
CROSS BORDER SECURITIES UPDATE

March 2004

Inside This Issue:

- [The New BC Corporations Act](#)

The New BC Corporations Act

As of March 29, 2004, the new BC Business Corporations Act (the "Act") will replace the old BC Company Act. As a result, there have been several key changes which will affect all BC and extraprovincial companies. In this article, we will highlight some of these changes and what BC companies need to do to comply with the Act.

Summary of Changes

1. Incorporation

Under the new Act, BC Companies will have to file an Incorporation Application and a Notice of Articles (in the old Act, this was the memorandum). Companies no longer need to file their Articles. Also, it is important to note that under the new Act, companies can be incorporated by a person, including another company.

2. Constituting Documents

The constituting documents of companies under the Act will be the Notice of Articles and the Articles. The Notice of Articles will no longer have the text of any share rights and restrictions. The Articles must contain the name of the company and any translations of that name that the company uses, the incorporation number of the company and rights and restrictions on shares among other provisions.

3. Shares

Under the new Act, a company can have an unlimited number of authorized shares in a class. The new Act also permits companies to issue fractional shares.

4. Pre-emptive Rights/Rights of First Refusal

Under the new Act, there are no mandatory pre-emptive rights or rights of first refusal. Pre-emptive rights continue for pre-existing private companies, until they choose to remove these rights from their articles.

5. Residency

There is no longer any residency requirements for directors under the new Act.

6. Officers

Under the new Act, a company need not have any officers if it so chooses or can give its officers different titles.

7. Director's duties and liabilities

Under the new Act, directors can transfer their duties and liabilities to others, for example to shareholders.

8. Directors' consent and resignation

The Act does not require a consent to act as director, before election or appointment. Such consent can be signed after appointment or election of directors. Also, directors no longer have to deliver their resignations to the registered office of the company, to be effective. A resignation is effective as of the time and date the company or its solicitor receives it.

9. Conflict of Interest

These rules are expanded to include senior officers as well as directors.

10. Indemnification

It is no longer necessary to obtain court approval for a company to indemnify directors. Also, the class of persons who can be indemnified has been expanded. The company can also pay the expenses of a director, pending the outcome of a disposition. The Act makes indemnification of the expenses mandatory on the company's part if the director wholly or substantially succeeds in the proceeding.

11. Special Majority

Under the new Act, a special majority is between two-thirds and three-quarters of the votes cast, depending on the articles. In other words, a company can tailor its articles to provide for a lower threshold for a special majority, i.e. anywhere between two-thirds to three-quarters.

The New BC Corporations Act (continued)

12. Reduction of Capital

The new Act allows a company to reduce its capital without court order by a special resolution, unless this reduction brings the capital of the company below the company's realizable value (assets minus liabilities). This makes it easier to return capital, tax free, to shareholders.

13. Dividends

Under the Act, it is now possible for a company to pay dividends to its shareholders from its profits, capital or otherwise. The only time a dividend cannot be issued is if the company is insolvent (unable to pay its debts as they become due; the Act also changed the definition of insolvent and the solvency test) or will become so if dividends are paid.

14. Financial Assistance

Under the Act, a company can provide financial assistance to any person, for any reason, through loans, guarantees, etc. But, when the company provides material financial assistance to certain categories of individuals (such as shareholder, directors, officers, etc.) or for the purpose of buying the company's shares, the assistance must be disclosed.

15. Financial Statements and auditors

Under the new Act, all voting and non-voting shareholders can unanimously agree to waive the production of financial statements and appointment of an auditor.

16. Annual General Meetings ("AGM")

The new act allows for all voting shareholders to unanimously waive the holding of an AGM. Also, the Act allows an AGM to be held outside of BC, if such locations is provided for in the articles or approved by an ordinary resolution before a meeting. It is important to note that meetings can be held via telephone, teleconferencing and internet chartrooms or other medium, so long as all participants can communicate with each other.

17. Notice

Notice period for private company AGMs can now be anywhere from 10 to 21 days. For public companies, the notice period is 21 days.

18. Proposals

The Act introduces the new topic of proposals. Shareholders, meeting certain requirements, can submit a notice setting out a matter to be discussed in the next AGM and the company is obligated to address the proposal.

19. Amalgamations

These procedures have been simplified. In most instances, the requirement for court approval no longer stands. Also subsidiaries can now amalgamate with their parents or other subsidiaries without amalgamation agreements. In certain instances a company can amalgamate with a company outside of BC without first continuing the companies into one jurisdiction.

20. Dissolution and Liquidation

Short-form dissolutions are allowed in the Act without the company needing to eliminate liabilities, so long as adequate provisions are made for the liabilities.

21. Restoration

Restorations can now be done by the Registrar and without a court application, unless there is a claim to recover escheated land where the company has been dissolved over two years. Also, there are no longer any restrictions as to time limit on restorations, i.e. the 10 year limit under the old Company Act has been removed.

22. Extrajurisdictional Companies

The Act lifts the restriction on the powers of extrajurisdictional companies that are not registered in BC. An extrajurisdictional company need not be registered any longer in order to maintain a claim or to hold interest in land.

Transition Steps

Pre-existing companies have until March 29, 2006 (two years from the effective date of the Act) to adopt the new rules. If not, the Registrar can dissolve non-complying companies. To adopt the new rules, each pre-existing company must do the following:

1. Authorize the transition application and the changes to the Articles (mandatory changes and/or optional changes) with either a directors' resolution or an ordinary shareholder resolution;
2. Adopt a Notice of Articles in place of the memorandum;

The New BC Corporations Act (continued)

3. Change its Articles to comply with the Act. There are mandatory changes, such as adding the text of rights and restrictions on shares to your Articles and also adding the incorporation number of your company, and other changes which are optional (we will be happy to discuss these changes with you in detail);
4. Replace the current share register with a Central Securities Register;
5. Organize your company's records to comply with the Act; and
6. File a Transition Application with the Registrar in the prescribed form.

It should be noted that until steps 1-5 have been accomplished, a company cannot file a Transition Application.

The above has been a short summary of the changes affecting BC Companies as a result of the new Act. For more detailed analysis and discussion of the new Act, as it pertains to your company, please contact our offices.

The information in this newsletter is of a general nature only about recent developments of interest to our clients. You are encouraged to contact legal counsel before acting on any information provided.



Author Alixe Cormick has assisted small and micro cap companies through each stage of their growth from inception to graduation to junior and more senior trading forums.

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