INCORPORATING YOUR MEDICAL PRACTICE IN ONTARIO

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“The GI Practice in Evolution”
BACKGROUND
Evolution of Statutory Background

- **2000-2001 Amendments to Ontario Business Corporations Act** ("OBCA")
  - Authorized use of corporations by regulated professionals, on conditions (previously only architects and engineers)

- **2002 Amendments to Regulations under the Regulated Health Professions Act** ("RHPA")
  - Enabled issuance of Certificates of Authorization to professional corporations ("PC")

- **2005-2006 Amendments to OBCA and Regulations under OBCA and RHPA governing Physician and Dentist Professional Corporations**
  - Allowed the issuance of non-voting shares to family members and trusts for minor children
  - Consequential amendments to ensure control rests with the professional member
Why Incorporate?

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

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

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

  - Package is available online at: http://www.cpso.on.ca/Info_physicians/members/inc.htm
How Do I Do It?

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

- **Step 4: Transfer of Existing Practice Into Corporation**
  - Requires agreements based on legal and accounting advice
  - May require dealings with third parties
  - May require assignment/renegotiation of contracts
  - Can be structured on a tax-deferred basis with deferred consideration funded over time or integrated with estate planning
  - Timing of transfer is important concerning CCA pools and initial equity position of corporation
  - Structure to ensure no GST on the transfer and to minimize/avoid PST
How Do I Do It?

- Step 5: Keep it Alive and Make Sure it Works as Intended
  - Reflect the existence of the corporation in day-to-day affairs and in all contracts and relationships (e.g. with hospitals)
  - Corporations are separate legal persons
    - Very different from sole proprietorship
    - Meaningful differences from partnerships
    - The member needs to become “employed” by the corporation – pay is subject to statutory withholdings and remittances
  - Attend to required filings with College
    - Annual filing package at: http://www cpso on.ca/Info_physicians/members/inc.htm
    - Duty to promptly file notice of changes in name, constating documents, shareholdings
How Do I Do It?

- Attend to governmental registrations and annual/periodic filings and information slips (tax and otherwise)
- Flow of funds must reflect corporation and shareholders – OHIP payments due to the medical professional should be streamed to corporate bank account
THE DETAILS - IT'S NOT THAT EASY
Incorporation Details

- Selection of Name

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

- Business restricted to the particular discipline (multidisciplinary practices not allowed) and ancillary investment/deployment of surplus assets

- Directors and Officers must be shareholders who are members of the College
Incorporation Details

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

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

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

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

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

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

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

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