Both domestic and international businesses, when doing business in Canada, may choose the province in which they incorporate. Each province has its own business corporation legislation. While there are distinguishing features in the corporate regime of each of the provinces, there has not been, until recently, a Delaware-like jurisdiction that has clear advantages for business owners and investors.

For several years, academics and professionals (notably Bryce C. Tingle K.C. and J. Paul Barbeau in several editions of the Annotated Business Corporations Act: Lexis/Nexis) have advocated for changes to the Alberta Business Corporations Act ("ABCA") to distinguish Alberta as the leading corporate legal regime in Canada.

In 2022, a series of major amendments to the ABCA were proclaimed into force, and there is now a widely-held consensus that Alberta has the most business and investor-friendly corporate regime in Canada.

Alberta corporations now have a significant advantage in attracting sophisticated foreign financial investors, due to the following features:

**Corporate Opportunity Waivers**

While not controversial in the United States, where corporate opportunity waivers have been available in Delaware since 2000, Alberta is the first province in Canada to permit them. Generally, the corporate opportunity doctrine prohibits fiduciaries (such as directors and officers) from personally benefitting from opportunities that belong to the corporation, or else risk personal liability. This can raise issues in certain contexts, such as directors that are appointed by investors with interests in multiple businesses in the same industry. Under the ABCA, directors and officers may now obtain waivers whereby the corporation waives any interest in an opportunity to participate in a particular business opportunity that is offered to a director, officer or shareholder of the corporation, provided that the articles of the corporation or a unanimous shareholders agreement enable the corporation to give such waiver.
These waivers reduce the risk exposure of investment fund managers (such as private equity firms and venture capitalists) sitting on portfolio boards, as well as facilitating competent directors sitting on multiple boards in the same industry.

**Shareholders may “Fetter” Discretion**

Shareholders are now allowed to “fetter” their discretion when exercising the powers of the directors under a unanimous shareholders agreement. This was always a troubling ambiguity under the old rules. The change reduces the risk of shareholders by allowing them to rely on the advice or written reports of others when making decisions.

**Director Vote on Self-Interested Transactions**

Directors are now permitted to vote in cases where they are in a conflict, provided the nature of the conflict is disclosed in writing and benefits the corporation, as may occur when a director (or a shareholder with which it is affiliated) guarantees a loan.

**No Director Residency Requirements**

Historically, most Canadian jurisdictions required that a percentage of directors be Canadian residents. This requirement has been removed from the ABCA, allowing foreign investors and shareholders to appoint qualified directors regardless of their jurisdiction of residence.

**Increased Indemnity Protections for Directors**

At a time where legislatures are continuing to increase the risk of personal liability, the ABCA has improved the indemnity protections afforded to directors and senior officers:

- Directors and officers may be indemnified by the corporation even if they are just “involved” in an action, rather than having to be “party” to the action.
- The amendments clarify that indemnification is available for investigations and other sorts of proceedings, not just “actions”.
- The condition for receiving indemnification is now only that the indemnified party is not judged to have committed a fault or omitted something that ought to have been done. This is a much lower standard that the previous requirement that the indemnified party be “substantially successful on the merits” of a claim. As well, the amendments eliminated the vague condition that the director or officer be “fairly and reasonably entitled” to indemnification.
- The indemnity provisions of the ABCA allow corporations to advance funds to officers and directors in a broader range of circumstances, provided that the indemnified party must return the funds if they are
ultimately judged to be ineligible for indemnification. This is an important change, given that most of the pressure on directors and officers is linked to the expense of participating in an investigation or action, rather than the risk they will be found liable at the end of the process.

- The amendments follow Ontario and the federal statute in permitting D&O insurance to apply to breaches of the insured’s fiduciary duty.

**Broadened Due Diligence Defence for Directors**

The statutory due diligence defense has been extended to permit directors to rely on the opinion of employees of the corporation, where their expertise or profession lends credibility to their work. Previously, director reliance was confined to professionals and financial reports. This meant directors could not, for example, rely on the work done by a company’s own financial team in creating a cash flow model for corporate planning.

**Increased Flexibility in Major Transactions**

Corporate reorganizations and business combinations in Canada are frequently done by way of a court-approved plan of arrangement. The ABCA has historically included arrangement features that limited the ability of corporations to complete major transactions (including exit transactions).

Recent changes to the ABCA now give courts discretion to determine the required securityholder approval threshold for plans of arrangement (including determining that shareholder approval is not required in certain circumstances or that it may be obtained by way of written consent resolution), rather than requiring shareholder meetings in every transaction (even in debt restructurings). This change eliminates the need for an expensive and time-consuming shareholder vote in circumstances when shareholders are not being treated adversely.

In addition, the court has the power to grant any interim or final order it sees fit, meaning it can grant a stay of proceedings against the corporation at the outset of the arrangement, giving firms the time to reorganize their businesses.

A final point of distinction is that the ABCA does not require corporate solvency to use the arrangement provisions. As a result, the ABCA permits major restructurings (including debt restructurings) of both solvent and insolvent companies in a way other jurisdictions in Canada do not.

**Other Business-Friendly Provisions**

Several other changes to the ABCA have been implemented to bring greater speed and efficiency to corporate actions. These include:

- The minimum notice period for shareholder meetings for private companies will be shortened from 21
days to seven days, resulting in accelerated timelines for corporate actions that require shareholder approval.

- Written shareholder resolutions for private companies may be approved by obtaining the signatures of shareholders holding only two-thirds of the outstanding voting shares, rather than unanimity, having the potential to greatly reduce the number of shareholder meetings that are required for certain corporate actions.
- Audits for private companies can be dispensed with approval by holders of two-thirds of the shares, rather than all of them.
- Corporations can be revived up to ten years following dissolution, up from five years.
- Corporations will not need to publish shareholder meeting notices in a national newspaper – a departure from an archaic and costly practice that long outlived its usefulness.

Conclusion

A key objective of these reforms is to make Alberta uniquely attractive to sophisticated investors, including private equity and venture capital firms. Companies that wish to attract such investors should strongly consider incorporating in, or continuing from another jurisdiction into, Alberta, regardless of where in Canada they hold assets or conduct business.

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A Cautionary Note

The foregoing provides only an overview and does not constitute legal advice. Readers are cautioned against making any decisions based on this material alone. Rather, specific legal advice should be obtained.

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