give to the secretary of the Corporation notice in writing of its desired intentions to transfer, sell or otherwise dispose of any Shares. The notice (the "Selling Notice") shall set out:
 - (A) the number of Shares;
 - (B) the price and terms of payment which the Offeror is willing to accept for the Shares; and

- (C) if the Offeror has received an offer to purchase the Shares, the name and address of the Offeror and the terms of payments and price contained in the offer.
- (ii) The secretary of the Corporation shall thereupon be deemed to be the agent of the Offeror for the purpose of offering the Shares to the Offerees on the terms of payment and for the price contained in the Selling Notice and the offer by the secretary shall remain open for acceptance as hereinafter provided for a period of thirty days following the making of the offer by the secretary.
- (iii) The Shares shall be offered by the secretary for sale to each Offeree as nearly as may be in proportion to the number of Shares held by it as a proportion of all issued Shares less any Shares held by the Offeror. The offer shall state that any Offeree which desires to purchase Shares offered in excess of its proportion shall state in its purchase notice (the "Purchase Notice") how many Shares it desires to purchase in excess of its proportion. If, within the period of thirty days hereinbefore mentioned, a Purchase Notice has not been given by an Offeree to the secretary in respect of the Shares being offered, the Offeree shall be deemed to have refused to purchase the Shares being offered.
- (iv) If any Offeree does not claim its proportion of the Shares being offered, the unclaimed Shares shall be used to satisfy the claims of the Offerees in excess of their respective proportions. If claims in excess are more than sufficient to exhaust unclaimed Shares being offered, the unclaimed Shares shall be divided pro rata among the Offerees desiring such Shares in excess of their proportion in proportion to the number of Shares held by them at the date of the offer, provided that no Offeree shall be bound to take any Shares in excess of the number it so desires.
- (v) If the Shares being offered shall not be capable of being offered to or divided among the Offerees as set out above without resulting in division into fractions, the same shall be offered or divided among the Offerees as nearly as may be in accordance with the foregoing provisions and the balance shall be offered to or divided among the Offerees or some of them in such manner as may be determined by the Board.
- (vi) If any of the Shares being offered shall be accepted by any Offeree pursuant to the provisions of this paragraph (b), the Shares being offered shall be sold to the Offeree for the price and for the terms contained in the Selling Notice.
- (vii) If Purchase Notices have not been given by the Offerees to purchase all of the Shares being offered, the Offeror may, within sixty days after the expiration of the thirty day period hereinbefore mentioned, offer and sell the unpurchased

Shares to any other person at the price and on the terms and conditions set out in the Selling Notice.

- (c) No right created under paragraph (a) shall be exercised unless the approval in connection therewith under the *Investment Canada Act*, if any, has been obtained.
- (d) The transfer of the Shares shall be subject to the condition that the purchaser thereof shall, if not a party hereto, agree to be bound by the terms hereof and become a party hereto in accordance with the provisions of Section 11.3.
- (e) If Shares are being offered under paragraph (b) other than by reason of an obligation of law, the offer may be made only in respect of all (and not less than all) of the Shares owned by the Offeror.
- (f) If a sale, transfer or other disposition is completed in accordance with this Section 5.3, the Offeror shall upon completion of the purchase be absolved from all liability to or in respect of the Corporation under the provisions of this Agreement and the purchaser of the Shares offered shall assume all obligations in respect thereof.

5.4 Mandatory Transfers

- (a) (i) In the event that either Shareholder (in this paragraph called the "Selling Party"):
 - (A) becomes incapable, whether for mental or physical reasons, so that he is unable to perform his duties as a director and officer of the Corporation for a period of one year; or
 - (B) resigns from the board of directors of the Corporation at any time on his own initiative; or
 - (C) does, permits to be done or omits to do any act in breach of this Agreement or is in default under this Agreement and the other Shareholder has, before such breach or default has been cured or waived, given notice in writing to the Selling Party specifying such breach or default, or

[also consider the following]

- (D) attains the status of a "bankrupt" within the meaning of the *Bankruptcy and Insolvency Act* (Canada) or has a receiver or receiver-manager appointed with respect to the Shareholder's assets or enters into an assignment for the benefit of creditors; or
- (E) has an application or proceeding brought against such Shareholder under *The Family Property Act* (Manitoba) to determine the entitlement

of a spouse or former spouse to the net family property of the Shareholder;

then the other Shareholder (in this paragraph called the "Purchasing Party") shall have the right to purchase the Shares of the Selling Party upon and subject to the terms and conditions set out in paragraph (d) hereof.

- (ii) In the event that either party acquires the right to purchase the Shares of the other party pursuant to subparagraph (i) of this paragraph then in order to exercise such right the party acquiring such right shall within the thirty days next following of the acquisition of such right notify the other party that he desires to purchase the Shares of such other party.
- (b) If at any time the Shareholders are unable to agree as to how the affairs of the Corporation are to be conducted and paragraph (a) hereof is not applicable, then either of the Shareholders may offer to sell to the other Shareholder the Shares held by him at a price calculated in accordance with paragraph (d) hereof and subject to the terms and conditions of paragraph (d). The party to whom any such offer is given shall be allowed a period of thirty days from the receipt thereof in which to accept such offer. If within such thirty-day period the party to whom such offer is given, gives notice to the other party that he accepts such offer, then the resulting agreement shall be a binding contract of purchase and sale to be carried out in the manner and at the price calculated in accordance with paragraph (d) hereof. If within the period of thirty days aforementioned the party to whom such offer is given does not give notice to the other party of his desire to purchase such Shares, then he shall be bound to sell the Shares held by him to the other party (and the other party will be bound to purchase) at the price and subject to the terms and conditions calculated in accordance with paragraph (d) hereof.

[Alternatively, a shotgun buy-sell provision could be included where a shareholder can trigger the buy-sell provision by making an offer at any price (which does not need to be calculated by specific formula).]

- (c)
 - (i) Upon the death of either of the Shareholders hereto the other Shareholder shall be obliged to purchase the Shares of the deceased party at the price calculated in accordance with and subject to the terms and conditions set out in paragraph (d) hereof.
 - (ii) Each of the parties hereto agrees to carry sufficient insurance on the life of the other party to enable him to fulfil his obligation contained in subparagraph (i) of this paragraph and shall furnish at the request of the other party proof of compliance with this subparagraph (ii).

(d) If pursuant to paragraphs (a), (b) or (c) hereof one of the parties hereto (in this paragraph called the "Purchasing Party") becomes obliged to purchase the Shares of the other party (in this paragraph called the "Selling Party"):

- (i) The Purchasing Party shall immediately, and the Selling Party may, notify the Auditor of the agreement of purchase and sale in order that the Auditor can proceed pursuant to the provisions of subparagraph (iii) hereof.
- (ii) The terms of the purchase shall be that the price for the Shares shall be calculated in accordance with subparagraph (iii) hereof and the transaction shall be completed within thirty days following the submission of the final statement of the Auditor in accordance with subparagraph (iii) hereof.
- (iii) The price for the Shares to be purchased shall be determined as follows:

The Auditor shall, forthwith upon being notified of such purchases, prepare and complete a financial statement of the Corporation computed as of the date the Auditor receives notification under paragraph (d)(i) hereof. For the foregoing reasons the Auditor shall have access to all books of account and records of all vouchers, cheques, papers and documents which in any way relate to the business or the Corporation. A copy of such statement shall be furnished forthwith upon its completion to each of the parties, or their personal representatives, as the case may be, who shall be bound thereby unless one of the parties or their personal representatives objects thereto and notice is given to the Auditor of such objection within thirty days after the furnishing of a copy thereof as aforesaid, in which case the Auditor shall reconsider the statement, and, if the Auditor considers it necessary to do so, revise the same, provided that the Auditor shall have the sole and final decision as to whether any revision is necessary. The price of the Shares shall be the book value thereof as determined by the Auditor's statement. The Auditor in preparing his statement shall have regard to and make all proper and necessary allowances in respect of depreciation actually or reasonably estimated, profit and losses on transactions which have been partially or entirely completed but in connection with which the profits and losses have not been carried into the books of the Corporation and contingent or other reserves, but shall make no allowance for goodwill. In preparing such statement the value which shall be attributed to the fixed and other assets (excluding goodwill) of the Corporation shall be as may be agreed upon by the parties hereto or their personal representatives, as the case may be, or failing such agreement shall be determined by the Auditor provided that the Auditor shall have the right to retain any appraiser or appraisers at the expense of the parties to assist him in making such valuation if the auditor so desires. The valuation of the Auditor shall be final and binding upon the parties hereto. The remuneration of the Auditors shall be borne equally by the parties hereto.

[Alternatively, the purchase price of the shares could be defined as being the “Fair Market Value” of the Shares as the at the day which is immediately prior to the day on which the transfer event occurred which has triggered the transaction of purchase and sale. The Fair Market Value of the Shares would be determined by agreement of the parties and failing such agreement by referral to a qualified certified public accountant or business valuator valuing the corporation as a going concern and applying generally accepted accounting and valuation principles. The determination of the Fair Market Value of the Shares by the valuator (or if Fair Market Value is expressed as a range, the midpoint of the range) would be final and binding on all parties.]

ARTICLE VI - BOARD OF DIRECTORS

6.1 Appointment and Replacement

The Board shall consist of a number of directors equal to the number of Shareholders. Each Shareholder shall nominate one director to the Board. Any Shareholder may replace any director nominated by it at any time. If any vacancy occurs on the Board, such vacancy shall be filled by a person nominated by the Shareholder, the retirement or death of whose nominee created this vacancy.

OR

6.1 Appointment and Replacement

Except as they may otherwise agree in writing in accordance with the terms hereof, the parties hereto agree that:

- (a) the Board will consist of 6 directors;
- (b) all voting rights in respect of the Shares shall be exercised for the election and maintenance in office as directors of four nominees of A and two nominees of B;
- (c) the number of directors from time to time constituting a quorum at the meetings of the Board shall be a majority of the directors, provided that at least two directors nominated by A be present and at least one director nominated by B be present;
- (d) on the appointment or election of each director, the secretary of the Corporation shall make note of the nominator of the director in the records of the Corporation and the nominator shall be entitled by direction in writing, from time to time, to remove its nominee or nominees and to nominate his successor or successors who shall promptly be elected a director as contemplated herein;
- (e) resolutions shall be decided by a majority of those voting;
- (f) the chairman of the meeting shall not have a second or casting vote; and

- (g) all of the persons from time to time nominated to the Board shall be residents of Canada, as such term is defined in *The Corporations Act* (Manitoba) [or Canadian residents as defined in *Canada Business Corporations Act*].

6.2 Remuneration

Directors of the Corporation shall not be remunerated as such for their work and services to the Corporation, and each Shareholder shall bear all costs (including costs of transportation and lodging, if any), of the attendance at all meetings of the Board by the director nominated to the Board by such Shareholder.

[Alternatively, these costs could be borne by the Corporation.]

ARTICLE VII - OFFICERS

7.1 Appointment

Until changed by resolution of the Board, the officers of the Corporation shall be the following:

<u>Office</u>	<u>Name</u>
Chairman of the Board	•
President	•
Vice-President	•
Secretary	•
Treasurer	•

7.2 Remuneration

Officers of the Corporation who are not employed solely by the Corporation shall not be remunerated as such for their work in and services to the Corporation, but the Corporation shall reimburse for all of their out-of-pocket expenses incurred in performing their duties, including reasonable costs for transportation and lodging, save and except when acting as a member of the Board or as a proxy to a Shareholder, in which case such expense shall be reimbursed by the Shareholder on behalf of which such officer is acting.

ARTICLE VII - FINANCIAL MATTERS

8.1 Auditors

Except as the parties may otherwise agree in writing the auditors of the Corporation shall be .

8.2 Fiscal Year

Unless otherwise agreed to by the parties, the fiscal year of the Corporation shall end on in each and every year.

8.3 Borrowing

Unless otherwise agreed to by the parties, the Corporation shall not borrow money other than from the Shareholders pro rata to their holding of Shares.

OR

8.3 Borrowing

Unless otherwise agreed by the parties, the Corporation shall borrow only pursuant to an operating line of credit with the Bank and the aggregate of all loans to the Corporation outstanding at any time shall not exceed \$.

ARTICLE IX - RESTRICTIONS OF MANAGEMENT OF THE CORPORATION

9.1 Unanimous Approval

Except with the written consent of each of the parties to this Agreement, no action will be taken by or on behalf of the Corporation or with respect to any of the following:

- (a) changing the provisions in the by-laws of the Corporation with respect to notice of meetings of directors or of Shareholders and the quorum at such meetings;
- (b) the sale of all or substantially all of the properties and assets of the Corporation; or
- (c) the dissolution or winding up of the Corporation.

9.2 Special Approval

Except with the written consent of parties to this Agreement that are the holders of two-thirds of the aggregate number of Shares outstanding at such time, no action will be taken by or on behalf of the Corporation or with respect to any of the following:

- (a) subject to s. 9.1(a) hereof, the enactment, amendment or repeal of any by-law of the Corporation;
- (b) the declaration or payment of any dividend, distribution or bonus to employees;
- (c) the creation and issuance of Shares or the granting of any option or right capable of becoming an option to purchase any additional Shares;
- (d) the acquisition or disposition by the Corporation of interests in other enterprises;
- (e) the purchase, sale, mortgage or lease by the Corporation of any real property;
- (f) any purchase, commitment, lease or expenditure which, if completed, would raise the aggregate of capital expenditures of the Corporation in any fiscal year to more than \$;
- (g) the employment of any person at an aggregate annual remuneration of more than \$ per year or an increase in the remuneration of any employee to a total in excess of that amount;
- (h) the lending of money by the Corporation;
- (i) any commitment by the Corporation which raises the aggregate of the outstanding obligations of the Corporation for material or supplies to more than \$;
- (j) the authorization or execution by the Corporation of any contract, the performance of which by the Corporation will require more than a year to complete;
- (k) the guarantee by the Corporation of the debts of any other person in any amount;
- (l) the approval of the Corporation's balance sheet and statement of profit and loss;
- (m) the amendment of the signing authority relating to the Corporation's bank accounts;
or
- (n) any action or transaction not in the ordinary course of the business of the Corporation.

ARTICLE X - RESOLUTION OF DISPUTES

10.1 Resolution by Arbitration

If any dispute or controversy shall occur between the parties hereto relating to the interpretation or implementation of any of the provisions of this Agreement, such dispute shall be resolved by arbitration. Such arbitration shall be conducted by a single arbitrator.

10.2 Appointment of Arbitrator

The arbitrator shall be appointed by agreement between the parties or, in default of agreement, such arbitrator shall be appointed by a Judge of the Court of King's Bench of Manitoba upon the application of any of the parties and a Judge of the Court of King's Bench shall be entitled to act as such arbitrator, if the Judge so desires. Any such arbitration shall be held in the City of Winnipeg. The procedure to be followed shall be agreed by the parties or, in default of agreement, determined by the arbitrator.

10.3 Procedure

The arbitrator shall have the power to proceed with the arbitration and to deliver the award notwithstanding the default by any party in respect of any procedural order made by the arbitrator. The arbitration shall proceed in accordance with the provisions of *The Arbitration Act* (Manitoba). It is further agreed that such arbitration shall be a condition precedent to the commencement of any action at law. The decision arrived at by the arbitrator shall be final and binding and no appeal shall lie therefrom. Judgment upon the award rendered by the arbitrator may be entered in any court having jurisdiction.

ARTICLE XI - ENFORCEMENT OF SHAREHOLDER AGREEMENT

11.1 Voting Power

The parties hereto shall at all times use their voting powers (whether expressed by way of vote or written consent) in accordance with the provisions of this Agreement and for the purposes of effectuating the same and for the purposes of ensuring that the directors of the Corporation shall exercise their powers as members of the Board consistently with the provisions of this Agreement and for the purposes of effectuating the same. The Board shall see to it that the officers and employees of the Corporation carry out all duties which they are required to perform under the provisions of this Agreement.

The powers of the directors of the Corporation to manage the business and affairs of the Corporation, whether such powers arise from the Act, the articles or the by-laws of the Corporation, or otherwise, are hereby restricted to the fullest extent permitted by law and the directors are relieved of their duties and liabilities, including any liability for wages of employees.

The Shareholders shall have, enjoy, exercise and perform all the rights, powers and duties of the directors of the Corporation to manage the business and affairs of the Corporation.

In the exercise of the rights, powers and duties granted and transferred hereunder, the Shareholders shall be subject to the same duties and liabilities to which the directors of the Corporation would have been subject in the exercise of such rights and powers had this Agreement not been made.

Notwithstanding that the rights, powers and duties of the directors of the Corporation to manage the business and affairs of the Corporation are hereby vested in the Shareholders, the directors shall act in an advisory capacity to the Corporation.

Notwithstanding any other provisions of this Agreement, if any director gives notice in writing to the Board that he wishes any matter which would otherwise be determined by the Board to be determined by the Shareholders, then the powers of the Board are hereby restricted with respect to such matters, the Shareholders shall assume the powers to deal with such matter, and the directors are relieved of their duties and liabilities with respect thereto.

11.2 Legend

All Shares, whenever issued, are subject to the terms of this Agreement and all Share certificates of the Corporation shall have the following legend typed or otherwise endorsed upon them:

"The shares represented by this certificate are subject to the provisions of a unanimous shareholder agreement made •, among the shareholders of the Corporation, and shall not be transferred, encumbered or dealt with in any way except in accordance with that Agreement."

11.3 Additional Parties

Every issue and transfer of Shares shall be subject to the condition that each subscriber or transferee, as the case may be, shall, if not a party hereto, agree to be bound by the terms hereof and become a party hereto by executing an agreement to be bound hereby. Any agreement to be bound hereby and any other agreement in favour of the parties hereto shall be effectively delivered to each party hereto by delivering to the secretary of the Corporation a signed copy thereof and the secretary shall thereupon forward a photocopy of such copy to each party hereto.

11.4 No Right to Dissent

The Shareholders confirm that this Agreement is intended to supersede the provisions of Section 184 of *The Corporations Act* (Manitoba) [Section 190 of the *Canada Business Corporations Act*] which provides a shareholder with an opportunity to dissent. A Shareholder dissenting in respect of any proposed transaction of the Corporation shall not have the right to demand payment for its Shares in accordance with the provisions of Section 184 of Act but shall only be permitted to dispose of its Shares in accordance with the provisions of this Agreement.

ARTICLE XII - GENERAL

12.1 Amendment of Agreement

Any amendment to this Agreement approved in writing by the holders of all of the outstanding Shares shall be binding upon all parties to this Agreement.

12.2 Notices

Any notice to be given under this Agreement shall be in writing and shall be delivered, mailed by prepaid mail or sent by facsimile addressed to the party or parties to whom it is to be given at their last address shown in the records of the Corporation. All such notices shall:

- (a) if delivered, be deemed to have been received upon receipt;
- (b) if transmitted by facsimile, be deemed to have been given on the next Business Day following the day they were sent; and
- (c) if mailed, be deemed to have been given on the fifth Business Day following the date they were mailed.

In the event of disruption of normal postal service, notice shall be made by delivery or facsimile only.

12.3 Counterparts

This Agreement may be executed in counterparts, each of which shall be deemed to be an original and all of which shall constitute one and the same document. Each party shall be entitled to rely on delivery of a facsimile or other electronic transmission of this Agreement, and acceptance by either party of a facsimile or other electronic transmission of this Agreement shall create a legal, valid and binding agreement among the parties hereto in accordance with the terms hereof.

IN WITNESS WHEREOF the parties hereto have executed this Agreement.

Witness

•

Witness

•

•

Per: _____

7. Sample Reporting Letter to Client

BROWN, SMITH & ASSOCIATES
BARRISTERS & SOLICITORS

600 Portage Avenue
Winnipeg, MB R3V 3L6

Sally Q. Brown
Stephen O. Smith
Anthony R. Grey

Phone: (204) 999-9999
Fax: (204) 999-0000
e-mail: sbrown@brownsmith.mb.ca

January 16, 20__

File No. 999999

Mrs. Joan E. Client
123 Any Street
Winnipeg, MB R1R 2R2

Dear Joan:

Re: 3332221 MANITOBA LTD. – Incorporation and Organization

The incorporation and organization of 3332221 Manitoba Ltd. (the “Corporation”) are complete and I am writing to provide you with my report.

Incorporation

The Corporation was incorporated by Certificate and Articles of Incorporation issued January __, 20__ in accordance with *The Corporations Act* of Manitoba (the “Act”) under the hand and seal of the Director of the Companies Office. I have placed the original Certificate and Articles in the Minute Book for safekeeping. A copy of the Certificate and Articles of Incorporation is enclosed.

Capacity, Powers and Registration

As the Articles of Incorporation do not restrict the type of business that the Corporation may carry on, the Corporation has the capacity and, subject to the Act, the rights, powers and privileges of a natural person. In addition, the Corporation has the capacity to carry on its business, to conduct its affairs and exercise its powers in any jurisdiction outside Manitoba to the extent that the laws of that jurisdiction permit.

If you wish at any time to have the Corporation actually carry on business outside Manitoba, please call to review the registration requirements in those other jurisdictions.

Authorized Capital

The Corporation is authorized to issue an unlimited number of common shares. The rights, privileges, restrictions and conditions attaching to the shares are described in the Act, i.e., voting, dividends and the right to return of capital upon dissolution.

Restrictions on Share Transfer

The Articles provide that no shares in the capital stock of the Corporation shall be transferred without the express consent of a majority of the directors, to be signified by a resolution passed by the Board of Directors, or, in lieu thereof, the written consent of shareholders holding 51% or more of the shares.

Shareholdings

At the present time, the Corporation has issued the following shares:

Joan E. Client	51 common shares,
Timothy N. Client	49 common shares.

The certificates for these issued shares are in the minute book.

Organization

The First Director, the Shareholders and the permanent Board of Directors have passed the appropriate resolutions to complete the organization of the Corporation. The Shareholders and Directors have also passed and enacted general by-laws and general borrowing by-laws.

The Directors and Shareholders of the Corporation resolved to elect the following Directors and Officers:

Officers:

President:	Joan E. Client
Secretary-Treasurer:	Timothy N. Client

Directors:

Joan E. Client
Timothy N. Client

Fiscal Year End

The fiscal year end of the Corporation has been fixed at December 31st in each year. If you or your accountants think it necessary to change the corporation's fiscal year end at any time in the future, you will need to have formal approval by way of a shareholders' resolution and, if the change occurs after your first year of operation, the consent of the Minister of National Revenue.

Accountants

Makem, Pay & Howe, Chartered Accountants, have been appointed as accounting consultants for the Corporation. With the shareholders' consent, the appointment of an auditor was dispensed with for the current year.

Registered Office

The registered office of the Corporation has been established at 600 Portage Avenue, Winnipeg, Manitoba, R3V 3L6. The Act requires that the following records be established and maintained at the registered office, namely:

- (a) the articles and all amendments thereto;
- (b) all by-laws;
- (c) a copy of any unanimous shareholders' agreement;
- (d) minutes of meetings and resolutions of shareholders;
- (e) a register of directors, setting out the names, addresses and occupations of all persons who, during the currency of this arrangement, are or have been directors of the Corporation, indicating the date on which each becomes or ceases to be a director;
- (f) a register of all individuals with significant control over the corporation, setting out names, date of birth, latest known address, tax jurisdiction, date on which the person acquired a significant interest of the corporation and nature of the individual's interest in the Corporation.

It is understood, of course, that we can maintain these records only if you provide us with all necessary information from time to time to make the appropriate entries. To date, we have prepared the minute book including the articles, by-laws, organizational resolutions, and registers of directors and shareholders. As we discussed, I shall retain the minute book although, of course, it is available to you at any time.

The Act provides that all shareholders, creditors, their agents and legal representatives may have access to the records listed above. However, you will note that the list of accessible records does not include directors' resolutions or the minutes of their meetings. The Corporation's accountants or auditors, for obvious reasons, must also have complete access to the corporate records. It is understood, therefore, that we have your authority to permit all authorized persons to have access.

Annual Meetings and Returns

The Corporation is required each year to file an Annual Return of Information at the Companies Office. In addition, a general meeting of Shareholders must be held at least once during each year. The Act permits Resolutions, signed by all Shareholders or Directors (as the case may be) to be substituted for meetings. We will prepare the appropriate material for you, annually, unless you instruct us that you wish to do so yourself or are making other arrangements.

The Notion of “Limited Liability”

It is a fundamental principle of corporate law that a corporation is a legal “person” separate from its shareholders. It owns property and does business in its own name through its directors, officers and employees. As a result, shareholders have limited liability -- that is, generally speaking, they are not responsible personally for the contracts and actions of the corporation unless they become guarantors, assume personal liability or participate directly in any wrongs committed by the corporation.

Shareholders may lose the protection of limited liability if they fail to observe the separate existence of the Corporation by conducting the business as though they, not the Corporation, were the owners. To maintain your limited liability as a Shareholder of the Corporation, please keep the following in mind:

- (a) Carefully observe the formalities of running a corporation. Follow the rules laid down by the incorporating statute, the by-laws and Articles of Incorporation. Hold meetings of the shareholders and the directors at the required times for required purposes. Keep up-to-date minutes of these meetings.
- (b) Take care in handling corporate funds and transactions to keep them completely separate from your personal affairs. In dealings between you and the Corporation, be as business-like as you would be with a stranger.
- (c) Always use the full corporate name on letters, cheques, contracts, signs, advertisements and other printed materials. See that all corporate documents are signed properly by the appropriate officers and make it clear that they are signing on behalf of the Corporation; for example, sign:

“3332221 Manitoba Ltd.

By: “Your Signature”
its authorized officer”

-NOT-

“ “Your Signature”
Corporate President”

as the latter may give rise to a personal obligation.

We would also like to point out that the property owned by the Corporation should be insured in the name of the Corporation and would also recommend that you contact your accountants to ensure that the appropriate steps are taken with respect to Employment Insurance, Canada Pension, Income Tax, Retail Sales Tax and the reporting requirements of these laws and regulations. Municipal zoning and licensing requirements should also be observed.

Our Account

Finally, as all legal aspects of the incorporation and organization are complete, I enclose the firm's statement of account for services rendered and disbursements incurred. I trust you will find all to be in order, but please don't hesitate to call if the foregoing gives rise to any questions.

Sincerely yours,

SALLY Q. BROWN

Enclosures