

Overview of the New British Columbia *Business Corporations Act*

On March 29, 2004, the new *Business Corporations Act* (British Columbia) is expected to come into force bringing with it wholesale changes to B.C. company law for the first time in over 30 years. Readers are cautioned, however, that despite its name, the BCA is not a statute which follows the model of the *Canada Business Corporations Act* and most other provincial corporate statutes but rather is an evolution of the previous Company Act.

The new BCA contains many changes which are intended to provide greater flexibility to provincially-incorporated companies and, to a certain degree, to ease the administrative burdens of compliance on such companies. While some changes bring British Columbia in line with other jurisdictions, others provide benefits which are not available in other jurisdictions. The aim of this update is to provide you with an overview of the significant changes from the Company Act to the BCA.

Incorporation and Filings with Registrar

- ❑ **T**he Company Act “memorandum” is replaced by the “Notice of Articles” under the BCA.
- ❑ **U**nder the BCA, companies are required to file documents with the Registrar electronically and fewer documents need to be filed.
- ❑ **D**ocuments will be available to the public online and it will be possible to print certain documents (e.g., Certificate of Incorporation) from the online database.
- ❑ **A**rticles do not need to be filed with the Registrar, but instead are required to be deposited at the company’s records office.
- ❑ **T**he BCA imposes greater responsibilities and liabilities on those who maintain corporate records.
- ❑ **U**nder the BCA there is no requirement for an incorporator to be a natural person (as was the case under the Company Act), making the formation of a subsidiary easier.
- ❑ **A** company governed by the BCA can adopt a pre-incorporation contract by conduct signifying that it agrees to be bound by the contract. The individual who executed the pre-incorporation contract on behalf of the company is absolved from liability.

Shareholders

- ❑ **U**nder the BCA, holders of shares are referred to as “shareholders” instead of “members”.
- ❑ **T**he BCA provides that a $\frac{2}{3}$ vote of the shareholders of a new company will be required to pass a special resolution (the Company Act required a $\frac{3}{4}$ majority). Companies will have the flexibility to specify in their articles a different majority for passing a special resolution so long as the majority is at least $\frac{2}{3}$ but no more than $\frac{3}{4}$.

- ❑ **U**nder the BCA, a pre-existing company by default continues to require a $\frac{3}{4}$ majority of shareholder votes to pass a special resolution. A pre-existing company may alter its articles (by special resolution) to change the threshold for passing a special resolution to a majority which is at least $\frac{2}{3}$ and not more than $\frac{3}{4}$ of the votes.
- ❑ **T**he BCA allows a company to specify in its articles what types of actions require approval by “exceptional resolution” and to specify the majority (which must be greater than that needed for a special resolution) required for approval of such actions.
- ❑ **P**rovisions relating to the form and use of proxies and information circular form requirements are not carried over to the BCA from the Company Act – these are instead dealt with solely in the Securities Act.
- ❑ **T**he BCA provides that an Annual General Meeting (AGM) may be deferred to a date past the date by which it is otherwise required to be held if such deferral is approved by unanimous resolution of all shareholders entitled to vote at that meeting.
- ❑ **T**he BCA provides that the shareholders may waive the holding of an AGM or any previous AGM.
- ❑ **T**he BCA does not require a “report to members” or equivalent to be placed before the shareholders at an AGM, unless the articles so require.
- ❑ **T**he required notice period for calling a shareholders’ meeting under the BCA is deemed to be 21 days, subject to the articles, which can prescribe a longer period. Private companies can reduce the notice period to as little as 10 days if their articles so provide.
- ❑ **U**nder the BCA, a shareholders’ meeting can now be held outside British Columbia at a location prescribed by the articles. If the articles do not prescribe a location outside British Columbia, the shareholders may approve holding the meeting outside the province (provided that the articles do not restrict the location) by ordinary or exceptional (if the articles so provide) resolution passed before the meeting is actually held.
- ❑ **U**nder the BCA, shareholders holding not less than $\frac{1}{20}$ of the outstanding voting shares may requisition a shareholder meeting.
- ❑ **T**he BCA allows individual shareholders who meet certain requirements to have specific matters submitted for consideration at the next AGM of a public company by way of a “shareholders’ proposal”.



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Directors and Officers

- ❑ **T**he BCA removes the Company Act requirement that each company have a president and a secretary. In addition, the requirement that the president of the company also be a director has been eliminated.
- ❑ **T**he Company Act required that companies have Canadian and British Columbia resident directors - the BCA contains no restrictions on the residency of directors.
- ❑ **W**hile the BCA does not provide for unanimous shareholder agreements, the BCA does provide that the articles of a company may transfer in whole or in part the powers of the directors to manage the company to one or more other persons (including companies). The articles may also restrict the powers of the directors. The persons to whom the powers are transferred will be subject to the same liabilities as if they were directors and the directors will be relieved of liabilities to the same extent.
- ❑ **T**he BCA allows shareholders to remove directors with less than a $\frac{3}{4}$ majority vote if the articles so provide.
- ❑ **U**nder the BCA, consents to act as director may be given after the meeting at which a director is initially elected or appointed or “by performing functions of a director after the person knew or ought to have known of his appointment”.
- ❑ **T**he requirement that directors file their residential address with the Registrar has been modified to allow directors to instead give the address of the office which they normally occupy during business hours.
- ❑ **U**nder the BCA, a director or senior officer will have a disclosable conflict of interest where his or her interest in a contract or transaction is material and the contract or transaction is material to the company.
- ❑ **S**enior officers now include officers who have a "policy making function" and "the capacity to influence the direction of the company", but no longer include the five highest paid company employees.
- ❑ **T**he BCA limits a director's liability where there is reliance in good faith on officers or professional advisors.
- ❑ **T**he BCA provides a two year limitation period for the commencement of proceedings against a director for breach of the BCA.
- ❑ **I**n most circumstances, a company will not require court approval to indemnify its directors or officers.
- ❑ **U**nder the BCA, directors and officers may apply to court where a company refuses to indemnify them.

Corporate Finance

- ❑ **T**he BCA permits companies to authorize an unlimited number of shares in each class.
- ❑ **T**he BCA expressly permits different shareholders within each class or series of a class to have different share rights.
- ❑ **U**nder the BCA, companies retain the flexibility to issue shares with or without par value.
- ❑ **T**he BCA permits setting par values in currencies other than Canadian dollars.
- ❑ **U**nder the BCA, the capital of a company may be reduced without court order in certain circumstances.

- ❑ **U**nless expressly included in the articles, companies incorporated under the BCA do not have pre-emptive rights. The pre-emptive rights contained in the Company Act continue to apply to pre-existing companies which are not reporting issuers unless the pre-existing company amends its articles to remove this requirement.
- ❑ **T**he BCA permits companies to issue fractional shares.
- ❑ **O**nly pre-existing companies are required to redeem or offer to repurchase their shares rateably among all shareholders. The BCA permits the articles of pre-existing companies to override this requirement.
- ❑ **U**nder the BCA, dividend “sprinkling” is expressly permitted, meaning that the directors of a company can declare a dividend for some classes of shares and not others, even if the rights of such classes are identical. Further, the BCA permits directors to declare dividends to one or more series of shares of a class but not others.
- ❑ **T**he BCA provides that a company must not be insolvent when paying a dividend, but this restriction does not apply to stock dividends.

Mergers and Acquisitions

- ❑ **T**he BCA allows “short form” amalgamations with and between a parent company and/or its subsidiaries and also allows a British Columbia company to amalgamate with one or more foreign (i.e. non-British Columbian) corporations. To take advantage of this provision the foreign corporation must be authorized to do so by the foreign corporation's jurisdiction (note that as of the time of writing the only other Canadian jurisdiction which allows for this type of amalgamation is the Yukon Territory). Otherwise, the foreign corporation must first be continued to British Columbia.
 - ❑ **U**nder the BCA, amalgamations can be effected with or without court order.
 - ❑ **T**he BCA provides that an amalgamation may be consented to in writing by all the shareholders entitled to vote on the resolution or adopted by the shareholders by special resolution at a meeting.
 - ❑ **U**nder the Company Act, arrangements could only be carried out between a company and its members (shareholders) or creditors, or classes thereof. The BCA provisions permit a company to propose an arrangement with groups of persons other than shareholders that would have previously been prevented from taking part in an arrangement under the Company Act, such as optionholders.
 - ❑ **T**he BCA has broadened who can use the “squeeze-out” mechanism to include non-corporate entities, as well as companies existing pursuant to the laws of jurisdictions other than British Columbia – however, the “squeeze-out” mechanism is still limited to shares rather than “other securities”.
 - ❑ **U**nder the BCA, as under the Company Act, a company requires shareholder approval to dispose of all or substantially all of its assets. However, under the BCA a company may dispose of its assets without shareholder approval if the disposition is in the ordinary course of business.
- ## Continuances and Extra-Provincial Companies
- ❑ **U**nder the BCA, a company is not permitted to continue out of British Columbia unless the jurisdiction to which the company desires to
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continue imposes obligations on the “new” company in relation to its pre-continuance conduct.

- ❑ Under the BCA, extra-provincial companies must register within two months of carrying on business in BC, however the BCA does not carry over the Company Act requirement that an extra-provincial company must be registered in British Columbia to sue or hold an interest in land.
- ❑ The BCA allows a foreign entity applying for extra-provincial registration to use an assumed name in British Columbia if its corporate name is rejected by the Registrar.

Financial Assistance

- ❑ The BCA permits financial assistance to be given to any person for any purpose.
- ❑ The BCA requires disclosure of material financial assistance where it is extended to persons involved in the company or for the purpose of purchasing shares.
- ❑ Directors are still under a fiduciary duty to act in the best interests of the company in authorizing any financial assistance.

Miscellaneous Changes

- ❑ The BCA process for voluntary dissolution is more flexible than under the Company Act by simplifying the shareholder approval and directors’ affidavit requirements.
- ❑ Under the BCA, restorations are possible without court order (limited restoration can now be brought about by any person).
- ❑ The BCA provides an enhanced ability to apply to court to correct errors in articles, notices of articles, minutes of meetings, resolutions and registers.
- ❑ Under the BCA, private companies may waive the preparation of financial statements if the unanimous consent of the company’s shareholders is obtained.

Transition

- ❑ All pre-existing companies (i.e., companies governed by the Company Act prior to the BCA coming into force) have 2 years from the date the BCA comes into force to “transition” by replacing their memorandum with a Notice of Articles and by amending their articles to comply with the BCA. Companies that do not transition by the deadline run the risk of being struck from the register and dissolved. A shorter transition period applies to dissolved companies which are subsequently restored.
- ❑ As part of the transition rollover, the articles of a company can be amended to take advantage of some of the new provisions of the BCA. These amendments must be approved by special resolution.
- ❑ The BCA includes a provision which is intended to prevent a transition rollover from being considered a breach of any contract.

The statements contained in this publication are not legal opinions and readers should not act on the basis of such statements without first consulting a lawyer. Fraser Milner Casgrain LLP is committed to assisting its clients with respect to the important changes outlined above. If you have any questions about the BCA, please contact one of the lawyers listed opposite.

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