



# What's New in the Corporate and Business Law World?

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# Key Changes in Business Law World

1. Amendments to the *Business Corporations Act* (Alberta)
2. New disclosure requirements under the *Canada Business Corporations Act* and the *Business Corporations Act* (British Columbia)
3. Other new developments in the business realm
  - Proposed change to criminal rate of interest
4. Mystery Case & Discussion

Appendix – Additional Materials- Duty of good faith in Canadian Contracts



# Amendments to the *Business Corporations Act* (Alberta) (“ABCA”)

- Amendments to ABCA came into force on May 31, 2022 with the stated intentions to reduce administrative burdens, to attract investment into the province and to diversify Alberta’s economy.

## 1. Corporate Opportunities

- Prior to the amendments, directors and officers were at risk of having to disgorge to the corporation any profits earned from participation in or taking advantage of business opportunities of which they became aware as a result of their position, as directors and officers owe fiduciary duties to the corporation.
- **New** (Section 16.1) – if a corporation’s articles of incorporation or an unanimous shareholder agreement enables the corporation to so do, a corporation would have the option to waive its interest in specified corporate opportunities offered to it or its directors, officers or shareholders. Note that the new provision suggests that the specific opportunity must be first offered to the corporation before it may be waived; as such, the waiver must be precise and cannot be generic or prospective. Alberta is the first Canadian jurisdiction to allow for corporate opportunity waivers.
- **Waiver of business interests**
  - 16.1(1) Subject to the regulations, a corporation may waive any interest or expectancy of the corporation in or to, or in being offered an opportunity to participate in, a specified business opportunity or specified classes or categories of business opportunities that are offered or presented to the corporation or one or more of its officers, directors or shareholders.*
  - (2) Subject to the regulations, a waiver referred to in subsection (1) may only be made if the corporation’s articles of incorporation or a unanimous shareholder agreement enables the ability to so waive, or in any other manner set out in the regulations.*
  - (3) Subject to the regulations, a waiver may be modified or revoked.*



# Amendments to the *Business Corporations Act* (Alberta) (“ABCA”) cont’d

## 2. Responsibilities and protections to directors and officers

- **Expansion? of good faith defense (s.123(3))**

- An employee of a corporation was not expressly included in the list of parties on whose opinions or reports a director may rely on in good faith in order to be relieved of liability for certain actions regarding a breach of duty of care.
- As well, arguably, a director could not rely on interim financial statements to be relieved of such liability.
- **Amendment** – It is clarified that directors may discharge their duties of care if, in the course of exercising their powers, they can demonstrate that they relied in good faith on an opinion or report from an employee of the corporation (in addition to a lawyer, accountant, engineer or appraiser), providing their profession or expertise “lends credibility” to what that person is saying. It is arguable that this is actually a limiting provision as before, any other person (not just an employee), other than a lawyer, accountant, engineer or appraiser, with the proper expertise could be relied upon. A director can also rely on interim financial statements and not just annual statements.



# Amendments to the *Business Corporations Act* (Alberta) (“ABCA”) cont’d

## **Dissent by director**

123(3) A director is not liable under section 118, and has complied with the director’s duties under section 122, if the director exercises the care, diligence and skill that a reasonably prudent person would exercise in comparable circumstances, including reliance in good faith on

(a) *financial statements or interim financial statements of the corporation represented to the director by an officer of the corporation or in a written report of the auditor of the corporation to reflect fairly the financial condition of the corporation, or*

(b) *an opinion or report of a person, including a lawyer, accountant, engineer, appraiser or ~~other person~~ employee of the corporation, whose profession or expertise lends credibility to a statement made by that person.*

## **Liability of directors and others**

**118(1)** *Directors of a corporation who vote for or consent to a resolution authorizing the issue of a share under section 27 for a consideration other than money are jointly and severally liable to the corporation to make good any amount by which the consideration received is less than the fair equivalent of the money that the corporation would have received if the share had been issued for money on the date of the resolution.*

**(3)** *Directors of a corporation who vote for or consent to a resolution authorizing*

(a) *a purchase, redemption or other acquisition of shares contrary to section 34, 35 or 36,*

(b) *a commission on a sale of shares not provided for in section 42,*

(c) *a payment of a dividend contrary to section 43,*

(d) *financial assistance contrary to section 45,*

(e) *a payment of an indemnity contrary to section 124, or*

(f) *a payment to a shareholder contrary to section 191 or 242,*

*are jointly and severally liable to restore to the corporation any amounts so paid and the value of any property so distributed, and not otherwise recovered by the corporation.*



# Amendments to the *Business Corporations Act* (Alberta) (“ABCA”) cont’d

## ***Duty of care of directors and officers***

**122(1)** *Every director and officer of a corporation in exercising the director’s or officer’s powers and discharging the director’s or officer’s duties to the corporation shall*

*(a) act honestly and in good faith with a view to the best interests of the corporation, and*

*(b) exercise the care, diligence and skill that a reasonably prudent person would exercise in comparable circumstances.*



# Amendments to the *Business Corporations Act* (Alberta) (“ABCA”) cont’d

- **Enhanced indemnification provisions (s. 124(1))**

- Prior to the amendment, a corporation was able to indemnify a director or officer for costs incurred in connection with a civil, criminal, or administrative action or proceeding to which the director or officer is made a party, provided the director or officer acted in good faith.
- **Amendment** – the availability and scope of indemnification for directors and officers has increased to investigative actions. Costs associated with investigation process can now be covered by indemnity provisions.

- ***Indemnification by corporation***

*124(1) Except in respect of an action by or on behalf of the corporation or body corporate to procure a judgment in its favour, a corporation may indemnify a director or officer of the corporation, a former director or officer of the corporation or a person who acts or acted at the corporation’s request as a director or officer of a body corporate of which the corporation is or was a shareholder or creditor, and the director’s or officer’s heirs and legal representatives, against all costs, charges and expenses, including an amount paid to settle an action or satisfy a judgment, reasonably incurred by the director or officer in respect of any civil, criminal ~~or~~, administrative, **investigative or other** action or proceeding ~~to~~ **in** which the director or officer is ~~made a party~~ **involved** by reason of being or having been a director or officer of that corporation or body corporate, if*

*(a) the director or officer acted honestly and in good faith with a view to the best interests of the corporation, and*

*(b) in the case of a criminal or administrative action or proceeding that is enforced by a monetary penalty, the director or officer had reasonable grounds for believing that the director’s or officer’s conduct was lawful.*



# Amendments to the *Business Corporations Act* (Alberta) (“ABCA”) cont’d

- **Indemnification by corporation**

124(3) Notwithstanding anything in this section, a person referred to in subsection (1) is entitled to indemnity from the corporation in respect of all costs, charges and expenses reasonably incurred by the person in connection with the defence of any civil, criminal ~~or~~, administrative, *investigative or other* action or proceeding ~~to~~ in which the person is ~~made a party involved~~ by reason of being or having been a director or officer of the corporation or body corporate, if the person seeking indemnity

~~(a) was substantially successful on the merits in the person’s defence of the action or proceeding,~~

*(a) was 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, and*

*(b) fulfils the conditions set out in subsection (1)(a) and (b), ~~and~~*

~~(c) is fairly and reasonably entitled to indemnity.~~

- **Need for Director and Officer Indemnification Agreements**

### Pre-paid Expenses

All costs, charges and expenses, including without limitation legal costs and disbursements on a solicitor and its own client basis, reasonably incurred by the Indemnified Party in investigating, defending or appealing any civil, criminal or administrative action or proceeding, actual or threatened, covered hereunder shall, at the request of the Indemnified Party, be paid by the Corporation in advance as soon as practicable and in any event within thirty (30) days from the date the Corporation receives a written request from the Indemnified Party....





# Amendments to the *Business Corporations Act* (Alberta) (“ABCA”) cont’d

- **Additional exemptions for directors to vote where they have a material interest in any contracts or transactions (s.120)**
  - Prior to the amendment, directors are required to disclose and abstain from voting where they have a material interest in any contracts or transactions, subject to very limited exemptions.
  - **Amendment** – directors are now allowed to vote on a material contract or transaction in which they are a party if the director’s interest would benefit the corporation, such as guaranteeing a loan.
  - **Disclosure by directors and officers in relation to contracts**

*120(1) A director or officer of a corporation who*

    - (a) is a party to a material contract or material transaction or proposed material contract or proposed material transaction with the corporation, or*
    - (b) is a director or an officer of or has a material interest in any person who is a party to a material contract or material transaction or proposed material contract or proposed material transaction with the corporation, shall disclose in writing to the corporation or request to have entered in the minutes of meetings of directors the nature and extent of the director’s or officer’s interest.*

*(1.1) This section applies to a person acting in the capacity of a director or officer of a corporation as if that person were a director or officer.*

# Amendments to the *Business Corporations Act* (Alberta) (“ABCA”) cont’d

- ***Disclosure by directors and officers in relation to contracts***

120(6) A director referred to in subsection (1) shall not vote on any resolution to approve the contract or transaction unless the contract or transaction is

(a) ~~an arrangement by way of security for money lent to a~~ contract or transaction in which, but only to the extent that, the director undertakes an obligation or obligations ~~undertaken by the director, or by a body corporate in which the director has an interest,~~ for the benefit of the corporation ~~or an affiliate,~~

(b) a contract or transaction relating primarily to the director’s remuneration as a director, officer, employee or agent of the corporation or an affiliate,

(c) a contract or transaction for indemnity or insurance under section 124, or

(d) a contract or transaction with an affiliate.



# Amendments to the *Business Corporations Act* (Alberta) (“ABCA”) cont’d

## 3. Reduction of administrative burdens (for non-reporting issuers)

- **Lower approval threshold for approving shareholder resolutions by written resolutions (s.141)**
- Prior to the amendment, a written resolution must be signed by ALL of the shareholders entitled to vote on that resolution or at that shareholder meeting.
- **Amendment** – a new provision is added so that a written resolution (other than a special resolution) can now be passed by at least 2/3 of the shareholders entitled to vote on that resolution or at that shareholder meeting signing on the written resolution. Problem with existing wording: Consider a situation where 2 - 1% shareholders and 1 - 98% shareholder.
- *Resolution instead of meetings*  
*141(1) A resolution in writing signed by all the shareholders entitled to vote on that resolution is as valid as if it had been passed at a meeting of shareholders.*  
*(2) A resolution in writing dealing with all matters required by this Act to be dealt with at a meeting of shareholders, and signed by all the shareholders entitled to vote at that meeting, satisfies all the requirements of this Act relating to meetings of shareholders.*  
*(2.1) Where a corporation is not a reporting issuer, a resolution in writing signed by at least 2/3 of the shareholders entitled to vote on that resolution or at that meeting is sufficient for the purposes of subsections (1) and (2).*  
*(3) A copy of every resolution referred to in subsection (1) or (2) shall be kept with the minutes of the meetings of shareholders.*



# Amendments to the *Business Corporations Act* (Alberta) (“ABCA”) cont’d

- **Lower approval threshold dispensing with audit requirement (s.163)**

- Prior to the amendment, to dispense with audit requirement, such resolution must be passed by all of the voting and non-voting shareholders.
- **Amendment** – the audit requirement can now be dispensed by way of passing a special resolution under the new amendment. A special resolution is a resolution passed by a majority of not less than 2/3 of the votes cast by the shareholders who voted in respect of that resolution or signed by all the shareholders entitled to vote on that resolution. It appears that the consent of non-voting shareholders is no longer required. **Note that the special resolution is valid only until the following annual general meeting of shareholders.**
- *Dispensing with auditor*

163(1) The shareholders of a corporation other than a ~~distributing corporation~~ *may reporting issuer* may by *special resolution* resolve not to appoint an auditor.

(2) A *special* resolution under subsection (1) is valid only until the ~~next succeeding~~ *following* annual meeting of shareholders.

~~(3) A resolution under subsection (1) is not valid unless it is consented to by all the shareholders, including shareholders not otherwise entitled to vote.~~

# Amendments to the *Business Corporations Act* (Alberta) (“ABCA”) cont’d

## 3. Reduction of administrative burdens (for non-reporting issuers) (cont’d)

- Notice period for non-reporting issuers to hold shareholder meetings (s.134)
  - Prior to the amendment, the statutory notice period for a corporation to hold a shareholder meeting is minimum of 21 days to a maximum of 50 days.
  - **Amendment** – under the amendment, ABCA provides flexibility for non-reporting issuers to change the notice period to minimum 7 days and to a maximum of 60 days, by stating same in its bylaws.
  - *Notice of meeting, adjournment, business and notice of business*  
*134(1) Notice of the time and place of a meeting of shareholders shall be sent not less than 21 days and not more than 50 days before the meeting,*
    - (a) *to each shareholder entitled to vote at the meeting,*
    - (b) *to each director, and*
    - (c) *to the auditor of the corporation.*
- (1.1) Notwithstanding subsection (1), where the corporation is not a reporting issuer, the corporation’s bylaws may provide that the notice period under subsection (1) is not less than 7 days and not more than 60 days before the meeting.*

# Amendments to the *Business Corporations Act* (Alberta) (“ABCA”) cont’d

- More time for a dissolved corporation to be revived by the Registrar from 5 years to 10 years (s. 208).
  - *Revival*

208(1) *If a corporation is dissolved under this Part, any interested person may apply to the Registrar within 5 10 years after the date of dissolution to have the corporation revived.*

(1.1) *A corporation may not be revived after the expiry of 5 10 years from the date of dissolution.*

~~(1.2) *Notwithstanding subsection (1.1), a corporation that was dissolved before the coming into force of the Unclaimed Personal Property and Vested Property Act may be revived at any time up to 5 years after the coming into force of that Act.*~~

(1.2) *Repealed 2021 c18 s50.*

(2) *Articles of revival in the prescribed form required by the Registrar and documents relating to corporate names that are prescribed by the regulations must, unless otherwise provided by the Registrar, be sent to the Registrar.*

(3) *On receipt of articles of revival and the documents referred to in subsection (2), the Registrar shall issue a certificate of revival in accordance with section 267.*

(4) *A corporation is revived on the date shown in the certificate of revival and, subject to any reasonable terms that the Registrar may impose and to rights acquired by any person prior to the revival, the corporation is deemed to have continued in existence as if it had not been dissolved.*

# Amendments to the *Business Corporations Act* (Alberta) (“ABCA”) cont’d

- Electronic Updates

- Electronic form of share certificates is allowed (s.48)

- *Security certificates*

48 (7.1) *A security certificate may be issued in electronic form.*

- Electronic communication as acceptable form of communication (ss.152, 255(5))

- *Rights and duties of proxyholder*

152 (3.1) *Notwithstanding subsections (2) and (3), unless the bylaws, articles or a unanimous shareholders agreement expressly provides otherwise, any vote referred to in subsection (2) or (3) may be held, in accordance with the regulations, if any, entirely by any electronic, telephonic or other method that the corporation has made available for that purpose.*

(3.2) *Unless the bylaws, articles or a unanimous shareholders agreement expressly provides otherwise, a proxyholder or alternate proxyholder entitled to vote at the meeting may vote, in accordance with the regulations, if any, by any electronic, telephonic or other method that the corporation has made available for that purpose.*

- Sending of notices and documents to shareholders and directors

255 (5) *A Unless the corporation’s bylaws, articles or other governing documents expressly provide otherwise, a notice or document required to be sent, served or delivered under this section or section 256 or 257 may be sent by electronic means in accordance with the provisions of the *Electronic Transactions Act*.*

(6) *A notice or document sent by electronic means under subsection (5) is deemed to have been received, served or delivered at the time it would be received in the ordinary course of electronic means despite the fact that it is returned as undeliverable.*



# Amendments to the *Business Corporations Act (Alberta)* (“ABCA”) cont’d

## 4. Other amendments

- Term “distributing corporation” is now “reporting issuer” to line up with wording in *Securities Act*
- Required forms are no longer prescribed by regulation but as required by the Registrar
- New section 26(6) provides that shares of 2 classes or of 2 series can have identical rights, privileges, restrictions and conditions – brings ABCA in line with other jurisdictions which have adopted this provision. Legislatively deals with the oft-heard CRA argument that such classes or series are really not distinct classes or series of shares.

*26 (6) The articles may provide that 2 or more classes of shares, or 2 or more series within a class of shares, have the same rights, privileges, restrictions and conditions.*



# New disclosure requirements under the *Canada Business Corporations Act* and the *Business Corporations Act* (British Columbia)

- **What is the new disclosure requirement?**
  - Most privately held corporations created under the *Canada Business Corporations Act* (“CBCA”) and the *Business Corporations Act* (British Columbia) (“BCBCA”) are required to keep a register of individuals with significant control. Such register is named “Register of Individuals with Significant Control” (“ISC Register”) under CBCA while it is called “Transparency Register” under BCBCA.
  - This is not currently a requirement in Alberta.
  - Ontario has a transparency register requirement that will come into force on January 1, 2023.
- **Rationale for ISC Register and Transparency Register**
  - The register provides greater transparency over who owns and controls Canadian businesses and helps law enforcement agencies to uncover activities like money laundering, tax evasion and other illegal activities.



- Who is an “individual with significant control”?
  - **Under CBCA**, an individual who:
    - owns, controls or directs 25% or more of the voting shares or 25% or more of all the shares based on the fair market value of the shares;
    - has significant influence over the corporation without owning any shares; or
    - has a combination of any of these factors.
  - **Under BCBCA**, an individual (or a group acting in concert) has:
    - interest in 25% or more of the votes or shares as a registered or beneficial owner;
    - indirect control of 25% or more of the votes or shares;
    - a combination of above interest amounts to 25% of the votes or shares; or
    - a direct or indirect right or ability to influence, elect, appoint or remove a majority of the directors of the company.
  - **Under OBCA**, an individual who:
    - holds a 25% or greater interest in the corporation, either by votes or by fair market value (including registered shareholdings, beneficial ownership of shares and direct/indirect control or direction over the shares, and also including certain joint interests) or has direct or indirect influence that, if exercised, would give him or her “control in fact” of the corporation.

- **What information is required to be included in an ISC Register or a Transparency Register?**
  - Full name, date of birth and last known address;
  - Citizenship and tax residency;
  - Date of becoming or ceasing to be a significant individual in the company; and
  - A description of how they are significant individuals.
- **Who can inspect the ISC Register or the Transparency Register?**
  - An ISC Register or a Transparency Register must be kept confidential. Only the following officials are entitled to inspect the ISC Register or the Transparency Register:
    - **Under CBCA:**
      - Shareholders and creditors with an affidavit stating that the information obtained will only be used for matters related to the corporation, such as acquiring shares or influencing voting;
      - Investigative bodies, including:
        - any police force;
        - the Canada Revenue Agency (CRA) and any provincial body that has responsibilities similar to those of CRA; and
        - Any prescribed body that has investigative powers in relation to offences, such as the Financial Transactions and Reports Analysis Centre of Canada (FINTRAC); and
        - Corporations Canada.



- **Under BCBCA:**
  - Current directors of the company;
  - Police force in BC;
  - The Royal Canadian Mounted Police;
  - Tax authority of BC;
  - CRA;
  - The British Columbia Securities Commission;
  - The BC Financial Services Authority (formerly FICOM);
  - FINTRAC; and
  - The Law Society of British Columbia.
- **Under OBCA:**
  - The Minister
  - police forces;
  - tax authorities of Ontario and Canada;
  - certain specified regulators, including the Ontario Securities Commission, the Financial Services Regulatory Authority of Ontario and the Financial Transactions and Reports Analysis Centre of Canada (others may be designated by regulation)



- **Further proposed amendments to CBCA under Bill C-19: Reporting Requirement to Corporations Canada**
  - When Bill C-19 is in effect, private corporations governed by CBCA will be required to file the information contained in the ISC Register to Corporations Canada (i) when receiving CBCA certificate of incorporation, amalgamation or continuance, (ii) once a year, and (iii) within 15 days of any updates being made to the ISC Register.



- **Exemptions** – only certain types of entities are exempted from the disclosure requirements:
  - **Under CBCA:** a reporting issuer that has its securities listed and posted for trading on a “designated stock exchange” is not required to create and maintain an ISC.
  - **Under BCBCA:**
    - a public company;
    - a wholly owned subsidiary of a public company;
    - a credit union or an extra provincial credit union;
    - an insurance company or an extra provincial credit union;
    - a trust company or an extra provincial trust corporation;
    - a government corporation;
    - a corporation that is an agent, majority shareholder or controlled by Canada or a province;
    - a corporation incorporated, continued or amalgamated by an enactment or an Act of Canada or a province;
    - a subsidiary of a corporation incorporated, continued or amalgamated by an enactment or an Act of Canada or a province;



- a corporation incorporated or wholly owned by a municipality;
  - a corporation incorporated or wholly owned by a regional district;
  - an authority that operates an independent school;
  - a corporation incorporated under Part 6.1 of the School Act;
  - a company that results from the conversion of a corporation incorporated under Part 6.1 of the School Act;
  - a corporation that is wholly owned by one or more Indigenous nations;
  - a trustee of a testamentary trust;
  - the Public Guardian and Trustee; or
  - a public officer or corporation whose sole function is similar to those of the Public Guardian and Trustee and that is created under an Act of Canada or a province.
- 
- **Under OBCA**
    - A public company
    - A wholly owned subsidiary of a public company



- **Penalty for non-compliance**
  - **Under CBCA** – directors, officers and shareholders face a fine up to \$200,000 or imprisonment for up to 6 months or to both.
  - **Under BCBCA** – individuals and companies face fines of up to \$50,000 and \$100,000, respectively.
  - **Under OBCA** – company fines of up to \$5,000. Directors, officers and shareholders face a fine up to \$200,000 or imprisonment for up to 6 months or to both.



# Other new developments in the business realm - Proposed Change to Criminal Rate of Interest

- Pursuant to Section 347 of the *Criminal Code*, Existing criminal rate of interest is an effective annual rate that exceeds 60% per annum.
  - “interest” means **the aggregate of all charges and expenses, whether in the form of a fee, fine, penalty, commission or other similar charge or expense or in any other form,** paid or payable for the advancing of credit under an agreement or arrangement, by or on behalf of the person to whom the credit is or is to be advanced, irrespective of the person to whom any such charges and expenses are or are to be paid or payable, but does not include any repayment of credit advanced or any insurance charge, official fee, overdraft charge, required deposit balance or, in the case of a mortgage transaction, any amount required to be paid on account of property taxes;
- Proposed amendment to Section 347 of the *Criminal Code*
  - Bill S-239, which is currently before the Senate, proposes to reduce the criminal rate of interest to 20% plus the Bank of Canada’s overnight rate on the day the agreement is entered into or renewed.



# Other new developments in the business realm - Proposed Change to Criminal Rate of Interest

The Department of Finance Canada issued a consultation paper on August 9 seeking input from interested parties regarding the Criminal Rate of Interest. When the rate was set bank interest rates were at 21% so there was a 39% spread. The consultation period expired on October 7, 2022 and asked for responses to the following:

1. Should the criminal rate of interest be set at a fixed level or linked to prevailing market conditions?
2. To what extent is the interest rate charged by alternative lenders on high-cost installment loans a reflection of the creditworthiness of the borrower?
3. What are the reasons financial consumers access high-cost installment loans?
4. What are the impacts of high-cost installment loans on the financial well-being and financial resilience of Canadians?
5. What impact would lowering the criminal rate of interest have on the availability of credit for financial consumers who use high-cost installment loans? Would lowering this rate have any negative implications for financial consumers, including lost or reduced access to credit?
6. What impact would lowering the criminal rate of interest have on credit products other than high-cost installment loans?
7. How could the Government of Canada, including the FCAC, improve financial education and awareness regarding high-cost installment loans to further empower and protect Canadians as they make informed financial decisions?



# Mystery Case

- Facts
  - Mr. T. borrowed \$700,000 from friends and former clients and issued promissory notes from T. Co to evidence the loans.
- What is this case about?



# Mystery Case

- **Answer:** Whether or not promissory notes are “Securities” under the Securities Act (Ontario)
- Ontario Securities Commission v. Tiffin

## Fact

- T. was formerly a financial advisor licensed to sell insurance and insurance based investments and had been registered with the OSC to trade in securities. He and his Company had been cease traded for involvement in a fraudulent foreign exchange investment scheme. The purchasers and lenders were aware that T was prohibited from trading in securities.
- Definition of “security” in the *Securities Act* (Ontario)

“security” includes,

(a) any document, instrument or writing commonly known as a security,

(b) any document constituting evidence of title to or interest in the capital, assets, property, profits, earnings or royalties of any person or company,

(c) any document constituting evidence of an interest in an association of legatees or heirs,

(d) any document constituting evidence of an option, subscription or other interest in or to a security,

(e) **a bond, debenture, note or other evidence of indebtedness** or a share, stock, unit, unit certificate, participation certificate, certificate of share or interest, preorganization certificate or subscription **other than**,

(i) a contract of insurance issued by an insurance company licensed under the Insurance Act, and

(ii) evidence of a deposit issued by a bank listed in Schedule I, II or III to the Bank Act (Canada), by a credit union or central to which the Credit Unions and Caisses Populaires Act, 2020 applies, by a loan corporation or trust corporation registered under the Loan and Trust Corporations Act or by an association to which the Cooperative Credit Associations Act (Canada) applies,



# Mystery Case

- (f) any agreement under which the interest of the purchaser is valued for purposes of conversion or surrender by reference to the value of a proportionate interest in a specified portfolio of assets, except a contract issued by an insurance company licensed under the Insurance Act which provides for payment at maturity of an amount not less than three quarters of the premiums paid by the purchaser for a benefit payable at maturity,
  - (g) any agreement providing that money received will be repaid or treated as a subscription to shares, stock, units or interests at the option of the recipient or of any person or company,
  - (h) any certificate of share or interest in a trust, estate or association,
  - (i) any profit-sharing agreement or certificate,
  - (j) any certificate of interest in an oil, natural gas or mining lease, claim or royalty voting trust certificate,
  - (k) any oil or natural gas royalties or leases or fractional or other interest therein,
  - (l) any collateral trust certificate,
  - (m) any income or annuity contract not issued by an insurance company,
  - (n) any investment contract,
  - (o) any document constituting evidence of an interest in a scholarship or educational plan or trust, and
  - (p) any commodity futures contract or any commodity futures option that is not traded on a commodity futures exchange registered with or recognized by the Commission under the Commodity Futures Act or the form of which is not accepted by the Director under that Act,
- whether any of the foregoing relate to an issuer or proposed issuer; (“valeur mobilière”)

# Mystery Case

- **At trial**

- No. The trial judge adopted the “family resemblance” test from US caselaw. The trial judge thought the definition of “security” would be too broad if these promissory notes were securities and using the family resemblance test found they were similar to notes secured by lies on the assets of a small business.

- **Appeal to Superior Court of Justice**

- Yes. The promissory notes were securities and the trial judge erred by relying on the family resemblance test. The proper test is the “catch and exclude” test as the OSC had chosen to broadly define a security to capture a broad range of financial instruments. T sentenced to 6 months in jail and ordered to make full restitution on the promissory notes

- **Ontario Court of Appeal**

- Yes. The promissory notes were securities as they fit within the definition of a “bond, debenture, note or other form of indebtedness”. The Court of appeal confirmed the “catch and exclude” test was deliberately chosen by the legislature and the Ontario Securities Act and the US Securities Exchange Act are significantly different and as such, have different tests. If T. hadn’t have been prohibited from trading in securities, an exemption from the prospectus requirement would likely have been available. The Court of Appeal set aside the prison time and ordered probation as T. had not misled or deceived the noteholders and had made restitution.

- **Importance**

- It is important to consider securities laws and seek advice in a wide range of transactions including lending. A similar discussion was addressed in an earlier Alberta Court of Appeal decision where loan agreements were determined to be securities.
- The same or identical financial agreement may be a security in Canada but not in the United States



# Definitions

- “**private issuer**” means an issuer
  - (a) that is not a reporting issuer or an investment fund,
  - (b) the securities of which, other than non-convertible debt securities,
    - (i) are subject to **restrictions on transfer** that are contained in the issuer’s constating documents or security holders’ agreements, and
    - (ii) **are beneficially owned by not more than 50 persons**, not including employees and former employees of the issuer or its affiliates, provided that each person is counted as one beneficial owner unless the person is created or used solely to purchase or hold securities of the issuer in which case each beneficial owner or each beneficiary of the person, as the case may be, must be counted as a separate beneficial owner



# Standard Private Company Article Provisions

## Restrictions On Share Transfers Schedule

No transfer of shares shall occur or be registered unless and until the directors have, by a resolution, approved the transfer and the directors shall be under no obligation to give such approval or to give any reason for withholding the same.

## Limit on Number of Shareholders

The issued and outstanding securities of the corporation may not be beneficially owned, directly or indirectly, (and counting any 2 or more joint registered owners of a security as one beneficial owner), by more than 50 persons exclusive of (i) persons that are employed by the corporation or an affiliate of the corporation, and (ii) persons that beneficially owned, directly or indirectly, securities of the corporation while employed by the corporation or an affiliate of the corporation and, at all times since ceasing to be so employed, have continued to beneficially own at least one security of the corporation.

## No Invitation to the Public

The corporation is prohibited from extending an invitation to the public to subscribe for its shares.





# Exemptions from the Prospectus requirements

## Private Issuer

- (2) The prospectus requirement does not apply to a distribution of a security of a private issuer to a person who purchases the security as principal and is
- (a) a director, officer, employee, founder or control person of the issuer,
  - (b) a director, officer or employee of an affiliate of the issuer,
  - (c) a spouse, parent, grandparent, brother, sister, child or grandchild of a director, executive officer, founder or control person of the issuer,
  - (d) a parent, grandparent, brother, sister, child or grandchild of the spouse of a director, executive officer, founder or control person of the issuer,
  - (e) a close personal friend of a director, executive officer, founder or control person of the issuer,
  - (f) a close business associate of a director, executive officer, founder or control person of the issuer,
  - (g) a spouse, parent, grandparent, brother, sister, child or grandchild of the selling security holder or of the selling security holder's spouse,
  - (h) a security holder of the issuer,
  - (i) an accredited investor,
  - (j) a person of which a majority of the voting securities are beneficially owned by, or a majority of the directors are, persons described in paragraphs (a) to (i),
  - (k) a trust or estate of which all of the beneficiaries or a majority of the trustees or executors are persons described in paragraphs (a) to (i), or
  - (l) a person that is not the public.

## Exemptions (cont'd)

“**Accredited Investor**” (as defined in National Instrument 45-106 ("NI 45-106")) means:

- an individual who beneficially owns financial assets having an aggregate realizable value that, before taxes but net of any related liabilities, exceeds \$1,000,000;
- an individual whose net income before taxes exceeded \$200,000 in each of the two most recent calendar years or whose net income before taxes combined with that of a spouse exceeded \$300,000 in each of the two most recent calendar years and who, in either case, reasonably expects to exceed that net income level in the current calendar year;
- an individual who, either alone or with a spouse, has net assets of at least \$5,000,000;
- a person other than an individual or investment fund, that has net assets of at least \$5,000,000 as shown on its most recently prepared financial statements;
- a person in respect of which all of the owners of interests, direct, indirect or beneficial, except the voting securities required by law to be owned by directors, are persons that are accredited investors;



# Changes in Securities Laws – Revocation of Blanket Order 31-505

- What is Blanket Order 31-505?
  - Pursuant to National Instrument 31-103 – *Registration Requirements and Exemptions*, individuals who trade in securities distributed under an exemption from the prospectus requirement must be an Exempt Market Dealer.
  - Blanket Order 31-505 was adopted by the Alberta Securities Commission effective March 27, 2010, which allowed individuals to trade in securities distributed under an exemption from the prospectus requirement without being an Exempt Market Dealer, under certain circumstances.
  - Blanket Order 31-505 was revoked by the Alberta Securities Commission on May 12, 2022.
- Impact of the revocation of Blanket Order 31-505
  - Individuals who wish to trade in securities distributed under an exemption from the prospectus requirement must comply with the registration requirements prescribed in NI 31-103.





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## Appendix – Additional Materials

# Duty of Good Faith and Duty of Honest Performance

# Other new developments in the business realm – Duty of Good Faith and Duty of Honest Performance

- Canadian common law imposes certain contractual duties and obligations, which cannot be excluded by the parties. In 2014, in its decision of *Bhasin v. Hrynew* 2014 SCC 71, the Supreme Court of Canada for the first time recognized the existence of “**duty of good faith contractual performance**” and “**duty of honest performance of contractual obligations**” in all contracts.
- Duty of good faith contractual performance
  - Parties to a contract must perform their contractual duties honestly and reasonably and not capriciously or arbitrarily.
  - A party cannot seek to undermine the interest of the other party to the contract in bad faith; however, there is no duty of loyalty owed by one party to another. One party is not required to put the interest of the other party first.
  - Duty of good faith contractual performance is manifested through honest, candid, forthright or reasonable contractual performance; however, a party does not breach its duty of good faith by causing another party losses in pursuit of economic self-interest.
- Duty of honest performance of contractual obligations
  - Parties to a contract must maintain a minimum standard of honesty in contractual performance. The standard varies depending on the circumstances and is associated with the intention of the parties. Overall, a party cannot act unconscionably when performing its contractual obligations.
  - A contracting party must be able to rely on a minimum standard of honesty from the other contracting party with respect to carrying out contractual obligations as a reassurance that if the contract does not work out, the former will have a fair opportunity to protect its interests under the contract.

# Other new developments in the business realm – Duty of Good Faith and Duty of Honest Performance

- After the decision of *Bhasin v. Hrynew*, in 2021 the Supreme Court of Canada revisited the doctrine of duty of good faith and duty of honest performance in its decision of *Wastech Services Ltd. v. Greater Vancouver Sewerage and Drainage District*, 2021 SCC 7 and *C.M. Callow Inc. v. Zollinger* 2020 SCC 45. Through the two decisions, the Supreme Court of Canada reaffirmed the duty of honest performance and further acknowledged a general duty to exercise any discretionary power in a contract in a reasonable manner.
- Expansion of duty of good faith contractual performance – *Wastech Services Ltd. v. Greater Vancouver Sewerage and Drainage District*, 2021 SCC 7
- Facts
  - Wastech Services Ltd. (“Wastech”) entered into a waste disposal agreement with Greater Vancouver Sewerage and Drainage District (“Metro”). Pursuant to the agreement, Metro has “absolute discretion” to direct Waste to any of three disposal sites. Nevertheless, Metro reallocated where to send waste among the three disposal sites, which resulted in a lower than expected profit for Wastech. Wastech claimed that Metro acted in bad faith and therefore breached the contract by exercising its discretion in a way that deprived Wastech of any opportunity to achieve its target in making profit.
- Issue – did Metro violate the duty to exercise contractual discretion in good faith?

# Other new developments in the business realm – Duty of Good Faith and Duty of Honest Performance (cont'd)

- Analysis
  - Parties to a contract have a duty to exercise any contractual discretion in good faith in a reasonable manner. Reasonable manner means a manner connected to the purposes for which the discretion was granted.
  - The duty to exercise contractual discretion in good faith is breached only where the discretion is exercised unreasonably, in a manner unconnected to the purposes underlying the discretion.
  - A party breaches its duty to exercise contractual discretion in good faith if such exercise of discretion:
    - is arbitrary or capricious;
    - is made for purposes extraneous to the contract; or
    - Falls outside a range of reasonable outcomes contemplated by the contract.
  - The concept of a “reasonable” exercise of discretion does not mean that good faith can be used as a pretext for scrutinizing a party’s motive for exercising discretion in a particular way, or whether its decision was commercially wise.



# Other new developments in the business realm – Duty of Good Faith and Duty of Honest Performance (cont'd)

- Where discretion is exercised in a manner consonant with the purpose, that exercise may be characterized as reasonable according to the bargain the parties had chosen to put in place. But where the exercise stands outside the compass set by contractual purpose, the exercise is unreasonable in light of the agreement for which the parties bargained and may be thought of as unfair and contrary to the requirements of good faith.
- The measure of fairness is what is reasonable according to the parties' own bargain.
- As a result, the court dismissed Wastech's claim and held that Metro did not violate the duty to exercise contractual discretion in good faith. The majority of the SCC held that the duty to exercise discretion in good faith cannot be excluded by the parties in their contract whereas a minority was of the view that the parties should be able to create unconstrained discretionary powers in a contract, provided they do so in clear language.
- Takeaway
  - Defining the nature and intended breadth of the discretionary power or the purpose for which it has been granted will help avoid uncertainty in the event of a dispute.
  - Drafting contract recitals carefully as they may be used as evidence of the purpose of the contract as a whole or of a specific discretionary clause. Recitals may become important in interpreting the scope of a discretionary power or range of reasonable outcomes.

# Other new developments in the business realm – Duty of Good Faith and Duty of Honest Performance (cont'd)

- Reaffirming duty of honest performance – *C.M. Callow Inc. v. Zollinger* 2020 SCC 45
- Facts
  - In 2012, C.M. Callow Inc. (“Callow”) entered into a winter maintenance agreement and a summer maintenance agreement with a group of condominium corporations (“Baycrest”). The winter agreement allowed Baycrest to terminate the agreement for any reason upon giving Callow a 10-day notice.
  - In 2013, Baycrest decided to terminate the winter agreement early while it made Callow believe that the winter agreement would be renewed instead of being terminated early. Although Baycrest was aware of Callow’s incorrect impression, Baycrest did not clarify with Callow. As a result, Callow sued Baycrest for breaching the duty of honest performance when Baycrest terminated the winter agreement by providing a 10-day notice.
- Issue – did Baycrest breach its duty of honest performance?
- Analysis
  - The duty of honest performance is reaffirmed by the Supreme Court of Canada in this decision.
  - Contractual parties cannot lie or intentionally mislead one another relating to matters associated with the performance of the contract. The duty of honest performance of contracts applies to all types of contractual obligations and rights.

# Other new developments in the business realm – Duty of Good Faith and Duty of Honest Performance (cont'd)

- Takeaway
  - Do not make misrepresentations about the future of the contractual relationship.
  - Carefully consider any communications about the future contractual relationship if termination of the contract is being considered.
  - Correct any mistake about the contractual relationship as soon as possible.



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