axium
CORPORATE | FINANCE | LAW

CORPORATE FINANCE BULLETIN

April 22, 2004

Dear Client/Colleague:

New British Columbia Business Corporations Act

The new British Columbia Business Corporations Act (the "New Act") came into force on March 29, 2004 and replaced the British Columbia Company Act (the "Old Act"). The New Act represents the first major reform of company legislation in British Columbia since 1973 and is as a result a more modern corporate statute than the Old Act. It reduces the regulatory burden and affords greater flexibility for companies to conduct business in British Columbia. We have set out below in summary fashion some of the key changes from the Old Act to the New Act.

Transition

All companies governed by the Old Act (defined by the New Act as "pre-existing companies") must complete the necessary transition steps within two years from March 29, 2004, the date when the New Act came into force. However, we suggest that most companies should not wait for the full two-year period and should transition earlier in order to be able to take advantage of the corporate procedures and flexibility permitted by the New Act. For example, a company will need to complete a transition process to be able to alter its memorandum and articles (i.e. change its name, amend its authorized capital or alter special rights and restrictions, etc.) and to utilize short form amalgamation procedures afforded under the New Act. If a company is not transitioned within two years, the Registrar can dissolve the company. In order to transition, a pre-existing company must file a transition application with the Registrar.

Charter Documents

The memorandum of a pre-existing company will be replaced under the New Act by the notice of articles (the "Notice of Articles"). The Notice of Articles will include some information currently contained in the memorandum (such as the company name and authorized share capital) and will also include some additional information (such as names and addresses of directors and addresses of the registered and records offices).

The articles under the New Act (the "Articles") will substantially retain their current form and content. However, some items that are now contained in the memorandum of a pre-existing company and cannot be included in the Notice of Articles, will have to be set out in the Articles (such as special rights and restrictions attached to shares and restrictions on business and powers). The New Act eliminates the requirement to have Articles approved and filed with the Registrar. The Articles are now simply required to be available for inspection at the records office of the company.

Finance

Whereas the Old Act required a company to authorize a specific number of shares of each class that the company could issue, the New Act states that a company's charter may provide for unlimited share capital. It is likely that a number of pre-existing companies will opt to change to, for example, an unlimited number of common shares, when they transition under the New Act.

Axium Law Group Suite 3350, Four Bentall Centre, 1055 Dunsmuir Street, PO Box 49222
Vancouver, British Columbia, Canada V7X 1L2
TEL: 604.685.6100 FAX: 604.692.4900 www.axiumlaw.com

The "pre-emptive right" contained in the Old Act (i.e. the requirement that private companies first offer shares to current shareholders prior to issuing those shares to new shareholders) does not apply to companies incorporated under the New Act. The Old Act requirement will continue to apply to preexisting companies and only in the circumstances where it applies under the Old Act. However, a preexisting company can pass a special resolution to make this provision non-applicable to the company.

The New Act continues to allow both par value shares and shares without par value and will also permit par values in a foreign currency. The New Act permits fractional shares and allows more flexibility in setting the amount of paid-up capital.

The New Act eliminates the prohibitions in the Old Act on the granting of financial assistance and provides that a company may provide financial assistance (i.e. loans, guarantees, etc.) to any person and for any purpose. If a company grants financial assistance to a person related to the company or related to an affiliated company (such as a director, officer, shareholder, beneficial owner of shares or an employee), the New Act generally requires written disclosure of such financial assistance, although it does afford several exemptions from this disclosure requirement.

Directors and Officers

The New Act removes the residency restrictions for directors that existed under the Old Act (one British Columbia resident and majority Canadian resident directors). Therefore, directors who have been appointed or elected solely to comply with the residency requirement under the Old Act may now wish to resign. Similarly, companies which have been incorporated or continued outside British Columbia to avoid the directors' residency requirements are no longer restricted by such requirements and may want to consider continuing into British Columbia.

The New Act also removes the requirement to disclose residential addresses for directors and replaces it with the requirement to provide a "prescribed" address, which does not have to be a residential address and could be a business address for privacy reasons.

Under the New Act, a company is not required to have officers unless specified in the Articles and the president of the company is not required to be a director.

The limitations on liability of directors are slightly wider, because the New Act provides directors with a defence of good faith reliance on written reports of a professional person (such as a lawyer, accountant, engineer, etc.) or any record or representation that the court considers provides reasonable grounds for the actions of the director, whether or not that report was forged, fraudulently made or inaccurate.

While the Old Act was silent on the subject of transferring directors' powers, the New Act allows such transfer if the Articles so allow. In practice, the directors' powers are likely to be transferred to shareholders in closely held companies similar to the way such transfer is affected under a unanimous shareholder agreement as provided under the Canada Business Corporations Act.

Whereas the Old Act required a court order approval to indemnify a director or officer, the New Act permits a company to pay the expenses incurred by a director during an ongoing proceeding, subject to certain conditions.

The New Act has extended the requirement of directors to disclose conflicts of interest to cover both directors and senior officers. However, while the Old Act required disclosure of any type of conflict of interest, the New Act requires disclosure only if the interest of a director or senior officer in the contract or transaction is material and the contract or transaction is material to the company.

Governance

The New Act removes the Old Act requirement of a 3/4 majority of the votes cast for a special shareholders' resolution and allows companies to set out in the Articles the required majority for a special resolution of between 2/3 and 3/4 of the votes cast on the resolution. It is likely this will be 2/3 in most cases. In addition, the New Act allows companies to provide for an "exceptional resolution" in the Articles requiring a majority that is greater than a special resolution majority for certain corporate actions.

While the Old Act required shareholders' meetings to be held in British Columbia, unless the Registrar approved a location outside of British Columbia, the New Act permits shareholders' meetings to be held outside British Columbia without the Registrar's approval, if the company provides for such out of province location in the Articles or if shareholders approve such location by an ordinary resolution.

The New Act removes the Old Act requirement of conducting shareholders' business only by way of meetings in person or obtaining unanimous shareholders' consent in writing and provides that shareholders may conduct meetings by teleconference or other communications facilities at the option of the company and annual general meetings may be waived or postponed.

Fundamental Corporate Changes

The New Act allows British Columbia companies to amalgamate with foreign corporations directly in certain circumstances, which represents a significant change from the Old Act prohibition of amalgamations between British Columbia and foreign companies. Therefore, foreign companies do not have to continue into British Columbia in order to amalgamate with British Columbia companies.

The New Act simplifies the amalgamation procedures for related companies, because it eliminates the requirement for an amalgamation agreement.

Whereas the Old Act required a court order for all amalgamations, the New Act permits amalgamations without court order if affidavits can be sworn stating that creditors of the amalgamating companies will not be materially prejudiced by the amalgamation.

The New Act will also permit three-cornered amalgamations, where shares of an amalgamating company are exchanged for shares or other securities of a corporation other than the amalgamating companies, which the Old Act did not allow.

Extraprovincial Companies

Extraprovincial companies are no longer required to have a "head office" in British Columbia nor to maintain records in British Columbia. A registered extraprovincial company must still file an annual report. The New Act removes the draconian penalties under the Old Act for unregistered extraprovincial companies including inability of the unregistered extraprovincial companies to hold interests in land in British Columbia or bring an action in a British Columbia court.

Reduction in Regulatory Burden

Whereas the Old Act permitted a very limited number of electronic filings, the New Act allows significantly more online filings with the Registrar and also permits an increased use of future effective dates. For example, all companies will be incorporated online through an "Incorporation Application" web form on the Registrar's

new Corporate Online service. Whereas under the Old Act an incorporation was effective when filed with the Registrar, incorporation under the New Act can be made effective up to ten days in the future.

The New Act removed the duplicative governance rules that were contained in the Old Act and which sometimes conflicted with the securities legislation. The New Act does not contain a concept of a reporting company (not to be confused with the reporting issuers under the securities legislation) except for certain provisions regarding pre-existing reporting companies. The New Act does not contain requirements regarding forms of proxy, information circulars or proxy solicitations for reporting issuers. The insider trading provisions in the New Act apply to "private companies" only. Hence, the New Act leaves it to securities legislation to deal with these matters for public companies.

If you have any questions or would like more information, please contact us as set out below:

Rod McKeen, Partner
Direct: 604.692.4901
email: rmckeen@axiumlaw.com

Michael Varabioff, Partner
Direct: 604.692.4918
email: mvarabioff@axiumlaw.com

Joseph Giuffre, Partner
Direct: 604.692.4909
email: jgiuffre@axiumlaw.com

Yours truly,

AXIUM LAW GROUP