



The Advantages of Incorporation under the Alberta *Business Corporations Act*

Overview: Attracting Venture Capital & Private Equity Investment

Businesses in Canada enjoy flexibility regarding what jurisdiction they incorporate in. Simply put, incorporation in one jurisdiction does not impede doing business outside that jurisdiction, and it is not uncommon for a business incorporated in one Canadian province to have most – or even all – of its operations in another Canadian province.

This gives business owners options when deciding where to incorporate, including to *strategically select* among the different federal, provincial and territorial statutes available based on which best serves their goals. Nor does this optionality end upon initial formation: operating businesses can “continue” from their original jurisdiction of incorporation into another jurisdiction.

Perhaps most importantly, different business statutes offer different advantages and disadvantages in terms of *attracting investors*. In particular, business statutes can be tailored specifically with the investment practices and preferences of sophisticated financial investors in mind, including venture capital and private equity. The Alberta Government recently did exactly this with the Alberta *Business Corporations Act* (“ABCA”), making several investor-friendly amendments to an already business-friendly statute.

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The Investment-Friendly Aspects of the ABCA in Detail

The following points detail, at a high level, numerous of the advantages of the ABCA relative to other Canadian statutes (federal, provincial and territorial), including as relates to accommodating venture capital and private equity investment.

1. **No Shareholder / Transparency Register:** Unlike most other Canadian statutes, the ABCA does not require a register of individual(s) who “significantly control” the corporation.
 - Such registers can be burdensome administratively and impose significant penalties on both the corporation and its officers and directors.
2. **No Director Residency Requirements:** Unlike under federal statute, the ABCA doesn’t impose any director residency requirements. This allows for board appointments unrestricted by place of residence.
3. **Corporate Opportunity Waivers:** Neither Canada’s federal statute nor any other provincial statute allows for corporate opportunity waivers.
 - This is a significant risk mitigation tool for *both* investors and their nominee directors offered only by the ABCA, and is derived from a similar and very popular feature under US (Delaware) law.
4. **Special Consideration to Nominating Shareholder Interests:** Unlike under federal statute or any other provincial statute, the ABCA permits a nominee director to give special (although not exclusive) consideration to the interests of their nominating shareholder.
 - This is a significant and widely underappreciated advantage of the ABCA for *both* investors and their nominee directors, including in particular in the venture capital and private equity contexts.
5. **Director Self-Interested Transactions:** Unlike under other statutes, the ABCA permits a director to vote on agreements in which the director may have a material interest, but where the director’s interest may benefit the corporation (e.g. guaranteeing a loan).
6. **Expanded Director Due Diligence Defence:** Unlike under other statutes, ABCA directors can rely in good faith on:
 - a. “Interim financial statements” in addition to the company’s audited financial statements.
 - b. Reports or opinions of company employees in addition to lawyers, accountants, engineers and appraisers.



7. **Expanded Indemnification of Directors:** Recent amendments to the ABCA have markedly improved the ability of Alberta corporations to indemnify directors in connection with potential liability associated with that role.
- Whereas indemnification was previously limited to “civil, criminal and administration” proceedings, indemnification now also extends to “investigative” and “other” proceedings.
 - Whereas indemnification was previously limited to proceedings where the director is a direct “party”, indemnification now extends to proceedings where the director is merely “involved”.
 - Previously directors had to be both “substantially successful on the merits” as well as prove they were “fairly and reasonably” entitled to indemnification. Now they must only have not been “judged by a court... to have committed any fault or omitted to do anything that [they] ought to have done...”
8. **Facilitation of Voting by Written Resolution:** The threshold for approval of a written shareholder resolution has been reduced from unanimity to 2/3rds of the shareholders entitled to vote.
9. **Greater Flexibility Calling Shareholder Meetings:** The mandatory minimum notice period for reporting issuers has been reduced from 21 days to 7 days and the maximum notice period has been extended from 50 days to 60 days.
10. **Facilitation of Dispensing with Appointment of Auditor:** The threshold for passage of a resolution dispensing with the appointment of an auditor (and waiving the requirement of audited financial statements of privately-held corporations) has been reduced from unanimity to 2/3rds of the shares entitled to vote.
11. **Greater Flexibility During Arrangements / Exits:** Court discretion during arrangements has been increased, with the court now able to make any order “it thinks fit” in connection with an arrangement.
- This allows for potentially significantly more flexibility *structuring and implementing* exits.
12. **Facilitation of Electronic Signatures / Delivery:** Numerous changes have been made facilitating electronic signatures and electronic document delivery, including: (a) security certificates can be issued in electronic form; (b) financial statements can be signed by electronic means; and (c) documents can be sent to shareholders, directors and the corporation electronically.
13. **Instantaneous Filings:** Alberta’s CORES registry doesn’t require any government approval for certain filings (e.g., incorporation of a limited corporation and amendments to a limited corporation’s articles) and such that they are processed instantaneously. By comparison, other corporate registries involve processing times based on their workload and/or or charge additional fees for expedited (but still not instantaneous) service.
14. **Extended Revival Period:** The revival period for dissolved corporations has been extended from 5 to 10 years, facilitating the revival of dormant businesses.



Summary: The Benefits of the ABCA Go Beyond Alberta

The Alberta government's goal in revising the ABCA was to grant Alberta-incorporated corporations "every competitive advantage", including by reducing administrative burdens and approvals, matching modern communications and business methods, and either matching or exceeding the business and *investment friendly* aspects of competing legislation.

The aggregate result is what is now arguably Canada's most investor-friendly corporate statute. Moreover, it is important to underscore that the advantages offered by the ABCA are not limited to businesses *in Alberta* and are also available (including by "continuation") to companies doing business *elsewhere in Canada*. Lastly, for founders and other management seeking to attract investment (whether by venture capital, private equity or otherwise), a final point meriting emphasis is that several advantages of the ABCA are specifically designed to accommodate the investment practices and preferences of sophisticated financial firms. Adoption of the ABCA can therefore be a key component of a business' *fundraising strategy*.



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