

Corporate Law

NOVEMBER 7, 2001

Important Amendments to the Canada Business Corporations Act

Bill S-11, which makes significant amendments to the Canada Business Corporations Act ("CBCA"), received Royal Assent earlier this year. It is expected to come into force in late November or early December of 2001.

The amendments in Bill S-11 are the product of a thorough re-examination of the CBCA by the federal government and constitute the first major revision to the CBCA since its inception in 1975. The federal government has also published for comment an entirely new set of proposed CBCA regulations.

The following is a brief summary of some of the most important amendments to the CBCA. We have grouped these amendments under the following headings which reflect the stated goals of Bill S-11:

1. Enhancing the Global Competitiveness of CBCA Corporations;
2. Amending the Responsibilities and Liabilities of Directors and Officers;
3. Expanding Shareholder Rights;
4. Eliminating Duplication and Harmonizing the CBCA with Provincial Securities Legislation; and
5. Miscellaneous Amendments.

1. Enhancing the Global Competitiveness of CBCA Corporations

- **Directors' Residency Rules Relaxed.** The proportion of directors on the board who must be Canadian residents will be reduced from a majority to 25% (except for certain business sectors listed in the regulations or corporations subject to federal ownership restrictions). In addition, the requirement that a majority of the directors on each board committee must be Canadian residents will be eliminated. These changes will likely result in increased international representation on the boards of CBCA corporations.
- **Financial Assistance Provisions Removed.** The financial assistance provisions, which restrict the ability of CBCA corporations to provide loans, guarantees and other financial assistance to related corporations and individuals, will be repealed. However, directors approving financial assistance transactions will still have to consider their duty to act in the best interests of the corporation and to exercise the care, diligence and skill of a reasonably prudent person. Also, directors who have an interest in material financial assistance will still have to disclose their interest to the board and abstain from voting on the approval.
- **Electronic Meetings Permitted.** The amendments will allow directors' meetings to be held by electronic means provided that: (i) all directors consent; and (ii) it is permitted by the corporation's by-laws. The amendments will also allow shareholder meetings to be held by electronic means if expressly authorized by the by-laws.
- **Electronic Delivery Facilitated.** CBCA corporations will be allowed to deliver proxy materials and other documents to shareholders electronically provided: (i) it is permitted by the corporation's by-laws; (ii) applicable provincial securities laws are complied with; and (iii) shareholder consent is obtained.

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- **Shareholder Meetings Outside Canada Permitted.** The CBCA will permit shareholder meetings to be held outside Canada at any place specified in the articles. If the intended meeting place outside Canada is not specified in the articles, unanimous shareholder approval will be required.
 - **Location of Corporate Records Rules Relaxed.** CBCA corporations will be entitled to keep their corporate and accounting records at a place outside of Canada provided these records are electronically accessible from a location in Canada. This right will be subject to any requirements to keep records and books in Canada imposed by the *Income Tax Act* and other statutes administered by the Minister of National Revenue.
- ## 2. Amending the Responsibilities and Liabilities of Directors and Officers
- **Director and Officer Indemnification Rules Broadened.** The revisions to the directors' and officers' indemnification provisions of the CBCA broaden the scope of permitted indemnification arrangements. For example, the amendments will permit the advance of defence costs and allow indemnification in relation to investigative proceedings. In light of these amendments, CBCA corporations may wish to revisit their indemnification arrangements with directors and officers.
 - **D&O Insurance Restrictions Removed.** The provisions of the CBCA regulating the scope of permitted director and officer liability insurance will be repealed.
 - **Potential Liability for Managers of Directorless Corporations.** Any person who manages or supervises the management of a corporation where all the directors have resigned will be deemed to be a director and will assume the liability of directors. This amendment provides broad exemptions for officers, professionals, receivers and trustees.
- ## 3. Expanding Shareholder Rights
- **Shareholder Proposal Rights Expanded.** Corporations will no longer be able to refuse to include a shareholder proposal in management proxy materials on the basis that its primary purpose is to promote general economic, political, racial, religious, social or similar causes. The new test for rejection will be whether the proposal fails to relate in a significant way to the business or affairs of the corporation. Also, both registered and beneficial owners of shares will be entitled to make proposals or raise matters for discussion at shareholder meetings. However, the ability of shareholders to make proposals will be subject to new minimum ownership and time of ownership requirements.
- ## 4. Eliminating Duplication and Harmonizing the CBCA with Provincial Securities Legislation
- **Shareholder Communication Rules Relaxed.** The definition of "solicitation" will be amended to exclude, among other things, a public announcement by a shareholder of how the shareholder intends to vote and the reasons for that decision. Consequently, such announcements will not trigger the requirement to prepare and send a proxy circular.
 - **Dissident Proxy Solicitation Rules Relaxed.** Dissident shareholders will be able to solicit proxies from up to 15 other shareholders without having to prepare and send a dissident proxy circular. In addition, the proposed regulations would permit dissident shareholders to solicit proxies by public speech, broadcast or publication without having to send a circular, subject to certain conditions.
 - **Dissent Rights Expanded.** Going-private transactions involving public CBCA corporations will give rise to dissent and appraisal rights. Also, minority shareholders of private corporations will have dissent and appraisal rights under certain circumstances where their shares have been acquired under compulsion.
 - **New Right to Access Directors' Meeting Minutes.** The amendments will give shareholders the right to access the minutes of any directors' meetings during which a director makes mandatory disclosure of a material interest in a contract or transaction involving the corporation.
 - **New Approval Requirement for Squeeze-outs Involving Private Corporations.** Private corporations will be required to obtain majority of the minority shareholder approval for all squeeze-out transactions.
- **Insider Reporting Requirements Removed.** The insider reporting requirements of the CBCA will

be repealed. However, insiders of public CBCA corporations will still have to comply with insider reporting requirements under provincial securities legislation.

- **Take-over Bid Provisions Removed.** Currently, a bidder involved in a take-over bid involving a public CBCA target must comply with the take-over bid requirements of both the CBCA and provincial securities legislation. Under the amendments, the CBCA provisions regulating the conduct of take-over bids will be repealed.
- **Insider Trading Provisions Harmonized.** The CBCA insider trading provisions have been completely revised to harmonize with provincial securities legislation.

5. Miscellaneous Amendments

The following are some other important amendments:

- **Insider Short Selling Prohibition Broadened.** The CBCA provision which prohibits the short selling of a corporation's shares by insiders will be extended to apply to all securities, not just shares. In addition, the maximum fine for breaching this prohibition will be increased from \$5,000 to the greater of \$1 million dollars and three times the profit made.
- **Annual Meeting Requirement Amended.** CBCA corporations will be required to hold an annual shareholder meeting no more than six months after year-end and no more than fifteen months after the last annual meeting.
- **Directors Must Keep Address of Record Up to Date.** Directors will be required to notify the corporation of any change of address.

In light of the important amendments outlined above, CBCA corporations may wish to amend their articles and by-laws to conform to the amendments and the new regulations once they are proclaimed into force.

This is a brief overview and highlights only *some* of the most important amendments to the CBCA. We invite you to contact any of our lawyers for more information on the amendments.

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