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and executives

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THIS EDITION OF LAVERY BUSINESS SUMMARIZES SEVERAL ASPECTS OF THE NEW BUSINESS CORPORATIONS ACT THAT CAME INTO FORCE ON FEBRUARY 14, 2011.

## QUEBEC IN THE CORPORATIONS ERA

The *Business Corporations Act* (Quebec) (the "QBCA" or the "Act") came into force on February 14, 2011. Described as innovative for many, the Act provides a new regime for legal persons that were governed by Parts I and IA of the *Companies Act* (the "QCA"). Since the last time significant amendments were made to the QCA was in the early 1980s, legal and business communities eagerly expected the QBCA. The Quebec government now offers a modern Act, mainly inspired by legislation already in force in Canada, including the Canada Business Corporations Act (the "CBCA"), which it even surpasses in some respects.

The new provisions of the QBCA mostly affect small and medium-sized enterprises ("SMEs"), since they constitute the vast majority of the more than 30,000 businesses in Quebec to which the QBCA will apply.

Although the QBCA is innovative in many respects, some principles in the QCA survive this legislative change.

### HARMONIZATION WITH THE CBCA

In many respects, the QBCA builds on the provisions of the CBCA.

Here are some examples:

**Terminology** – The legislator has harmonized not only the legislation but also its terminology; the term "business corporation" must be used instead of "company." The terminology harmonization had already been done in the *Civil Code of Québec* in 1994.

**Financial assistance to shareholders** – The QBCA does away with restrictions on the granting of financial assistance to shareholders, which facilitate the financing of groups of corporations.

**Remedies for minority shareholders** – The introduction of new remedies promoting the protection of minority shareholders, who were clearly disadvantaged under Quebec legislation until recently, constitutes one of the major modifications made in the QBCA. The Act introduces in particular a remedy similar to the oppression remedy available under the CBCA to counter abuse or injustice by a corporation toward security holders, its directors or its officers.

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Any shareholder can, from now on, obtain leave of the court to bring an action in the name and on behalf of a corporation or its subsidiary. Furthermore, a minority shareholder currently has a right similar to the "right to dissent" available under the federal legislation, that is, the right to have his shares redeemed in the event that he opposes the adoption of certain special resolutions.

Proposals can now be presented by shareholders of corporations that have more than 50 shareholders or are reporting issuers within the meaning of the *Securities Act*.

**Alienations affecting significant business activity** – This chapter, which is another innovation of the QBCA, subjects any sale, exchange or lease of property of the corporation to the approval of its shareholders where the proposed transaction would result in the corporation being unable to continue a significant part of its business activity, this concept of "significant part of its business activity" being defined under the Act.

The alienation of a subsidiary's property is also subject to these rules and a corporation's loss of control of a subsidiary is deemed to be an alienation of all of the subsidiary's property.

**Creation of committees** – The QBCA provides more flexible rules respecting the delegation of powers by the board of directors. In particular, it provides that the board of directors can create one or more committees made up of directors and, contrary to the QCA, does not provide for a minimum number of members. Committees are henceforth created by a simple resolution of the directors and passing a by-law is no longer required. However, certain powers of the board of directors expressly mentioned in the QBCA may not be delegated.

**Conflicts of interest** – The QBCA introduces new rules pertaining to the disclosure by a director or officer of any interest he has in a contract or transaction to which the corporation is a party. The concept of "interest" refers to "any financial stake in a contract or transaction that may reasonably be considered likely to influence decision-making." A director who has a conflict of interest may not vote on the resolution submitted to approve, amend or terminate the contract or transaction in question or be present at deliberations during which the approval, amendment or termination of such contract or transaction is discussed.

**Reasonable diligence defence** – The QBCA specifies the duties of directors and grants them the right to present a defence of reasonable diligence with respect to acts in good faith in the exercise of their functions.

**Directors' liability and dissolution** – The QCA provided that a company's directors at the time of its dissolution were solidarily liable for its liabilities existing upon its dissolution. On the contrary, the QBCA, like the federal legislation, imposes no liability on the directors and rather provides that the shareholders of the corporation at the time of its dissolution are, as of that time, liable for the performance of the corporation's obligations up to the value of the share of the remaining property they have received and any amount outstanding on the shares they held at the time of dissolution.

**Reorganization and arrangement** – A complete chapter deals with the reorganization and arrangement mechanisms: in particular, it provides that, in the absence of adequate legal provisions or if existing provisions are impracticable or too onerous, a corporation that is not insolvent could apply to the court for the approval of an arrangement it proposes.

**Revival** – It is now possible to revive a corporation that was voluntarily dissolved by filing an application with the Quebec enterprise registrar (the "QER"), and also a corporation that was judicially dissolved, by filing an application with the Court. Subject to the rights acquired by third parties after the dissolution of the corporation, such revival is retroactive, and thus the revived corporation is deemed never to have been dissolved.

### PRESERVATION OF CERTAIN ATTRIBUTES

Although the QBCA innovates in many respects, certain particularities of Quebec legislation are preserved, including the possibilities of issuing shares with a par value and issuing shares that are not fully paid. In addition, no Quebec residence requirement applies to a corporation's directors.

### STREAMLINED REGIME FOR SMES

The QCA made no distinction between the obligations imposed on large enterprises and those imposed on SMEs. The QBCA takes into consideration the reality of Quebec SMEs, in particular by offering a simplified regime to sole shareholder corporations and allowing shareholders not to establish a board of directors and instead themselves exercise the powers of the directors. A sole shareholder is not required to comply with the requirements of the Act relating to by-laws, shareholders meetings and meetings of the board of directors. In addition, any act by a sole shareholder on behalf of the corporation is deemed to be authorized.

Let us also mention that a corporation is required to file, with the QER, a declaration with respect to the existence or termination of a unanimous shareholders' agreement.

### CORPORATE AND TAX REORGANIZATIONS

The QBCA introduces provisions that will facilitate the implementation of corporate and tax reorganization, more particularly the following:

**Corporate incest** – The QBCA allows a subsidiary to hold shares in the share capital of its parent corporation for a maximum period of 30 days, irrespective of the circumstances having led to the acquisition of the shares. Such a situation was tolerated only in very specific circumstances under the QCA.

**Continuance** – It is worth noting that it is possible to continue a foreign corporation under the QBCA (importing) and to continue a Quebec corporation under a jurisdiction other than Quebec (exporting); exporting, however, being subject to obtaining authorization from the shareholders and from the QER. This was an awaited new feature.

**Accounting and solvency tests** – The QCA provided that certain tests had to be met at the time of transactions affecting the share capital of a company (for example when redeeming shares and paying dividends), that is, the accounting test (the total assets must not be less than the sum of its liabilities and its issued and paid-up share capital) and the solvency test (discharge its liabilities as they become due). The requirement of satisfying the accounting test is not reproduced in the QBCA. Compliance with the solvency test remains for most transactions.

**Effective time** – The QBCA provides for the possibility of obtaining a specific effective time on certificates issued under its provisions (for instance, on a certificate of incorporation, amalgamation or amendment), which facilitate corporate and tax reorganization, which often require the observance of a very specific sequence of transactions.

**"High-low shares"** - When carrying out certain transactions, practitioners sometimes use the "high-low shares" concept, that is, shares that have a high redemption value and a low issued and paid-up share capital to limit certain adverse tax consequences. The use of high-low shares in the context of the declaration of a stock dividend was possible under the QCA by the use of shares with a par value. The QBCA specifically allows issuing high-low shares in the context of the declaration of a stock dividend without requiring the use of shares with a par value.

### TECHNOLOGICAL INNOVATIONS

The QBCA adapts to the modern technology era by allowing business corporations to file documents electronically with the QER and use technological means for the calling of meetings and participating therein, including voting electronically. In addition, the Act provides for the possibility of issuing uncertificated shares.

### TRANSITION

Within five years from the coming into force of the QBCA, companies incorporated under Part I of the QCA must file articles of continuance with the QER, failing which they will be dissolved. Companies incorporated under Part IA of the QCA, which represent a very large majority of the companies constituted under the QCA, are automatically governed by the QBCA, without any formalities being required.

### AN ACT RESPECTING THE LEGAL PUBLICITY OF ENTERPRISES

The coming into force of the QBCA coincided with the coming into force of *An Act respecting the legal publicity of enterprises* (the "ALP") that replaces both *An Act respecting the legal publicity of sole proprietorships, partnerships and legal persons* and *An Act respecting the enterprise registrar*. The ALP simplifies the process of disclosing information for businesses that will be subject to it, including business corporations, while requiring the disclosure of new information, such as the existence of a unanimous shareholders' agreement, the bankruptcy of a business and the dates on which persons become directors and cease to be directors.

### CONCLUSION

The enactment of the QBCA and its implementation constitute a concerted effort to reform Quebec corporate law. Despite the substantial number of changes included in the QBCA in comparison with the QCA, the coming into force of the QBCA requires the corporations governed by Part IA of the QCA to make immediate changes. However, companies now governed by Part I of the QCA must deliver articles of continuance to the QER within five years from the coming into force of the QBCA. In addition, it will be desirable to do an update of the corporate documents of all existing corporations that are subject to the QBCA. Such an update should include the replacement of the general by-laws with by-laws that comply with the QBCA, the adoption of new forms of share certificates and, if there is an existing shareholders' agreement, a revision of it that takes into account the new provisions of the QBCA and the ALP. As each situation is different, we invite you to contact us to assess the needs of your corporation.

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