

Overview of British Columbia Business Corporations Act

New Company Act for British Columbia

In late November, early December 2003, it is expected that a new act will replace our current BC **Company Act**. The new act is called the British Columbia **Business Corporations Act** and is substantially different from our current act. This will mean changes in practice and procedure for BC companies. This is the first time since 1973 that there has been a significant amendment to our **Company Act**.

Origins of New Act

The New Act is based on our current BC Act but contains significant amendments to reflect:

1. desired features from the CBCA and other Canadian statutes;
2. modern corporate practices; and
3. clarification of ambiguities in our current Act.

The New Act adopts the words 'corporation' (in the title) but BC companies will still be called "companies". The New Act also uses the word 'shareholder', instead of 'member', and replaces the 'memorandum' with a 'notice of articles'. A BC company's articles will still be called 'articles'.

Key Provisions of the New Act

- No director residency requirements
- Removal of mandatory president/secretary officer positions
- Insolvency test only “inability to pay debts as they become due in usual course”
- No court approval for director indemnities (with some exceptions)
- No mandatory pre-emptive rights on allotments of shares
- Reduction of capital may be done by special resolution, rather than just by court order
- Subsidiaries can acquire but not vote shares of parent
- Corporation may hold shares of its own capital
- Par value and non-par value shares permitted
- Shareholder meetings may be held outside BC and by electronic communication
- Choice of special resolution majorities (2/3 to 3/4)
- Shareholder proposals introduced
- Amalgamations may be effected with or without court approval
- Short form vertical and horizontal amalgamations permitted
- Amalgamation of BC corporation with foreign corporation possible
- Financial assistance no longer prohibited, only disclosure to shareholders required
- Restoration may be done by application to registrar or by court order
- Extra-provincial registration - removal of penalties for failure to file
- Electronic filings mandatory

Transition to New Act

Transition must occur within two years following the proclamation in force of the New Act.

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Memorandum and Articles of a BC company must be rolled over to new Notice of Articles and Articles and director/officer filings must be ‘refreshed’. All our clients who have BC companies in our corporate services system will receive from us detailed information and assistance on transition roll-overs prior to the coming into force of the New Act.

Director Residency and other Requirements

As with the current **Company Act**, non-public companies will be required to have at least one director, and public companies at least three directors (two of whom are non-officers and non-employees). (Public companies in the New Act include ‘reporting issuer’, as defined in the BC **Securities Act**, as well as reporting issuer equivalents).

The New Act will not contain any director residency requirements

The current BC **Company Act** requires a majority of the directors of a BC company to be ordinarily resident in Canada and one director to be ordinarily resident in BC. The New Act will not contain any director residency requirements. The New Act permits directors to provide a ‘prescribed address’ instead of their residential address, in order to protect privacy.

Officer Designations

The current **Company Act** requires a president and secretary to be appointed, who must not be the same person unless the company has only one shareholder. Also, a chair and/or president must also be a director.

The New Act permits any officer designations and an officer does not have to be a director (but must be qualified to be a director). As in the case of the current Act, the directors may remove an officer from his/her appointment.

Director Liability/Indemnity

This is a very broad topic but, generally speaking, few changes have been made under the New Act. The new solvency test makes it easier for directors to be sure they are not committing a breach of the Act, and there are also more defences to director liability under the New Act. Additionally, the indemnity provisions are broader and easier to invoke.

The New Act provides that directors must “act honestly and in good faith with a view to the best interests of the company and exercise the care, diligence and skill that a reasonably prudent individual would exercise in comparable circumstances”. This language is virtually identical to the current Act.

Under the New Act, directors may be personally liable for:

- consenting to the company acting outside its purposes;
- paying an unreasonable commission or permitting an unreasonable discount on share purchase;
- paying a dividend when the company is insolvent (or when paying the dividend causes insolvency);
- purchasing or redeeming shares when company is insolvent (or when action causes insolvency); and
- granting an indemnity or making an indemnity payment that breaches rules of New Act (such as the person being indemnified did not act in good faith).

Statutory liability continues under the **Employment Standards Act** and other legislation, as before.

The New Act provides directors with defences to personal liability provided the director has relied in good faith on financial statements represented to the director by an officer of the company or a written report of an auditor of the company or a report of a professional (such as lawyer, accountant, engineer or other person ‘whose profession lends credibility to a statement made by that person’).

The insolvency test under the New Act is much more certain than the insolvency test under the current Act. The New Act provides that insolvency is the ‘inability to pay debts as they become due in the usual course of business’. The current Act

states that insolvency '**includes**' the inability to meet debts as they become due in the ordinary course of business. This leaves open the possibility that the net realizable valuation of assets tests or other tests of solvency apply to a BC company. The New Act clearly excludes these other tests, making it much easier to assess and meet the test for solvency.

The New Act permits the company to indemnify a director or officer against expenses, judgements and settlements which may be reasonably incurred by the individual by reason of being or having been a director or officer if the director or officer acted honestly and in good faith in the best interests of the company or, in the case of an administrative or criminal matter, if the director or officer had reasonable grounds to believe that his or her conduct was lawful.

Unlike the current Act, no court application is required to approve the indemnification, except in the case of actions by the company as a plaintiff against the director or officer. Also, the New Act makes it clear that the company has a mandatory obligation to pay expenses actually and reasonably incurred by a director or officer if the director/officer has not been reimbursed for such expenses and is wholly or **substantially** successful on the merits of the proceeding.

Share Capital/Share Rights

The New Act permits unlimited authorized capital and also permits the issuance of fractional shares. Additionally, the New Act retains the concept of 'par value' shares and further permits non-Canadian currency par values.

A company may reduce its share capital under the New Act by a court order or by a special resolution, provided the capital of the company is not reduced to an amount that is less than the 'realizable value of the company's assets less its liabilities'. The current Act only permits capital to be reduced by court order.

The New Act continues pre-emptive rights on the issuance of new shares for companies incorporated under the current Act. This means that when shares are issued, they must be offered pro-rata to existing shareholders before they are offered to new parties. Under the New Act, companies will not be required to have pre-emptive rights if they do not specifically include them in their articles. Existing companies also have the option of removing pre-emptive rights by special resolution.

The New Act clarifies that a subsidiary can acquire shares of its parent provided it is solvent. The New Act, like the current Act, provides that a subsidiary cannot vote shares held in its holding company.

The New Act, like the current act, permits a company to hold its own shares. Upon repurchase or redemption of shares, the company has a choice of cancelling them and returning them to the status of unissued shares or keeping them outstanding and issued, registered in the name of the company. The company cannot vote its own shares.

Shareholder Meetings/Resolutions/Proposals

Unlike the current Act, the New Act permits shareholder meetings to be held outside BC if the location is stated in the articles or if it is approved by the shareholders ahead of time.

Additionally, unless the articles otherwise provide, shareholders may participate in, and vote at, a meeting of shareholders by telephone or other communications medium if all shareholders and proxy holders participating in the meeting are able to communicate with each other.

Special resolutions will require whatever majority is stated to be necessary in the articles, so long as that majority is equal to or between 2/3 and 3/4 of votes cast. If the articles do not make provision for special resolutions, then for companies incorporated under the current Act, the majority will be 3/4, and for companies incorporated under the New Act, the majority will be 2/3.

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The New Act also permits a company to specify in its articles a majority vote of the shareholders greater than a special majority for the passing of an 'exceptional resolution'. The articles or notice of articles may set out certain acts which may not be taken by the company or its directors, or specify provisions of the articles which may not be changed, unless such action or change is approved by exceptional resolution.

If shareholders unanimously agree, they may waive the requirement for receipt of annual financial statements (this applies only to non public companies).

The New Act provides for similar rights for non-voting shareholders to vote on certain issues (such as waiver of auditor) however short form amalgamations do not require shareholder votes.

The current Act does not contain any provision for shareholder proposals. The New Act provides that shareholders (registered and beneficial) have a right to submit to the company (if a public company) notice of any matter to be raised at an annual meeting. The New Act specifies thresholds for bringing a proposal (at least 1/100 of issued shares that carry right to vote at general meeting) and reasonably stringent notice requirements (at least 4 months before the anniversary of previous year's meeting) and mandates material in support of the proposal which must be sent out with the notice to shareholders.

The New Act provides that Shareholders have a right to submit to the company notice of any matter to be raised at an annual meeting.

Under the New Act, a shareholder proposal can be rejected by the company for numerous reasons:

- substantially the same proposal was previously submitted to shareholders in a previous [prescribed] period;
- the proposal does not relate in a significant way to the business or affairs of the company;
- the primary purpose for the proposal is securing publicity or enforcing a personal claim or grievance;
- the proposal has already been substantially implemented;

- the proposal, if implemented, would cause the company to commit an offence; or
- the proposal deals with matters beyond the company's power to implement.

Amalgamations

Under the New Act, a court approved amalgamation (with full amalgamation agreement) will still be an option, but companies may also amalgamate by resolution without court order. In addition, companies may undertake short form amalgamations whereby a parent corporation and one or more wholly-owned subsidiaries amalgamate (vertical) or whereby two or more wholly-owned subsidiaries of the same holding body corporation (parent) amalgamate (horizontal). Only directors' (not shareholders') approvals are required.

A court approved amalgamation may still be required if creditors will be materially prejudiced by the amalgamation and have objected to the amalgamation.

Companies may also undertake short form amalgamations

The New Act will also permit three-cornered amalgamations (in which shareholders receive assets including shares of another corporation, instead of only shares from the newly formed entity "Amalco").

The New Act also permits inter-jurisdictional amalgamations. In these situations, it is not necessary for a non-BC company to continue into BC before amalgamating with a BC company.

Financial Assistance

The New Act permits all forms of financial assistance to any person for any purpose by means of a loan, guarantee, the provision of security or otherwise. If financial assistance is given, then an obligation arises to disclose the particulars of the financial assistance in a record filed in the company's records office and within the resolution granting the assistance. Such disclosure obligation arises if the assistance is given to a shareholder, director, officer, affiliate or employee of the company; a person who is an associate of the foregoing persons; or any assistance for the purpose of acquiring shares in the company. There are exceptions to the disclosure requirement such as when assistance is provided to wholly owned subsidiaries; direct holding companies; employee share purchase plans or if the company is in the business of lending money.

The New Act permits all forms of financial assistance

Restoration

The New Act permits restoration to be effected by an application to the Registrar of Companies or by court application.

Extra-Provincial Registration

The New Act retains the same tests for extra-provincial registration as the current Act and also sets out some common law tests within the statute:

- name listed in telephone directory for any part of BC and address in BC is specified;
- name appears or is announced in advertisement in which BC address is specified;
- corporation has a BC resident agent or warehouse, office or place of business; or
- it 'otherwise carries on business in BC'.

There are no longer any 'disabilities' imposed on a corporation that fails to extra-provincially register

The New Act continues the provision that a foreign entity does not carry on business in BC merely because it has an interest as a limited partner in a limited partnership carrying on business in British Columbia.

The significant substantial difference between the New Act and the current act, is that there are no longer any 'disabilities' imposed on a corporation that fails to extra provincially register. The former incapability to maintain an action or proceeding or acquire or hold land is not carried through into the New Act. Nonetheless, the New Act provides that a foreign entity that fails to extra-provincially register commits an offence and is liable to a fine (to be prescribed).

Electronic Filing and Other Practice Points

Electronic filing of all documents required to incorporate a company and maintain its annual reporting (including change of directors, officers and registered and records office) will be done on-line.

The Registrar of Companies Office has not yet completed all electronic filing forms nor provided the complete information on filing procedures. This is expected by summer 2003. There will likely be a transition period whereby paper filings can be made concurrently with electronic filings.

The Notice of Articles will be filed in Victoria but the Articles will only be filed in the Records Office.

The New Act explicitly provides for rights of withdrawal of applications (e.g. to continue; to amalgamate; to alter the notice of articles; to dissolve etc.).

The New Act also provides for finely tuned date and time registrations, such as same day sequential amalgamations.

Transition

ABC company incorporated under the current Act ("pre-existing company") must within 2 years following the coming into force of the New Act:

1. File with the Registrar a transition application;

2. Alter its articles if and to the extent necessary to ensure compliance with the New Act; and
3. Supplement the information in its share register (now called central securities register) to comply with New Act.

Failure to comply is grounds for the Registrar to dissolve the pre-existing company.

A full transition package will be sent to each BC company for whom Davis & Company is the registered and records office.

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