Cassels

Levelling up: Modernizing the Alberta Business Corporations Act

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On May 31, 2022 amendments to the Alberta *Business Corporations Act* (ABCA) came into force. Originally introduced as Bill 84, which received royal assent on December 2, 2021, the amendments (Amendments) represent significant steps taken by the Government of Alberta to (1) modernize the ABCA, (2) improve corporate efficiency, (3) reduce regulatory red tape, and (4) make Alberta an attractive choice for businesses and investors.

Key Amendments to the ABCA include:

- Introduction of Corporate Opportunity Waivers.
- Greater court discretion with respect to plans of arrangement.
- Expansion of shareholder, director, and officer responsibilities and protections.
- Reduction of administrative barriers & modernization.

Introduction of Corporate Opportunity Waivers

Alberta is the only jurisdiction in Canada to introduce corporate opportunity waivers. Until now, all jurisdictions prohibited directors of a corporation from individually pursuing business opportunities that belonged to the corporation. Pursuant to section 16.1 of the ABCA Amendments, corporations now can include a corporate opportunity waiver, which allows a corporation to waive any interest (present or future) in a particular business opportunity so that a director, officer, or shareholder may participate. To utilize this waiver, a corporation must expressly include the waiver in the corporation's articles of incorporation or a unanimous shareholder agreement.

The introduction of the corporate waiver is expected to help stimulate venture capitalism and private equity investment throughout the province by providing flexibility and security to shareholders sitting on multiple boards.

Greater Court Discretion in Plans of Arrangement

Plans of Arrangement are court-sanctioned procedures used by corporations to conduct mergers and

acquisitions, debt restructuring, and other fundamental changes to a corporation. As such, most publicly listed companies in Canada complete their mergers and acquisitions by way of a plan of arrangement.

In Alberta, corporations often prefer to conduct plans of arrangement, specifically debt restructuring, under the provisions of the *Canada Business Corporations Act* (CBCA). This is because, relative to the ABCA, the CBCA allows a court to grant a stay of proceedings at the outset of the plan of arrangement proceedings. This provides the corporation with time to complete the plan of arrangement and mitigate the risk of a collateral attack. In addition, the CBCA does not require shareholder approval for a plan of arrangement; it leaves it to the discretion of court as to whether shareholder approval will be required. These differences have led many Alberta businesses to pursue debt restructuring under the CBCA.

The new revised language in section 193(4.1) allows the court to grant "any interim or final order it thinks fit". This passage effectively allows Alberta courts making orders under the ABCA to confer the same benefits to corporations available under the CBCA.

Amendments to the plan of arrangement provisions aim to encourage Alberta corporations to remain incorporated under the ABCA when plans of arrangement are pursued.

Increased Director Participation in Material Interests

Subject to certain exemptions, the ABCA originally required directors and officers to disclose material interests in contracts or transactions. These directors and officers were then unable to vote on resolutions relating to the corporation's involvement in certain contracts and transactions.

The Amendments have modified and expanded the exemptions to allow directors and officers to vote on resolutions relating to the corporation's involvement in a material contract or transaction provided that the director's interest would benefit the corporation.

Expansion of Shareholder, Director, and Officer responsibilities and Protections

The Amendments have also expanded the defences available to directors acting in good faith while enhancing the corporation's ability to indemnify its directors.

Good Faith Defence

Prior to the Amendments, directors of a corporation could not rely on the reports or opinions of an *employee*

in good faith in order to avoid liability for certain actions amounting to a breach of the duty of care.

The Amendments have modified this where directors of corporations will be relieved of liability if they can demonstrate that they relied “in good faith on an opinion or report of a person, including a lawyer, accountant, engineer, appraiser or *employee* of the corporation whose profession or expertise lends credibility to a statement made by that person”.

Enhanced Indemnification

Before the Amendments, s.124(1) of the ABCA provided that a corporation may only indemnify a director or officer who acted in good faith when costs have been incurred in connection to a "civil, criminal, or administrative action or proceeding to which the director or officer is made a party."

The Amendments provide that the director or officer no longer has to be a party to the proceeding and need only be "involved." This allows the indemnification to apply in any investigative situation where the director or officer is not a party to the proceedings but is nonetheless "involved" by virtue of his or her past or present connection with the corporation.

Reduction of Administrative Barriers

The Amendments also introduced several provisions that will improve efficiency for private corporations.

Shortening Notice Period for Shareholders Meetings

Prior to the Amendments, corporations were required to provide notice of a shareholder’s meeting not less than 21 days before the meeting date to a maximum of 50 days prior to the meeting. The Amendments have shortened this time window for notices to seven days to a maximum of 60 days.

Lower Approval Threshold for Written Shareholder Resolutions

Prior to the Amendments, the ABCA allowed corporations to obtain shareholder approval through written resolutions signed unanimously by all voting shareholders of the corporation. To improve efficiency, the Amendments have reduced the threshold for shareholder approval to two-thirds of the shareholders entitled to vote on that resolution or at that shareholder meeting.

Audit Requirement Threshold

Prior to the Amendments, the ABCA required that 100% of the shareholders, including shareholders holding non-voting shares, need to approve dispensing with the audit requirement. The Amendments provide that a

non-reporting issuer corporation’s shareholder can now dispense of the requirement to appoint a corporate auditor by special resolution (i.e. shareholders holding two-thirds of the shares).

Longer Timeframe for Revival of Dissolved Corporations

The ABCA provides that a corporation can only be revived within five years of dissolving. The Amendments extend this timeframe to 10 years from the date of dissolution.

Modernization

The Amendments also revise the ABCA in ways more reflective of modern commercial realities. Under the Amendments:

- Corporations are no longer required to publish the record date of a shareholder's meeting.
- Corporations may issue securities certificates in electronic form.
- Email correspondence is a listed acceptable contact method, and references to handwritten and faxed documents have been removed.
- The defined term "distributing corporation" has been replaced with "reporting issuer" (a term that is more common in securities transactions)

Our team will be monitoring developments associated with the Amendments and providing further updates.
