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**ANNOTATED ONTARIO BUSINESS  
CORPORATIONS ACT**

**Stephen N. Adams, Q.C.**

**Release No. 101, April 2020**

This is the most complete and current resource available covering the broad range of issues essential to operating an incorporated Ontario company.

**What's New in this Update:**

**Procedural Summary - Incorporation Pursuant to Ontario's Business Corporations Act - Case Law - Section 21** - The appeal addressed the legal question of how the law governing deposits that secure contracts for the purchase and sale of real property interacts with section 21 of Ontario's *Business Corporations Act*, which governs pre-incorporation contracts. On

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a motion for summary judgment, the motion judge found that the appellant forfeited the deposit when the transaction did not close, even though the pre-incorporation contract stated that the appellant was signing the contract 'without any personal liabilities'. The motion judge held that the provisions of the *OBCA* addressing pre-incorporation contracts do not displace the common law rules governing deposits in real estate transactions, and found that the deposit was forfeited to the respondent. Where a payer gives a vendor a deposit to secure the performance of a contract for purchase and sale of real estate, the deposit is forfeit if the purchaser refuses to close the transaction, unless the parties bargained to the contrary. Contracts that are executed by a person acting as a promoter or functionary - that is, executed on behalf of a company intended to be incorporated later - have an added complexity. Section 21 of the *OBCA* modifies the common law of contract to facilitate such transactions, clarifying the rights and obligations parties assume in pre-incorporation contracts. Personal liability of the promoter is established by s. 21(1) and prevails unless either contracted out of pursuant to s. 21(4), or displaced by the adoption of the contract by the company subsequent to its incorporation pursuant to s. 21(2). The default rule of personal liability is thus subject to an opt-out under s. 21(4), where the parties make it clear that is what they have chosen. A forfeited deposit does not constitute damages for breach of contract, but stands as security for the performance of the contract. A purchaser's obligations under a contract of purchase and sale are thus distinct from the obligation incurred by the payer of the deposit. An implied term of a deposit is that on breach of the contract by the purchaser (or, in the case of a pre-incorporation contract, by the promoter on behalf of the intended purchaser), the deposit is forfeited to the vendor. It was reasonable for the motion judge to interpret the phrase "without any personal liabilities" in the context of the contract as a whole, as not applying to the deposit: *Benedetto v. 2453912 Ontario Inc.*, 2019 CarswellOnt 2492, 2019 ONCA 149, 302 A.C.W.S. (3d) 205, 86 B.L.R. (5th) 1, 98 R.P.R. (5th) 177 (Ont. C.A.).