

U R G E N T



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**CHANGES TO THE CANADA BUSINESS
CORPORATIONS ACT (“CBCA”)**

OVERVIEW

Parliament has passed Bill S-11 which encompasses substantial amendments to the CBCA. The amendments reflect a more modern attitude to the increased pace of business that corporations must adapt to in today’s corporate environment. In addition to the CBCA amendments, new regulations will also come into force once the Bill is proclaimed. The amendments to the CBCA are expected to be proclaimed in force on November 24, 2001.

The relevant changes that will be of immediate interest to CBCA corporations have been briefly summarized below, however a full review of the changes to the CBCA should be undertaken to ensure a proper understanding.

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CORPORATE GOVERNANCE

1. Shareholders will be able to participate in shareholders meetings, and such meetings be held in their entirety by electronic, telephonic or

- other communication facilities that permit all participants to communicate adequately with each other as long as the corporation’s by-laws do not prohibit participation by such means.
2. Shareholders will also be entitled to vote at shareholders meetings by telephone, electronic or other communication facilities if the corporation makes available such communication facilities and as long as the by-laws do not prohibit voting in such a manner.
3. Proxy materials and other related information and documents will be able to be delivered by a corporation by electronic means as long as neither the by-laws nor articles prohibit such delivery. Shareholders must consent to accept delivery by electronic means and they are still entitled to insist on delivery of the documentation by traditional methods.
4. There will no longer be a requirement to have the majority of the board of directors of a CBCA corporation be resident in Canada. Instead, only twenty-five (25%) percent of the directors will be required to be resident in Canada. Further, now the various Committees of Boards are no longer required to have any members who are Canadian residents. Also, director’s meetings need only a quarter of those directors participating to be Canadian residents in order to conduct business which when combined with the ability to participate by electronic means, substantially increases corporate flexibility. These new provisions however do not apply to sectors or

CBCA corporations that are subject to ownership restrictions (i.e. uranium mining, distribution of film and video, Air Canada, Petro-Canada).

5. A CBCA corporation will be able to hold shareholders meetings outside of Canada at any place specified in its articles and there will be no requirement to obtain the unanimous approval of the shareholders.
6. Corporations may now be able to keep their financial and corporate records outside of Canada,

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as long as these records can be accessed electronically at the corporation's registered office or other location designated by the directors. The corporation will be required to provide technical assistance in order to allow others to use this service. Outside retention is permissible however, only if the requirements pertaining to the retention and maintenance of such records under legislation administered by National Revenue (i.e. Income Tax Act, Customs Act) are not violated.

7. The restrictions on financial assistance given to related parties of the CBCA corporation (i.e. shareholders, directors, officer and employees, subsidiaries and affiliates) will be repealed. As a result, a CBCA corporation can now provide financial assistance to any person, including shareholders, directors, officers and employees subject only to the directors' statutory fiduciary duties to act in the best interests of the corporation.
8. "Going private transactions" has been defined and expressly permitted in the amendments. Now, compliance with applicable provincial securities legislation will be necessary for distributing corporations executing these types of transactions

while in some limited cases minority shareholders of private companies receive the benefits of dissent and appraisal rights. Private companies now require a "majority-of-the-minority" approval of its minority shareholders before executing such transactions.

9. Non-distributing corporations (i.e. private companies) will be able to send out notices of shareholders meetings that are less than 21 days before the meeting as long as the shorter time period is specified in their articles or by-laws. As well, management of a corporation does not have to send out proxies if the corporation is a non-distributing corporation and has 50 or fewer shareholders entitled to vote at the meeting.

SHAREHOLDERS, DIRECTORS AND OFFICERS

1. Annual shareholders meetings must now be held not later than fifteen (15) months after the holding of the last preceding annual meeting, but in any event not later than six (6) months after the end of the corporation's preceding financial year, unless an extension has been obtained by court order.
2. Beneficial or registered shareholders may now make proposals at annual shareholder meetings. New regulations to be enacted will impose specific minimum ownership and time of ownership requirements in order for shareholders to meet eligibility criteria to submit a proposal. This will ensure that shareholders submitting a proposal have a continuous minimum level of investment in the corporation for a specified period.
3. The "good faith" reliance defence of directors will be repealed and replaced with a due diligence defence. The elements of the good faith defence will be kept to make it clear that these elements continue to be part of what constitutes due diligence. As long as a director exercises the care, diligence and skill that a reasonably prudent person would exercise in similar circumstances, he or she should be able to establish a defence to avoid and/or reduce exposure to statutorily imposed liability.
4. Those who take over the management of a CBCA corporation after all of the directors have resigned

will be assumed to be the directors and inherit all applicable director liability from the date that they assume their duties. Broad exemptions exist for officers acting at the request of the shareholders, as well as for professionals and receivers.

THE INDEMNIFICATION PROVISIONS HAVE BEEN BROADENED TO PERMIT A CORPORATION TO INDEMNIFY INDIVIDUALS WHO ACT IN A SIMILAR CAPACITY TO A DIRECTOR OR OFFICER OF ANOTHER ENTITY AT THE REQUEST OF A CORPORATION, SUCH AS TRUSTEES.

5. The amendments also incorporate the civil law concept of apportioning liability. As opposed to joint and/or several liability, a director may be proportionately liable for that portion of loss directly attributable to their degree of responsibility.
6. The indemnification provisions have been broadened to permit a corporation to indemnify individuals who act in a similar capacity to a director or officer of another entity at the request of a corporation, such as trustees. The provisions also provide for indemnification against all costs and charges

reasonably incurred in respect of civil, criminal, administrative and investigative proceedings. A corporation will also be allowed to advance monies to a director or officer or other individual acting in a similar capacity for the costs, charges and expenses of any such proceeding. The caveat is that the corporation may only indemnify such individuals if they have acted in the best interests of the corporation or the other entity for which the individual acted as a director or officer or in a similar capacity at the corporation's request.

7. An individual who is elected or appointed to hold office as a director is deemed not to be a director unless he or she was present at the meeting and did not refuse to hold office or if not at the meeting either consented to the election or appointment before the election or appointment or within 10 days after it, or he or she otherwise acted as a director subsequent to the election or appointment.

CONCLUSION

If you have further questions or need clarification on any of the above, be sure to contact a member of the Parlee McLaws Business Services Practice Group. Alternatively, send your inquiry via return email and it will be forwarded to the appropriate lawyer for you. If you know of other people who should receive Legal Alerts, or have suggestions for future articles, seminars or newsletters, please contact our Marketing Director, Nancy Martin at nmartin@parlee.com or by phone at (403) 294-4565.

We appreciate your taking the time to provide your valuable feedback to us at anytime.

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