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REFORM OF THE *CANADA* *BUSINESS CORPORATIONS ACT*

What does it mean for my practice?

Corporations Directorate

May, 2002



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Reform Highlights

- Increase shareholder participation
- Reduce directors' residency
- Broaden directors' indemnification and clarify defences
- Embrace technological change
- Remove overlap with securities legislation
- Repeal financial assistance restrictions



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Presentation Overview

- Objective: what can/must be done differently?
- Outline
 - Impact of CBCA Reform on dealings with Corporations Directorate
 - Impact of CBCA Reform on
 - Corporate Documents
 - Corporate Meetings
 - CBCA Reform Generally



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Status of Bill S-11

- in force: November 24, 2001
- review
 - within 5 years of coming into force (i.e., by November, 2006)
 - every 10 years thereafter (2016, 2026, 2036...)



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I. Incorporating Documents and Corporate Examination

- directors' residency
- registered office address
- corporate names
- who can sign



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Directors' Residency

- General rule = 25%,
- requirement eliminated for board committees
- but exceptions to 25% rule:
 - <4 directors
 - ownership restrictions
- Director's change of address must be notified



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Registered Office

- Province or territory, not place
- Impacts
 - Articles of Amendment: not required unless moving outside of province or territory
 - Form 3: still required



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Corporate Names

- Official Marks

 - e.g., Olympic

- Combined English + French

Form of Name

 - e.g., Automobiles ABC Cars



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Who can sign?

- Is the signatory a director or officer, or
- does the signatory:
 - have relevant knowledge of the corporation?
 - have the authority of the corporation?
- If yes to both, signatory:
 - may sign forms 3, 6, 22
 - may not sign other forms, e.g., articles
- Forms require capacity, not title, of signatory



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Signatures (cont'd)

- Document signed by more than 1 individual:
 - signatures may be on several documents
- Signature approving a financial statement:
 - signature may be a facsimile



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Corporate Examination

- Certificates of Compliance
- Copies/Extracts
- Corrections and cancellations
- Dissolution and revival
- Exemptions



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Corrections

- Director may now:
 - request changes in documents filed
 - correct obvious errors



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Cancellations

- cancel certificates and articles incorrectly issued
 - on Director's initiative:
 - obvious error
 - Director made error
 - court ordered cancellation
 - Director lacked authority
 - no prejudice to shareholders or creditors



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Cancellations (cont'd)

- On request of corporation, if:
 - cancellation approved by directors
 - cancellation reflects intent of corporation
 - no prejudice to shareholders and creditors
 - no dispute among directors/shareholders about request to cancel
- and:
 - no use made, or consent of 3rd parties



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Dissolution

- Accelerated dissolution for non-payment of fee
- No publication in Canada Gazette
- Dissolve insolvent + bankrupt corporations
- Dissolve corporations with no directors



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Revival

- “Interested persons” defined
- Director’s discretion in issuing certificate
- Revival effective on certificate date
- Revivals are retroactive



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Exemptions

- Exemption decisions, not orders
- Distributing corporations



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Director' Powers and Fees

- Refusal of filings
- Forms
- Appeal of Director's decisions



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Refusal of Filings

- Director may refuse to issue certificate of incorporation
- but power is limited to non-compliance indicated by:
 - Notice re registered office address
 - Notice re directors



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Forms

- No longer prescribed
- Director now “fixes”



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Appeal of Director's decisions

- Decisions added that are appealable:
 - conditions placed on exemption
 - granting of exemption
 - revival of a corporation
 - terms of revival
 - certificate of compliance
 - correction
 - cancellation



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Technology

- Documents sent to the Director
- Website Publication
- Electronic Signatures



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II. Impact of CBCA Reform on Corporate Documents

- Articles of Incorporation
- By-laws
- Minutes of Meeting



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Optional Changes to Articles of Incorporation

- Fix # of shares in series and conditions of shares
- Hold shareholder meetings outside Canada



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Optional Changes to By-laws

- Corporations may keep corporate and accounting records outside of Canada



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Electronic Shareholder Meetings

- Shareholder meetings held entirely electronically/by telephone
- Electronic/telephonic participation/voting at shareholders meetings



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Electronic Director Meetings

- Electronic/telephonic participation at directors meetings



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Other Effects on Meetings

- Call annual meeting within 6 months of fye
- Notice of Meetings/Record Date: not +21 days, not ,60 days
- Non-distributing companies <21 days notice



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Other Options

- Corporations may provide notices or other information electronically
- Electronic signature of documents
- Shareholder access to minutes of director's disclosed interest
 - but shareholders resolution may confirm



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Ballots at Meetings

- Entry in directors/shareholders meeting minutes = evidence of vote on resolution
- No ballot required if proxyholders = +5% of all votes cast



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Consent to Election as Director

- If attending, objection to election?
- If not attending, consent
 - in writing:
 - before election as director, or
 - within 10 days of election
 - or by acting as director



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Number of Directors

- Lack of consent/quorum
- Appoint additional directors
- Deemed directors



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Review - Changes to Corporate Documents

- Articles amendments:
 - province or territory of registered office
 - place of shareholder meeting held outside of Canada
 - delegation to directors of shares in series
 - combined form of name



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Review - Changes to Corporate Documents (cont'd)

- By-law amendments
 - Necessary if:
 - <21 days notice of shareholder meeting (private co.)
 - holding shareholder meeting entirely electronically



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Review - Changes to Corporate Documents (cont'd)

- By-law amendments (cont'd):
 - Desirable if
 - limiting electronic attendance/vote at
 - shareholders meeting
 - directors meeting



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Review - Changes to Corporate Documents (cont'd)

- Do articles or by-laws prevent corporation from taking advantage of:
 - 25% Canadian resident directors?
 - no Canadian resident directors necessary on committees?
 - adding/replacing directors due to minimum/maximum numbers specified?
 - directors/shareholders participating in meetings electronically?
 - broadened indemnification/insuring of directors and officers?



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Review - Changes to Corporate Documents (cont'd)

- Consent forms
 - Shareholders consent to receiving electronic notice of meeting
 - Evidence of director's consent to election:
 - consent form
 - or
 - evidence of acting as director



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Review: Overview of CBCA Reform Generally

- Changes vis-à-vis Corporations Directorate
- Changes vis-à vis Corporate Documents and Meetings



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III. CBCA Reform

Generally

- 4 Key Themes:
 - Competitiveness
 - Responsibility
 - Shareholder Participation
 - Efficiency



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Competitiveness

- Directors' residency requirements reduced
- Directors' liability defences clarified
- Directors' indemnification broadened
- Corporate finance more flexible



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Directors' Liability Defence Clarified

- Due diligence defence explicitly provided
- Good faith reliance defence retained



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Director's Indemnification Broadened

- Investigative proceedings now covered
- Advance moneys to directors or officers
- Indemnify directors or officers of another “entity”
- Conditions to qualify
- Right to indemnification for defence costs
- No restrictions on insuring vs d+o liability



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Corporate Finance More Flexible

- Repeal of financial assistance constraints
- Authorization/delegation of share class issues
- Stated capital accounts
- Subsidiaries acquiring shares of parents



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Repeal of Financial Assistance Constraints

- Solvency test difficult to apply
- Protections still exist



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Stated Capital Accounts (SCA)

- Share-Property Exchange
- SCA: Roll-overs facilitated
 - Shares exchanged for property
 - Share exchanges in ordinary amalgamations
- Directors not liable for SCA reduction



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Subsidiary Acquiring Shares of Parent

- Pre-acquisition conditions:
 - subsidiary + target must not be resident in Canada
 - share purchase value = fair market value
 - shares widely held + traded on Cdn stock exchange
 - arm's length relationship
 - sole purpose = transfer of shares to target



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Subsidiaries Acquiring Shares of Parents (cont'd)

- Post-acquisition conditions:
 - immediate transfer of shares to target shareholders
 - subsidiary retains no beneficial interest
 - neither subsidiary nor target can become Canadian
 - end result: target = subsidiary of subsidiary



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Responsibility

- Modified proportionate liability
- Unanimous shareholder agreements



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Modified Proportionate Liability

- Apportion award of damages among ≥ 1 defendant
- Loss re financial information required by CBCA
- Damages uncollectable from ≥ 1 defendant or 3rd party



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Joint & Several Liability still applies to plaintiffs who are ...

- federal and provincial governments
 - unless Crown agent = trader in securities
- charitable organizations
- unsecured trade creditors
- individuals whose investment + \$20K (unless equitable grounds)
- if defendant or 3rd party acted fraudulently or dishonestly



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Unanimous Shareholder Agreements

- Shareholders or 3rd parties assume directors'
 - liabilities
 - rights
- Shareholders may fetter own discretion
- Acquiring shareholder has right to cancel purchase if not informed of usa



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Shareholder Participation

- Shareholder communication facilitated:
 - dissident proxy rules relaxed
 - shareholder proposal rules broadened
- Electronic meetings/voting permitted



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Proxy Circular Requirements Liberalized

- Exceptions from management proxy circular:
 - non-distributing corporations with 50 or fewer shareholders
- Exceptions from dissident proxy circular:
 - communications “concerning the business and affairs of the corporation”
 - 15 or fewer shareholders
 - public broadcast, speech or publication
 - public announcement



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Shareholder Proposal Rules Broadened

- Beneficial shareholders can make proposals
- Grounds for rejecting a proposal limited



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Shareholder Proposals - Eligibility Requirements

- Proposing shareholder or group must have/meet:
 - $\geq 1\%$ voting shares, or $\geq \$2K$ share worth
 - ≥ 6 months ownership
 - submission deadline = 90 days before anniversary of notice of meeting
 - minimum support within past 5 years



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Efficiency

- Repeal insider trading reporting and take-over bid provisions
- Permit electronic communications
- Clarify that going-private and squeeze-out transactions are permitted



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Repeal

- Insider trading reporting
- Take-over bids
- Filing of securities documents



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Going-private and Squeeze-out Transactions Permitted

- Going-private transactions
 - comply with provincial securities legislation
- Squeeze-out transactions
 - majority of minority approval



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Forced Acquisitions

- Dissent rights
 - going-private or squeeze-out
 - 1 class of shares
- Take-over bidders acquiring $\geq 90\%$ - shareholders not tendering may demand share purchase



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Summary

Benefits for Corporations +
Investors:

- shareholder participation
- competitiveness
- efficiency



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Summary (cont'd)

- Shareholder Participation
 - shareholder communication
 - shareholder proposals



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Summary (cont'd)

- Competitiveness
 - reduce directors' residency requirements
 - due diligence defence
 - broaden directors' indemnification



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Summary (cont'd)

- Efficiency
 - electronic capabilities
 - meetings
 - shareholder + director participation
 - voting
 - repeal of
 - insider trading reporting provisions
 - take-over bid provisions
 - financial assistance restrictions