

Polishing up the ABCA: amendments to the Alberta Business Corporations Act are proclaimed into force

June 15, 2022

Bill 84, the *Business Corporations Amendment Act*¹, was proclaimed into force on May 31, 2022.

When Bill 84 was first introduced on November 15, 2021, it was heralded as a means of attracting business and investment to Alberta and a way to confer a competitive advantage to innovators, entrepreneurs and job-creators in the province. The most significant improvements to the Alberta *Business Corporations Act* (ABCA)² are described below.

Advantages for directors and officers

- **Alberta is the first province to introduce “corporate opportunity waivers” in Canada.** A corporation may now waive “any interest or expectancy” in a specified business opportunity (or class or category thereof) that is offered to the corporation or its directors, officers or shareholders, provided such an ability to waive is included in the articles of incorporation or in a unanimous shareholders agreement.³ This allows directors or officers to take advantage of business opportunities that have been waived by the corporation whereas before such directors and officers could not take advantage of such business opportunities. One of the intended benefits of these changes is to attract private-sector investment, particularly from private equity and venture capital investors, who may wish to sit on several different boards within the same industry or area. It should be noted, however, that corporate opportunity waivers will be *optional*, not mandatory, and some details remain to be determined. For example, the scope and application of these waivers will be subject to the regulations. In addition, the tense of the amended language suggests that the specific opportunity must first have been offered before it may be waived (assuming the corporation has the power to waive) and so there cannot be generic or prospective waivers.
- **The amended ABCA broadens the exemptions that otherwise require a director to disclose and abstain from voting where they are a party to, or have a material interest in, any contracts or transactions with the corporation.** Now a director will be permitted to vote to approve a contract or

transaction in which they have a personal interest to the extent that the director undertakes an obligation which benefits the corporation (such as a director providing a guarantee of the corporation).⁴ Prior to these amendments, directors were required to disclose such personal conflicts and abstain from voting when they had a material interest in the corporation's contract or transaction, with a limited exception for security arrangements for money lent to, or obligations undertaken by the director, or by a corporate body in which the director had an interest.

- **The exercise of an officer's or director's fiduciary duties and duty of care has been narrowed to apply specifically when the director or officer is exercising their powers and discharging their duties to the corporation,**⁵ This clarifies that such duties are owed to the corporation. Further, directors and officers may now satisfy their due diligence obligations by relying on the opinions of employees who have credibility due to their profession or expertise (such as lawyers and accountants). Directors and officers will also be permitted to rely on *interim* financial statements in exercising their due diligence obligations.⁶
- **The scope of the actions or proceedings with respect to which a corporation is authorized to indemnify its directors or officers has been expanded to include "investigative" proceedings** (not just strictly civil, criminal or administrative actions), **and any other action or proceeding in which the director or officer is "involved"** (not just a named party).⁷ Corporations may wish to review their bylaws to ensure their indemnification language reflects the broadened authority permitted in the amended ABCA. The statutory entitlement of a director or officer to indemnification⁸ has also been broadened so that it will apply more liberally as long as the officer or director is not "judged by a court or competent authority to have committed any fault or omitted to do anything that the person ought to have done", rather than being contingent on the more restrictive stipulation that person be "substantially successful on the merits" in the action, and the requirement that the director be "fairly and reasonably entitled to indemnity" has been removed. This essentially lowers the thresholds for the director or officer to qualify for the statutory indemnity.

Advantages for corporations

- **The amended ABCA is intended to be equally attractive to federal business legislation with respect to restructurings and plans of arrangement.** A plan of arrangement is a court supervised and approved process by which a corporation may complete a range of transactions and reorganizations. Courts will now be permitted greater discretion to grant any interim or final order in conjunction with an expansion of remedies available, including orders that do not require a 2/3 shareholder vote.⁹ As a result, the courts have greater discretion to consider whether shareholder approval of the arrangement will be required at all, and to approve or amend any proposed arrangement.
- **Several changes were implemented for corporations other than reporting issuers (i.e. private corporations) for the purpose of streamlining administrative processes** and procedures, without compromising on the protections afforded to shareholder rights, such as:

- o The notice of a shareholder meeting has been reduced to a minimum of 7 days (as opposed to 21 days) and a maximum of 60 days (as opposed to 50 days).
 - o Shareholder resolutions can be passed in writing, with a 2/3 vote, instead of obtaining unanimous shareholder consent for a written resolution.
 - o The requirement for an auditor may be dispensed with when 2/3 of the voting shares elect to do so, as opposed to requiring the unanimous votes of all voting and non-voting shares. The special resolution will be valid only until the following annual shareholder meeting.¹⁰
- **Several other administrative changes**, which apply to both reporting issuers and corporations other than reporting issuers, have been introduced in order to increase efficiency, consistency with other legislative regimes, and to move legislation at the “speed of business.”¹¹ These include:
 - o The definition of “reporting issuer” is now used (rather than “distributing corporation”) so as to be consistent with the Alberta *Securities Act* and similar legislation.¹²
 - o Security Certificates may be issued in electronic form.¹³
 - o Directors of a reporting issuer no longer need to provide a record date of a shareholder meeting (this requirement will continue to apply to reporting issuers by stock exchanges).

Advantages for shareholders and stakeholders

- The amendments now expressly provide that **shareholders who assume rights, powers, duties and liabilities of a director pursuant to a unanimous shareholder agreement, are expressly entitled to the defences** that are available to those directors as well.¹⁴
- The amendments provide that **shareholders are not prevented from fettering their discretion** when they are exercising the powers of directors pursuant to a unanimous shareholder agreement.¹⁵
- **The amendments have modified the insider trading defence.** Section 130 of the amended ABCA provides that an insider who uses confidential information for their own benefit will be liable to compensate any person for a resulting loss, *unless* the insider can establish that it *reasonably believed* that the information had been generally disclosed, or was known or reasonably ought to have been known by the seller or purchaser.¹⁶ This introduces a subjective element to the defence.¹⁷ Further, a person who proposes to make a takeover bid or proposes a business combination is considered an “insider” under the Amended ABCA.¹⁸

The amendments have polished up the ABCA to make it more competitive and attractive with the intention of germinating new investments in Alberta. We hope these changes bear fruit.

BLG regularly acts for corporations, directors, businesses owners and entrepreneurs to provide advice on corporate compliance and structures. If you have any questions regarding the *Business Corporations Amendment Act*, please reach out to the authors or any of the contacts listed below.

Footnotes

¹ 2nd Sess, 30th Leg, Alberta, 2021 (assented to December 2, 2021) SA 2021 c-18. Note that the amended *Business Corporations Act*, as a result of Bill 84 is referred to as the “Amended Act”.

² RSA 2000, c B-9.

³ Section 16.1 of the Amended Act.

⁴ Section 120(6)(a) of the Amended Act.

⁵ Section 122(1) of the Amended Act.

⁶ Section 123(3) of the Amended Act.

⁷ Section 124(1) of the Amended Act.

⁸ Section 124(3)

⁹ Section 193, Amended Act.

¹⁰ Section 163, Amended Act.

¹¹ Alberta, Legislative Assembly of Alberta, Government Bills and Orders, Second Reading “Bill 84, *Business Corporations Amendment Act, 2021*”, *Alberta Hansard*, (November 24, 2021) at 16.

¹² Section 1(cc.01), Amended Act.

¹³ Section 48(7.1), Amended Act.

¹⁴ Section 146(7), Amended Act.

¹⁵ Section 146(10), Amended Act.

¹⁶ Section 130(c), Amended Act.

¹⁷ Section 130(d), Amended Act.

¹⁸ Section 127(e), Amended Act.

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