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The New BC *Business Corporations Act*

British Columbia's new *Business Corporations Act*—the first wholesale change in the province's company law legislation since 1973—received Royal Assent on October 31, 2002, and is scheduled to come into force by regulation in March 2004. On coming into force, it will repeal and replace the existing *Company Act*. While the basic underlying principles of company law will not change, there are substantial changes in the way a company is created and maintained and mandatory transition requirements for bringing existing companies into compliance with the new Act.

This article is a brief introduction to *some* of the changes with which we will all need to become familiar in the coming months and years.

For much of this material, I acknowledge my indebtedness to the Continuing Legal Education Society of BC, which published an excellent reference entitled, "British Columbia *Business Corporations Act* Transition Guide." I strongly recommend that anyone whose practice includes creating and maintaining companies acquire a copy of this guide.

The new Act has been 15 years in development and is intended to remedy many of the shortcomings and ambiguities of the current *Company Act*. It will introduce more modern provisions in a number of areas, many with a view to eventually having most of the filings with the Registrar of Companies made electronically, on a 24/7 basis.

Incorporation Under the New Act

The new Act retains the "contract" model, that is, individuals initiate the process of creating a company by agreeing to subscribe for shares.

On coming into force, it will repeal and replace the existing Company Act.

Section 5 of the current *Company Act* reads as follows:

Subject to this Act, one or more individuals may form a company by subscribing their names to a memorandum and by complying with this Act, the equivalent new Act provides, in section 10(1) that:

One or more persons may form a company by:

- (a) entering into an incorporation agreement;
- (b) filing with the registrar an incorporation application; and
- (c) complying with this Part.

The substance has not changed, but the terminology and process has. The current memorandum, (which in essence is both an agreement and an application), is being replaced by three documents:

- a very brief incorporation agreement, (which is not filed with the Registrar);

- an Incorporation Application; and
- something called a Notice of Articles. This will set out the corporate name, any translation of the corporate name, the address of the registered and records office, the names and addresses of the directors (and note that directors will no longer be required to provide their residential addresses), and the authorized share structure, (what is currently called the authorized capital).

The prescribed forms have not yet been issued but it is expected that the Notice of Articles will contain boxes to tick to indicate whether any special rights or restrictions are attached to the shares. Unlike the articles themselves, which will no longer be required to be filed with the Registrar, this Notice of Articles (referred to as a "record") will be filed with the Registrar as well as with the company's records office.

The articles themselves will continue to be much the same as currently, except that any restrictions on the businesses to be carried on by the company will now appear in the articles. Also, if there are to be any special rights and restrictions attached to the shares, these (as before) will need to be included in the articles.

Authorized Share Structure

There are changes here to add flexibility.

- It will now be possible to have an unlimited number of authorized shares of a class (and series) in addition to having limits.

- Par value shares will be retained but can now be in other currencies.
- Shares without par value can be issued for amounts less than the consideration received for them.
- Companies will be allowed to issue fractional shares.

Financial Assistance

Under the new Act, a company will be permitted to give financial assistance to any person for any purpose by means of a loan, a guarantee, the provision of security or otherwise, but the company will have to disclose any material financial assistance where it is given to someone involved in the company or where it is for the purpose of the purchase of shares.

Registered and Records Offices

There is a change in what records must be kept: mortgages and prospectuses will no longer need to be kept; financial statements and disclosures of conflict of interest and of financial assistance, however, will now need to be kept. This requirement will make it very important to consider who can inspect such records. Under the new Act, current directors will have the right (as one would expect) to inspect **all** documents. Shareholders and others can inspect as provided by the articles. Attention will need to be paid to the drafting of the articles in this regard.

Directors and Officers

There are important changes (in my view, improvements) here.

- There will no longer be any residency requirements (either BC or Canada) for directors.
- No longer must a company have a president and a secretary.
- The president need not be a director.
- The new Act will allow the company, by its articles, to transfer the powers of the directors to manage or supervise the management of the business and affairs of the company to other

persons. The persons to whom such powers are transferred will have all the rights, powers, duties, and liabilities of the directors to the extent of the transfer; the directors will be relieved of their rights, powers, duties, and liabilities to the same extent.

- Senior officers as well as directors will have to disclose conflicts of interest, but there will be a double-barrelled materiality test to determine whether an interest must be disclosed: the interest will have to be material, directly or indirectly, to the director or officer and the contract or transaction itself will have to be material to the company.

What is to become of all our existing companies in the face of this torrent of change?

Shareholder Meetings

There is more flexibility here, as well.

- General meetings of shareholders can be held at a location outside BC if the articles or an ordinary resolution provide for this.
- Electronic and telephone meetings of shareholders (and directors) will be permitted.
- The time limits for holding an annual general meeting will be extended to 18 months after incorporation for the first one and thereafter to 15 months after the previous meeting. There must, however, still be one annual meeting in each calendar year.
- There are changes to the requirements for passing special resolutions at a general meeting: the new Act will use the term “special majority.” The articles can now

specify the majority of votes required to pass a special resolution, provided it is between two-thirds and three-quarters of the votes cast. If the articles fail to cover this off, the “default” special majority will be two-thirds for a new company and three-quarters for a pre-existing company. There is also the flexibility of allowing for an “exceptional majority,” where the articles require a majority that is greater than a special majority, e.g., three-quarters for capital alterations, two-thirds for alterations to articles and other situations.

- An ordinary resolution may be passed in lieu of a meeting by being submitted to all shareholders and consented to in writing by the relevant special majority (as opposed to the current requirement of unanimity). A special resolution, to be passed without a meeting, still requires unanimous written consent.

Transition Applications

What is to become of all our existing companies in the face of this torrent of change?

All BC companies in existence under the current *Company Act* must file a mandatory Transition Application (in the prescribed form to be issued by the Registry) **within two years of the new Act coming into force.**

A company that fails to file a Transition Application will be dissolved. **Period.** (This raises the question for many practitioners: where a client has an existing but inactive company that he or she is thinking of using for a new venture or transaction, then with all **other** things being equal, it might be more cost-effective to let the existing company be dissolved and begin with a shiny new 2004-model business corporation.)

Once the new Act is in force, an existing company may not alter its memorandum or articles until it has filed the Transition Application.

Transition Applications take effect upon being filed with the Registry. They are considered to be “routine” documents and are not deemed to be alterations to charter documents. It is hoped, therefore, that as such they will not require the consent of third parties under existing security agreements.

Conclusion

The brief overview is simply intended as a “heads up.” In our office we sent a letter telling all our existing companies to expect extra compliance requirements in the coming year.

Apart from that, there is not a lot that can be offered with certainty by a company’s advisors until the regulations are completed and the prescribed forms prepared and made available.

In addition, the Continuing Legal Education Society has indicated it will be publishing a set of “standard form” new articles shortly, which all practitioners will find helpful as a guideline. The requirement to file a Transition Application for every existing company can be seen as an opportunity for each company law practitioner to review what his or her new “standard” articles should look like, so that both old and new companies will carry on in the future under more or less the same rules.

In the meantime, certain of your current active companies can begin to be made aware of some of the substantive features of the new Act and invited to consider what beneficial changes will soon be available to them. Apart from the fact of change itself, most clients will welcome the more modern, flexible new Act. ▲

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