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A bid to attract business: amendments to Alberta's Business Corporations Act

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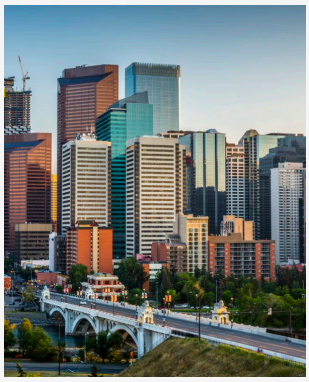

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On May 31, 2022, amendments to Alberta's *Business Corporations Act* (the ABCA) (formerly Bill 84) were proclaimed into force. The amendments make significant changes to the ABCA, with the intention of modernizing the ABCA to attract investment and to retain business in Alberta.

The amendments to the ABCA include

- changes to plan of arrangement provisions that increase flexibility for courts and corporations
- relaxation of requirements surrounding written shareholder resolutions
- the ability for corporations to allow directors and officers to participate in certain types of external corporate opportunities
- enhanced protections for directors and officers
- other modernizing changes, including reducing the approval requirement to waive audit requirements, more flexible notice periods of shareholders meetings, extended timing for the revival of dissolved corporations and removal of the requirement to publish notices of a record date for a shareholder meeting

Changes to plans of arrangement approval mechanics

Plans of arrangements are court-approved procedures used to complete various transactions, including mergers and acquisitions, debt restructurings and other fundamental changes to a corporation.

Prior to the ABCA amendments, the plan of arrangement provisions under the *Canada Business Corporations Act* (CBCA) were generally considered more favourable to corporations than those under the ABCA, especially in the context of debt restructurings. Benefits of the CBCA included no statutory requirement to hold a shareholder meeting, which was often

helpful for companies completing debt a restructuring plan; and that courts could grant a stay of proceedings with their ability to make any interim or final order it thinks fit.

By contrast, the ABCA required that any plan of arrangement be approved by a majority of shareholders representing at least two-thirds of the votes cast by shareholders *plus*, in the context of arrangements involving debt, a majority in number of creditors representing at least two-thirds of the debt claims. This requirement often presented challenges for corporations in Alberta undergoing debt restructurings or completing a merger and acquisition transaction for which debt securities would also be arranged. As a result, some corporations pursuing debt restructurings would "continue" from the ABCA to the CBCA prior to implementing a debt restructuring.

The recent amendments align the ABCA with the CBCA by giving the court discretion to determine the required securityholder approval threshold for plans of arrangement, rather than requiring shareholder meetings in all circumstances and a fixed approval threshold by creditors for arrangements involving debt. The ABCA now also grants the court increased discretion to make any interim or final order it thinks fit, which would allow a court to grant a stay of proceedings.

One distinction between the ABCA and the CBCA that has remained following the amendments is that the ABCA does not require a corporation to be solvent to use its arrangement provisions, while the CBCA provides that the corporation must be solvent (although most CBCA arrangements can be structured to include a solvent corporation to manage this requirement).

Overall, the new ABCA arrangement provisions should reduce complexity for both solvent and insolvent corporations pursuing restructuring and avoid the need for these corporations to continue under the CBCA for purposes of completing a debt restructuring.

Another change to the ABCA arrangement provisions is a new requirement for companies to notify the Alberta registrar of corporations prior to proceeding with an arrangement, which also aligns with the CBCA arrangement provisions.

Changes to shareholder approval requirements for non-reporting issuers

Shareholders of a corporation can approve ordinary resolutions and special resolutions by voting at shareholder meetings or by signing written resolutions. Previously, the ABCA required that a written resolution be signed by all of the shareholders entitled to vote on the resolution. Where even one shareholder was unwilling or unavailable to sign a written resolution, a corporation would be required to call and hold a shareholder meeting on at least 21 days' prior notice, even if the outcome of that meeting was already effectively predetermined. This resulted in delay and increased administrative burden.

Under the amendments to the ABCA, shareholders of corporations that are not reporting issuers (i.e., not public companies) are now permitted to pass resolutions in writing so long as they are signed by at least two-thirds of the shareholders entitled to vote on the resolution, rather than by all shareholders.

While the wording of the amended ABCA provision is not entirely clear, we expect that the intent of this amendment was to permit shareholder resolutions to be passed in writing in instances where such resolutions are approved by shareholders holding two-thirds of the *votes* attached to shares entitled to vote on such resolution, and not by two-thirds of the

shareholders in *number*. Nonetheless, until the wording of this provision is clarified by further amendment, we recommend that non-reporting issuer corporations obtain approval from holders satisfying both thresholds if they intend to pass shareholder resolutions in writing.

Corporate opportunity waivers

The ABCA amendments introduce a new ability for a corporation to include a corporate opportunity waiver in its articles or unanimous shareholder agreement, making Alberta the first jurisdiction in Canada to permit these waivers. Under a corporate opportunity waiver, a corporation expressly waives any interest or expectancy of the corporation in or to an opportunity to participate in a specified business opportunity that is offered to the corporation or its officers, directors or shareholders.

This waiver is beneficial to directors and officers who are involved with multiple corporations or potentially competing businesses, such as representatives of private equity or venture capital firms who sit on the board of directors of corporations in which they have invested. The corporate opportunity waiver provides increased certainty to these directors and officers that their actions will not violate the duties they would otherwise owe to each corporation at common law and should make Alberta a more desirable jurisdiction for incorporation of private equity- or venture capital-backed corporations in particular.

Director and officer indemnification

The ABCA amendments also expand the scope of director and officer indemnification by offering directors and officers indemnification in situations where a director or officer is not a party to, but is involved in, a civil, criminal, administrative, investigative or other action or proceeding. In addition, the amendments provide corporations with the ability to purchase and maintain directors' and officers' insurance benefitting the directors and officers even where they have failed to act honestly and in good faith with a view to the best interests of the corporation. Corporations may wish to review their current director and officer indemnity agreements and insurance arrangements to evaluate whether any updates are desirable in light of these amendments.

Other modernizing changes

The amendments also introduce the following changes that generally modernize other ABCA requirements:

- **Audit requirements**: A non-reporting issuer corporation's shareholders may now dispense with the requirement to appoint an auditor by special resolution (i.e., shareholders holding two-thirds of the shares), rather than by unanimous approval of all voting and non-voting shareholders.
- **Notice period for shareholder meetings**: The notice period for shareholder meetings for non-reporting issuers is now a minimum of seven days to a maximum of 60 days (if so specified a corporation's bylaws). Previously, the minimum was 21 days and the maximum was 50 days. Non-reporting issuer corporations who wish to take advantage of this flexibility should consider amending their bylaws to permit this expanded notice timeframe.

- **Revival of dissolved corporations**: A corporation may be revived up to ten years following a dissolution, up from the previous five-year limit. This gives shareholders, directors, officers, creditors or other persons in a contractual relationship with a dissolved corporation more time to reinstate a corporation following its dissolution.
- **Removal of requirement to publish record date**: Reporting issuers are no longer required to publish notice of a record date for each shareholder meeting in a newspaper at least seven days before the record date. This shortens the time required to hold a shareholder meeting where the time to hold the meeting is being abridged under applicable securities laws (such as where the meeting is being held to approve a special transaction).

Conclusion

These recent amendments, along with previous amendments to the ABCA that removed director residency requirements, are part of an ongoing effort to modernize corporate legislation in Alberta to reduce administrative burdens and to attract businesses to Alberta.