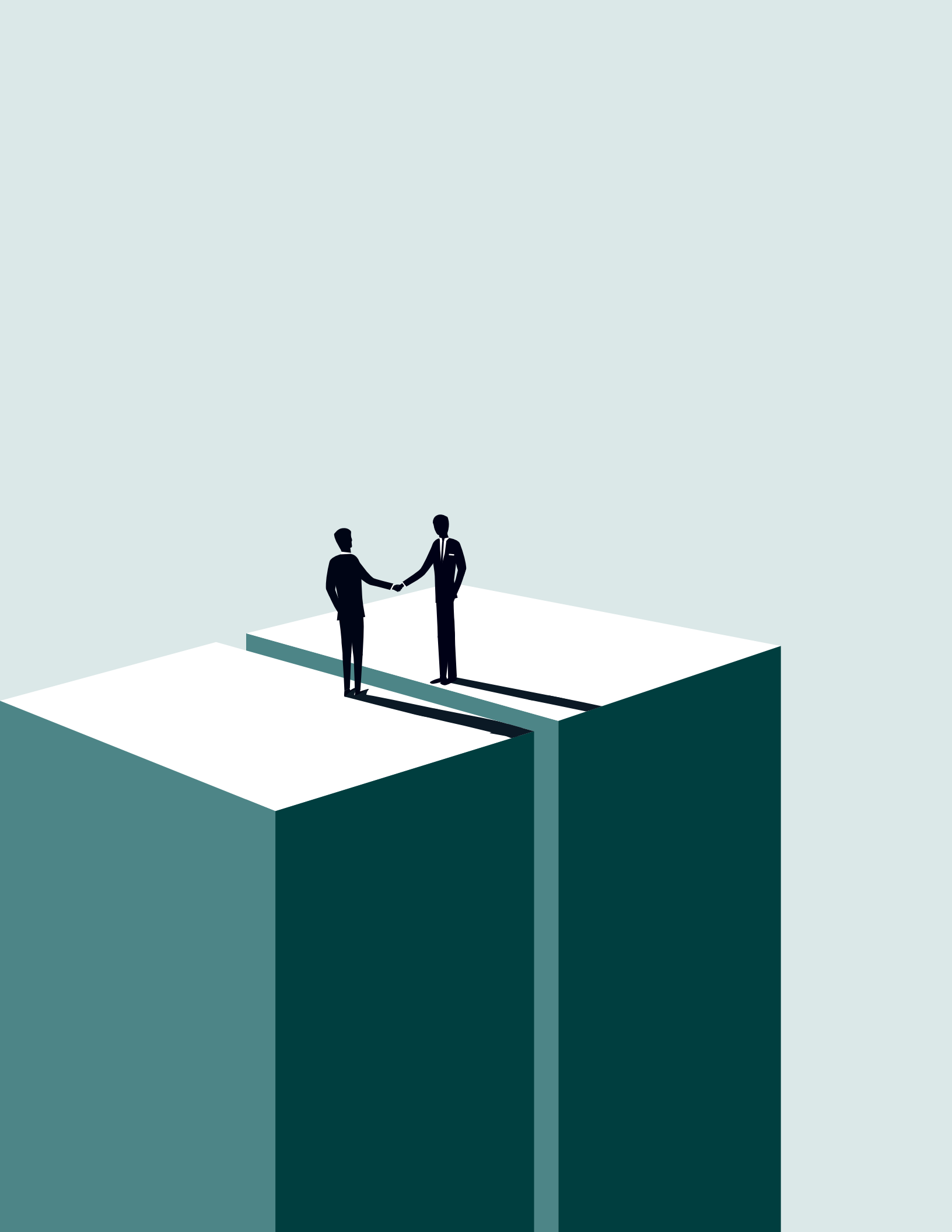




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# INCORPORATION FORUM SHOPPING IN CANADA: CONSIDERATIONS FOR CANADIAN TECH STARTUPS





# TABLE OF CONTENTS

|                                                  |    |
|--------------------------------------------------|----|
| Overview .....                                   | 1  |
| CBCA Pros .....                                  | 3  |
| CBCA Cons .....                                  | 4  |
| OBCA Pros .....                                  | 5  |
| OBCA Cons .....                                  | 5  |
| ABCA Pros .....                                  | 7  |
| ABCA Cons .....                                  | 8  |
| BCBCA Pros .....                                 | 9  |
| BCBCA Cons .....                                 | 10 |
| Table of Concordance by Jurisdiction: Pros ..... | 11 |
| Table of Concordance by Jurisdiction: Cons ..... | 14 |
| Notes .....                                      | 17 |



# OVERVIEW

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Startup tech companies have certain needs that differ from other startups. They frequently plan to carry on business primarily outside of Canada. They often contemplate receiving venture capital investment from Canadian and non-Canadian venture investors, incur significant research and development expenses, and have non-Canadian directors.<sup>1</sup>

Many years ago, when American venture investors invested in a Canadian technology company, they would often require that the company reincorporate in the United States, usually Delaware. The principal reason was that the American venture investors were familiar with Delaware corporate law and U.S. tax law.

In the United States, Delaware has typically been the most popular jurisdiction for incorporation as it is viewed as business-friendly and has developed an entire ecosystem around the business corporation, including a sophisticated court system. The Delaware court judges who hear corporate law cases are experts in corporate law and the general corporate law statute is regularly updated to reflect developments in corporate law.<sup>2</sup>

More recently, American venture investors have become familiar with Canadian corporate law and are now willing to make investments in companies formed under the federal *Canada Business Corporations Act* (CBCA) and similar provincial statutes, such as the Ontario *Business Corporations Act* (OBCA), among others. As well, changes in the Canadian tax law have also facilitated US venture investment.

In Canada, incorporation forum shopping has historically been relatively rare. The decision on where to incorporate has typically been restricted to selecting whether to incorporate under the provincial statute in which the company's headquarters is based or to use the CBCA.

The CBCA at one time was viewed as having more prestige than provincial corporate statutes but that view seems to have waned. Another factor was the quantum of incorporation fees, with such fees formerly higher for federal incorporations. However, in terms of rules and regulations, the provincial business corporations statutes were all very similar and generally based on the CBCA, with British Columbia and Nova Scotia being the principal exceptions.

In recent years, provinces have begun updating and revising their business corporations statutes in an effort to address issues raised by businesses, and in part to make carrying on business more attractive in their jurisdiction.

In addition, provinces have also modernized the manner in which various processes are carried out, including by facilitating electronic filings for corporate matters that previously required onerous or time-consuming paper and in-person filings.

In the same way U.S. companies incorporate in Delaware and carry on business in other states, it is permissible to incorporate under the laws of one province and carry on business in another, with certain exceptions for Quebec.

Further, the incorporating jurisdiction is not a forever decision—a company can change, using a process called a continuance, to another jurisdiction if its shareholders approve the change.

Our analysis below compares the business corporations acts of Ontario, Alberta, British Columbia and Canada as they are the most active common law jurisdictions in Canada for technology company incorporations.<sup>3</sup>

Quebec has been excluded because it is a civil law jurisdiction, French is the dominant language and the head office of the company is required under the Quebec legislation to be located in Quebec.<sup>4</sup>

Nova Scotia has been excluded because its business corporations act is not based on the CBCA and it does not have business-friendly provisions.

New Brunswick, Prince Edward Island, Manitoba and Saskatchewan have been excluded because, although their business corporations acts are based on the CBCA, they have not distinguished themselves from Ontario and Alberta with particularly noteworthy business-friendly terms.

The territories have also been excluded because they are physically remote and less sophisticated business jurisdictions that do not offer any material benefits beyond what is available elsewhere. The one exception is the Yukon which has some distinctive provisions intended to make it a business-friendly jurisdiction, but those provisions are either (1) not typically used by startups, or (2) can be found in Alberta, Ontario and/or British Columbia legislation.

There is one notable legal distinction between Canadian jurisdictions applicable to technology (and other) companies that is not found in the business corporations acts. Toronto, Ontario has a specialized division of the Ontario court known as the Commercial List. Like the Delaware Chancery Court, it is comprised of a team of judges with extensive knowledge and experience in the

field of corporate law who have a wealth of experience in managing complex, high-stakes and fast-paced corporate/commercial litigation. The Commercial List expedites time-sensitive corporate/commercial matters using experienced corporate/commercial judges. Alberta also has a Commercial List in Calgary and Edmonton but it is limited to issues of commercial insolvency law. British Columbia has no equivalent court.

With that context, we provide our view on the pros and cons of the CBCA, OBCA, Alberta *Business Corporations Act* (ABCA) and British Columbia *Business Corporations Act* (BCBCA) as they apply to a (private) Canadian startup technology company incorporation.<sup>5</sup>



# CBCA PROS

## Statutory Reputation and Legal Framework

- Well-known statute
- Historically considered more prestigious
- Right to carry on business across Canada under the corporate name, but company will have to register<sup>6</sup> extra-provincially or extra-territorially in at least one province or territory where the company's head office is located
- Generally, very flexible statutory arrangement<sup>7</sup> provision; however, the corporation must be solvent to use it
- Can access Ontario courts (including the Commercial List division) for litigation under the CBCA<sup>8</sup>, as well as the courts of other provinces and territories, providing flexibility for corporations, shareholders and stakeholders

## Director Responsibilities and Liabilities

- Directors have a diligence defence to liability on insolvency for six months' wages<sup>9</sup>
- Ability for directors to obtain broad indemnity and insurance protection

## Administrative Efficiency

- CBCA Director can assist<sup>10</sup>
- All filings of corporate documents with government offices are made electronically and no "wet" signatures are required—administratively easy and filings can be made at any time
- Electronic minute books and other records are permitted
- Amendments to articles can be prearranged and date and time stamped
- No physical share certificates required, but an acknowledgment of the right to receive a share certificate is provided to a shareholder, which can be electronically signed
- Greater choice of locations for registered office, records office and shareholders meetings

## Shareholder Rights and Meetings

- Unanimous shareholder agreement supersedes articles and by-laws, and it can be amended without unanimity
- Shareholders can fetter their discretion when exercising powers of directors under unanimous shareholders agreement
- If specified in articles or by-laws, the notice period for shareholders meetings can be as short as desired
- Virtual shareholders meetings are permitted subject to certain technical requirements

## Corporate Transactions

- An acquiror can force a compulsory acquisition of shares if the acquiror holds more than 90 percent of the class of shares being acquired (can be a pro or con depending on perspective)

# CBCA CONS

## Director Responsibilities and Liabilities

- Canadian resident director requirement (25 percent) of directors
  - Also applies to meeting quorum (board and committee meetings)
- Nominee directors (e.g., directors selected by venture investors) have the same duties as all directors—duty to the corporation (can also be a pro depending on perspective)<sup>11</sup>

## Shareholder Rights and Meetings

- Written resolutions (directors or shareholders) require signatures of 100 percent of those entitled to vote
- If exceed 50 shareholders, must send a form of proxy and proxy circular in a prescribed (detailed) form for shareholder meetings
  - Can apply to the CBCA Director annually for relief in certain circumstances<sup>12</sup>
- Annual financial audit waivers require unanimous shareholder consent—even from non-voting shareholders<sup>13</sup>
- Shareholders and creditors are entitled to access a variety of corporate records, including unanimous shareholders agreement, articles, by-laws and certain securities registers, etc. but only shareholders are entitled to annual financial statements
- Articles are publicly available

## Name Approval and Registration

- Name<sup>14</sup> approval review standard is tougher than provincial incorporation because the name needs to be clear across Canada and is reviewed carefully by CBCA staff<sup>15</sup>
- Need to file/register in each province in which the company carries on business and extra-provincially register where the registered office is located<sup>16</sup>
- Can take up to 24 hours to receive a certificate of incorporation

## Corporate Opportunity and Conflict Management

- No corporate opportunity waivers available for directors, officers and shareholders<sup>17</sup>
- Conflicted directors can attend the portion of the meeting dealing with conflicted business but must abstain from voting

## Financial and Transparency Requirements

- Must use Canadian GAAP if private company<sup>18</sup>
- Must maintain a transparency register and file information with the federal government showing individuals with significant control, which information is made publicly available<sup>19</sup>
- Cannot increase stated capital without sufficient retained earnings, which limits certain tax strategies on sale<sup>20</sup>
- Insider trading and tipping restrictions apply to private companies (can be a pro or con depending on perspective)<sup>21</sup>
- Minority squeeze-out transactions are more difficult than under the OBCA, ABCA and BCBCA
- Directors and officers are required to provide residential addresses to government which are accessible to public<sup>22</sup>



# OBCA PROS

## Statutory Reputation and Legal Framework

- Well-known statute based on CBCA
- Can access Ontario courts for cases under the OBCA (including Commercial List)
- Certain proceedings, including shareholder oppression claims, require resort to the Ontario courts

## Director Responsibilities and Liabilities

- No Canadian director residency requirements
- Ability for directors to obtain broad indemnity and insurance protection

## Administrative Efficiency

- OBCA Director, but less authority than CBCA director
- All filings of corporate documents with government offices are made electronically and no “wet” signatures are required—administratively easy
- No need to “register” in Ontario (but may need to register in other jurisdictions where carrying on business (as defined in those other jurisdictions))
- Electronic minute books and other records are permitted
- No physical share certificates required, however, a notice setting out all the information in a share certificate needs to be sent to shareholders, which can be signed electronically

## Shareholder Rights and Meetings

- Ordinary written resolutions of the shareholders do not require unanimity (but written special resolutions do)
- Unanimous shareholder agreement supersedes articles and by-laws, and it can be amended without unanimity
- No physical share certificates required
- Shareholders can fetter their discretion when exercising powers of directors under unanimous shareholder agreements
- Virtual shareholders meetings are permitted subject to certain technical requirements

## Corporate Transactions

- Easier, as compared to CBCA, to use plan of arrangement process (no solvency requirement), which can be helpful on the sale of a company
- Minority squeeze-out transactions are less restrictive than under CBCA
- An acquiror can force a compulsory acquisition of shares if the acquiror holds more than 90 percent of the class of shares being acquired (can be a pro or con depending on perspective)
- Less restrictions on corporate name than in other jurisdictions



# OBCA CONS

## Director Responsibilities and Liabilities

- Directors have absolute liability on insolvency for six months' wages (no diligence defence like CBCA contains)
- Nominee directors (e.g., directors selected by venture investors) have the same duties as all directors—duty to the corporation (can be a pro depending on perspective)
- Written director resolutions require signatures of 100 percent of those entitled to vote

## Shareholder Rights and Meetings

- Written shareholder special resolutions require signatures of 100 percent of those entitled to vote
- Annual financial audit waivers require unanimous shareholder consent—even from non-voting shareholders
- Notice period for shareholders meetings cannot be shorter than ten days
- Shareholders (registered and beneficial) and creditors entitled to a variety of corporate records, including unanimous shareholders agreements, articles, by-laws, certain securities registers, etc. but only shareholders are entitled to annual financial statements
- Articles are publicly available

## Corporate Opportunity and Conflict Management

- No corporate opportunity waivers for directors, officers, and shareholders
- Conflicted directors cannot attend the portion of the meeting dealing with conflicted business and cannot vote

## Name Approval and Registration

- Must extra-provincially register in any other province in which it carries on business<sup>23</sup>
- Offers little entity name protection in Ontario and no name protection outside of Ontario

## Administrative and Filing Inefficiencies

- Most efficient to use third-party agencies to file amendments to articles
- Amendments to articles cannot be filed immediately—must be processed by the system
- Cannot date-stamp filings for effectiveness as of a specified time
- Relatively new electronic registration system has numerous bugs

## Financial and Transparency Requirements

- Must use Canadian GAAP if private company
- Cannot increase stated capital without sufficient retained earnings, which limits certain tax strategies on sale
- Insider trading (but not tipping) restrictions apply to private companies—does not have a “reasonable belief that information has been disclosed” defence like CBCA and ABCA
- Must maintain a transparency register of individuals with significant control but no requirement to make or file like CBCA



# ABCA PROS

## Statutory Reputation and Legal Framework

- Well-known statute based on CBCA
- Can access Alberta courts for cases under the ABCA
- Certain proceedings, including shareholder oppression claims, require resort to the Alberta Courts

## Director Responsibilities and Liabilities

- No Canadian director residency requirements
- Nominee directors can consider the interests of nominating shareholders in certain circumstances—not solely the best interests of the corporation
- Directors can attend and vote in conflict situations where the decision/action will benefit the corporation (such as financing the corporation or guaranteeing a loan)
- Ability for directors to obtain broad indemnity and insurance protection
- Corporate opportunity waivers for directors, officers, and shareholders

## Administrative Efficiency

- ABCA Director, but less authority than CBCA Director
- All filings of corporate documents with government offices are made electronically and no “wet” signatures are required—administratively easy
- Electronic minute books and other records are permitted

## Shareholder Rights and Meetings

- Ordinary (not special) resolutions can be passed in writing by two-thirds of the shareholders entitled to vote on such resolution (at a meeting, an ordinary resolution requires approval by a majority of the votes cast by shareholders present in-person or by proxy at such meeting)
- Special resolution of voting shareholders (two-thirds of votes cast) to dispense with the financial audit requirement every year—must hold a meeting to use the two-thirds threshold
- No share certificates required
- No obligation to maintain transparency register although this may be a requirement in the future
- Unanimous shareholder agreement supersedes articles and by-laws
- Shareholders can fetter their discretion when exercising powers of directors under unanimous shareholders agreement
- Virtual shareholders meetings are permitted subject to certain technical requirements

## Corporate Transactions

- An acquiror can force a compulsory acquisition of shares if the acquiror holds more than 90 percent of the class of shares being acquired (can be a pro or con depending on perspective)

# ABCA CONS

## Director Responsibilities and Liabilities

- Written director resolutions require signatures of 100 percent of those entitled to vote
- Directors' joint and several liability for six months' unpaid wages but not liable if the director reasonably believed the corporation could pay debts as they fall due

## Shareholder Rights and Meetings

- Notice period for shareholder meetings cannot be shorter than seven days
- Not possible to amend a unanimous shareholders agreement without the written consent of all of those who are shareholders at the effective date of such amendment
- Shareholders and creditors entitled to a variety of records, including unanimous shareholders agreements, articles and by-laws, etc.
- Any person on payment of a reasonable fee is entitled to see a company's securities register of shares or debt obligations and make copies
- Articles are publicly available

## Corporate Opportunity and Conflict Management

- Insider trading (but not tipping) restrictions apply to private companies—could also be a pro depending on perspective

## Financial and Transparency Requirements

- Must use Canadian GAAP if a private company
- Cannot increase stated capital without sufficient retained earnings, which limits certain tax strategies on sale
- No obligation to maintain a transparency register (this may be a requirement in the future)

## Other Considerations

- Need to extra-provincially register in any other province in which it carries on business
- Must appoint an agent for service who is resident in Alberta



# BCBCA PROS

## Statutory Reputation and Legal Framework

- Very flexible
- Can access British Columbia courts for cases under the BCBCA
- Certain proceedings, including shareholder oppression claims, require resort to the British Columbia Courts

## Director Responsibilities and Liabilities

- No Canadian director residency requirements
- Ability for directors to obtain broad indemnity and insurance protection
- If provided in the constating documents, the powers of the directors, in whole or in part, can be transferred to one or more persons (similar to a unanimous shareholders agreement)

## Administrative Efficiency

- All filings of corporate documents with government offices are made electronically and no “wet” signatures are required—administratively easy
- Electronic minute books and other records are permitted
- Amendments to articles can be pre-filed and date and time stamped to show effectiveness at a specific date and time
- Can change company name without shareholder approval
- Can pre-clear company name before incorporating
- Appeal process if a company name is initially rejected

## Shareholders’ Rights and Meetings

- Ordinary (not special) resolutions can be passed in writing by two-thirds of the shareholders entitled to vote on such resolution (at a meeting, an ordinary resolution requires approval by a majority of the votes cast by shareholders present in person or by proxy at such meeting)
- No physical share certificates required
- Share terms and conditions are not part of publicly available articles, which preserves confidentiality on equity financings involving newly created share classes (treated like by-laws)
- Virtual shareholders meetings are permitted subject to certain technical requirements
- Unless expressly authorized by the company’s articles, shareholders are not entitled to review a variety of records including securities register, articles, shareholder resolutions and minutes, etc.

## Corporate Transactions

- Can increase capital<sup>24</sup> without restriction by resolution of directors or ordinary resolution of shareholders
- No solvency requirements for plans of arrangement
- An acquiror can force a compulsory acquisition of shares if the acquiror holds more than 90 percent of the class of shares being acquired (can be a pro or con depending on perspective)

## Corporate Opportunity and Conflict Management

- Directors can attend but not vote in conflict situations unless all directors have a conflict
- To not have to account for profits, a transaction where all directors have a conflict needs to be approved by a special resolution of shareholders

# BCBCA CONS

## Director Responsibilities and Liabilities

- Directors' joint and several liability for two months' unpaid wages but not liable if the director reasonably believed the corporation could pay debts as they fall due

## Statutory Reputation and Legal Framework

- Relatively new statute not based on CBCA—very different approach, but similar concepts
- As not based on CBCA, less familiar to lawyers/ investors across Canada & United States

## Corporate Opportunity and Conflict Management

- No corporate opportunity waivers are available for directors or officers
- Insider trading (but not tipping) restrictions apply to private companies (can also be a pro or con depending on perspective)

## Shareholders' Rights and Meetings

- There is no concept of "unanimous shareholder agreement" unlike in the CBCA and similar statutes however companies and shareholders frequently enter into shareholders' agreements which contractually supersede the constating documents of a company
- Notice period for shareholder meetings cannot be less than ten days

## Financial and Transparency Requirements

- Must use Canadian GAAP unless the requirement is waived by all shareholders, including non-voting shareholders
- Must maintain a transparency register but no obligation to file currently—public and non-confidential filing obligation is expected within the next couple of years (similar to the CBCA)
- Appointment of a financial auditor can only be waived with the approval (in writing or at a meeting) of all shareholders, including non-voting shareholders

## Name Approval and Registration

- Company name approval review standard is tougher than Ontario
- Need to extra-provincially register in any other province in which it carries on business

# TABLE OF CONCORDANCE BY JURISDICTION: PROS

| Topic                                       | CBCA                                                                                                                                | OBCA                                                                                                                                                     | ABCA                                                                                                                               | BCBCA                                                                                                                              |
|---------------------------------------------|-------------------------------------------------------------------------------------------------------------------------------------|----------------------------------------------------------------------------------------------------------------------------------------------------------|------------------------------------------------------------------------------------------------------------------------------------|------------------------------------------------------------------------------------------------------------------------------------|
| Statutory Framework                         |                                                                                                                                     |                                                                                                                                                          |                                                                                                                                    |                                                                                                                                    |
| <b>Statutory Reputation</b>                 | Well-known statute, arguably more prestigious                                                                                       | Well-known statute based on CBCA                                                                                                                         | Well-known statute based on CBCA                                                                                                   | Relatively new statute (introduced in March 2004) not based on CBCA                                                                |
| <b>Flexibility of Statutory Arrangement</b> | Very flexible (but requires solvency)                                                                                               | Moderately flexible                                                                                                                                      | Moderately flexible                                                                                                                | Flexible                                                                                                                           |
| <b>Access to Courts</b>                     | Access to Ontario Courts (Including Toronto Commercial List division)<br><br>Access to courts in multiple provinces and territories | Access to Ontario courts (including Toronto Commercial List)<br><br>Certain proceedings require Ontario Courts (including shareholder oppression claims) | Access to Alberta courts<br><br>Certain proceedings require Alberta Courts                                                         | Access to British Columbia courts<br><br>Certain proceedings require British Columbia Courts                                       |
| Director Responsibilities and Liabilities   |                                                                                                                                     |                                                                                                                                                          |                                                                                                                                    |                                                                                                                                    |
| <b>Residency Requirement</b>                | 25% Canadian resident director requirement                                                                                          | No Canadian residency requirement                                                                                                                        | No Canadian residency requirement                                                                                                  | No Canadian residency requirement                                                                                                  |
| <b>Director Liability for Unpaid Wages</b>  | Joint and several liability for 6 months' wages<br><br>Diligence defence available                                                  | Absolute joint and several liability for up to 6 months wages in insolvency<br><br>No diligence defence                                                  | Joint and several liability for debts owed to employees, capped at 6 months' wages per employee<br><br>Diligence defence available | Joint and several liability for debts owed to employees, capped at 2 months' wages per employee<br><br>Diligence defence available |
| Administrative Efficiency                   |                                                                                                                                     |                                                                                                                                                          |                                                                                                                                    |                                                                                                                                    |
| <b>Electronic Filing</b>                    | Yes                                                                                                                                 | Yes                                                                                                                                                      | Yes                                                                                                                                | Yes                                                                                                                                |
| <b>Wet Signatures Required</b>              | No                                                                                                                                  | No                                                                                                                                                       | No                                                                                                                                 | No                                                                                                                                 |

## Table of Concordance by Jurisdiction: Pros

| Topic                                                 | CBCA                                                                                                                                     | OBCA                                                                                                                                                               | ABCA                                                                                                                                                                                                                                                                                 | BCBCA                                                                                                                                                                                                                     |
|-------------------------------------------------------|------------------------------------------------------------------------------------------------------------------------------------------|--------------------------------------------------------------------------------------------------------------------------------------------------------------------|--------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|---------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| <b>Amendments to Articles</b>                         | Cannot be time-stamped                                                                                                                   | Can be prearranged to file at a future date                                                                                                                        | Can be prearranged to file at a future date                                                                                                                                                                                                                                          | Can be prearranged and date- and time-stamped                                                                                                                                                                             |
| <b>Electric Minute Books and Other Records</b>        | Yes                                                                                                                                      | Yes                                                                                                                                                                | Yes                                                                                                                                                                                                                                                                                  | Yes                                                                                                                                                                                                                       |
| <b>Physical Share Certificates Required</b>           | No but an acknowledgement of the right to receive one is provided to a shareholder and such acknowledgement can be electronically signed | No but notice setting out all information usually contained in share certificate needs to be sent to all shareholders and such notice can be electronically signed | No but notice setting out all information usually contained in share certificate needs to be sent to all shareholders and such notice can be electronically signed                                                                                                                   | No but notice setting out all information usually contained in share certificate needs to be sent to all shareholders and such notice can be electronically signed                                                        |
| <b>Shareholder Rights and Meetings</b>                |                                                                                                                                          |                                                                                                                                                                    |                                                                                                                                                                                                                                                                                      |                                                                                                                                                                                                                           |
| <b>Unanimous Shareholder Agreement Primacy</b>        | Yes, and can amend without unanimity                                                                                                     | Yes, and can amend without unanimity                                                                                                                               | Yes, but requires shareholder unanimity to amend                                                                                                                                                                                                                                     | No USAs but shareholder agreements common                                                                                                                                                                                 |
| <b>Ordinary Written Resolutions Require Unanimity</b> | Yes                                                                                                                                      | No                                                                                                                                                                 | No                                                                                                                                                                                                                                                                                   | No                                                                                                                                                                                                                        |
| <b>Written Resolution Requirements</b>                | Both written director and all shareholder resolutions required to be signed by 100% of those entitled to vote                            | Both written director and special resolutions of the shareholders required to be signed by 100% of those entitled to vote                                          | Written director resolution required to be signed by 100% of the directors<br><br>Written shareholder resolutions must be signed by the holders of at least two-thirds of the shares entitled to vote on the resolution in question (provided the company is not a reporting issuer) | Both written director and special resolutions of the shareholders required to be signed by 100% of those entitled to vote<br><br>Ordinary resolution required to be signed by two-thirds of shareholders entitled to vote |

## Table of Concordance by Jurisdiction: Pros

| Topic                                                                                 | CBCA                                                                        | OBCA                                                                        | ABCA                                                                                            | BCBCA                                                                                                                |
|---------------------------------------------------------------------------------------|-----------------------------------------------------------------------------|-----------------------------------------------------------------------------|-------------------------------------------------------------------------------------------------|----------------------------------------------------------------------------------------------------------------------|
| <b>Shareholders Entitled to Fetter Discretion Under USAs When Acting as Directors</b> | Yes                                                                         | Yes                                                                         | Yes                                                                                             | No USAs but shareholder agreements common, can fetter discretion in certain circumstances with amendment to articles |
| <b>Annual Financial Audit Waiver</b>                                                  | Yes, with unanimous shareholder consent (including non-voting shareholders) | Yes, with unanimous shareholder consent (including non-voting shareholders) | Yes, with only two-thirds votes at a meeting or unanimous consent by written resolution         | Yes, with unanimous shareholder consent (including non-voting shareholders)                                          |
| <b>Virtual Meetings Permitted</b>                                                     | Yes                                                                         | Yes                                                                         | Yes                                                                                             | Yes                                                                                                                  |
| <b>Notice of Meetings</b>                                                             | Flexible notice periods if provided articles or by-laws                     | 10-day minimum notice period                                                | 7-day minimum notice period (if stipulated in by-laws) and 21-day default minimum notice period | 10-day minimum notice period                                                                                         |
| <b>Corporate Transactions</b>                                                         |                                                                             |                                                                             |                                                                                                 |                                                                                                                      |
| <b>Compulsory Acquisitions Permitted</b>                                              | Yes if acquiror holds > 90% of shares                                       | Yes if acquiror holds > 90% of shares                                       | Yes if acquiror holds > 90% of shares                                                           | Yes if acquiror holds > 90% of shares                                                                                |
| <b>Minority Squeeze-Out</b>                                                           | Restrictions                                                                | Not addressed                                                               | Not addressed                                                                                   | Not addressed                                                                                                        |



# TABLE OF CONCORDANCE BY JURISDICTION: CONS

| Topic                                                     | CBCA                                                                                                                                           | OBCA                                                                                                              | ABCA                                                                                   | BCBCA                                                                                                             |
|-----------------------------------------------------------|------------------------------------------------------------------------------------------------------------------------------------------------|-------------------------------------------------------------------------------------------------------------------|----------------------------------------------------------------------------------------|-------------------------------------------------------------------------------------------------------------------|
| <b>Director Residency Requirements and Liabilities</b>    |                                                                                                                                                |                                                                                                                   |                                                                                        |                                                                                                                   |
| <b>Canadian Residency Requirement</b>                     | 25% (also applies to meeting quorum)                                                                                                           | None                                                                                                              | None                                                                                   | None                                                                                                              |
| <b>Corporate Registration Requirements</b>                |                                                                                                                                                |                                                                                                                   |                                                                                        |                                                                                                                   |
| <b>Name Approval</b>                                      | Name approval tougher due to need for nationwide originality<br>Name pre-clearance is possible, with Corporations Canada making final decision | Less strict name approval<br>Little name protection afforded in Ontario and no name protection afforded elsewhere | Similar to CBCA, name approval less strict                                             | Name approval tougher than Ontario<br>Can file request for name and get approval ahead of effective date          |
| <b>Registration</b>                                       | Must be registered in each province where business is carried on and extra-provincially registered where registered office is located          | Must extra-provincially register in any other province in which it carries on business                            | Must extra-provincially register in any other province in which it carries on business | Must extra-provincially register in any other province in which it carries on business                            |
| <b>Issuance of Certificate of Incorporation</b>           | Up to 24 hours' delay, but can apply for expedited service                                                                                     | Same day                                                                                                          | Same day                                                                               | Same day for online filing (typically immediately following incorporation filing)                                 |
| <b>Shareholder Rights' and Meetings</b>                   |                                                                                                                                                |                                                                                                                   |                                                                                        |                                                                                                                   |
| <b>Written Shareholder Special Resolutions Permitted?</b> | Yes, with signatures of 100% of those entitled to vote                                                                                         | Yes, with signatures of 100% of those entitled to vote                                                            | Yes, with signatures of two-thirds of those entitled to vote                           | Yes, with signatures of 100% of those entitled to vote for special resolution, two-thirds for ordinary resolution |
| <b>Notice Period for Shareholder Meetings</b>             | None if specified in articles or bylaws                                                                                                        | No shorter than 10 days                                                                                           | No shorter than 7 days                                                                 | No shorter than 10 days                                                                                           |

## Table of Concordance by Jurisdiction: Cons

| Topic                                                 | CBCA                                                                                                                        | OBCA                                                                | ABCA                                                                                                                                           | BCBCA                                                           |
|-------------------------------------------------------|-----------------------------------------------------------------------------------------------------------------------------|---------------------------------------------------------------------|------------------------------------------------------------------------------------------------------------------------------------------------|-----------------------------------------------------------------|
| <b>Unanimous Shareholders Agreements permitted?</b>   | Yes, can be amended without unanimity                                                                                       | Yes, can be amended without unanimity                               | Yes, but amendments require unanimity                                                                                                          | No                                                              |
| <b>Corporate Opportunity and Conflict Management</b>  |                                                                                                                             |                                                                     |                                                                                                                                                |                                                                 |
| <b>Corporate Opportunity Waivers Permitted?</b>       | No                                                                                                                          | No                                                                  | Yes                                                                                                                                            | No                                                              |
| <b>Meeting Participation of Conflicted Directors</b>  | Can attend but must abstain from voting                                                                                     | Cannot attend or vote                                               | Can attend and vote in certain situations                                                                                                      | Can attend but cannot vote unless all directors are conflicted  |
| <b>Financial and Transparency Requirements</b>        |                                                                                                                             |                                                                     |                                                                                                                                                |                                                                 |
| <b>Must use Canadian GAAP</b>                         | Yes, if private company                                                                                                     | Yes, if private company                                             | Not specified but records must be adequate to enable directors to ascertain the financial position of the corporation with reasonable accuracy | Yes, unless requirement waived by all shareholders              |
| <b>Transparency Register Required</b>                 | Yes, and must file information showing individuals with significant control (with such information made publicly available) | Yes (no filing)                                                     | No                                                                                                                                             | Yes (public filing requirement expected imminently)             |
| <b>Restrictions on (stated) Capital Increases</b>     | Cannot increase stated capital without sufficient retained earnings                                                         | Cannot increase stated capital without sufficient retained earnings | Cannot increase stated capital without sufficient retained earnings                                                                            | Can increase capital without restriction                        |
| <b>Insider Trading and Tipping restrictions apply</b> | Yes                                                                                                                         | Yes, insider trading restrictions<br>No restrictions on tipping     | Yes, insider trading restrictions<br>No restrictions on tipping                                                                                | Yes, insider trading restrictions<br>No restrictions on tipping |





# NOTES

1. For access to certain Canadian tax incentives by Canadian tech companies, it is common for a majority of the board to be Canadian.
2. However, even Delaware is not free of competition for incorporations. Recently, Delaware's business-friendly reputation took a hit when Elon Musk moved SpaceX from Delaware to Texas out of frustration with a Delaware court decision that went against him to the tune of US\$55 billion in Tesla bonus compensation.
3. In Canada, all business corporations acts offer limited liability protection to shareholders. Some jurisdictions also permit unlimited liability corporations. We have not examined those.
4. The term "head office" is not defined in the Quebec *Business Corporations Act*.
5. There are also certain provincial government incentives which typically are based on the location of the head office and the employees of the corporation, rather than the jurisdiction of incorporation.
6. Extra-provincial registration is simple but an additional administrative burden with a modest fee.
7. An arrangement is a court-sanctioned process used to implement a wide range of negotiated merger and acquisition (M&A) transactions and corporate reorganizations that is available under various corporate statutes in Canada.
8. The Ontario Commercial List is a part of the Ontario court that is staffed by judges with corporate law experience. It also can fast-track corporate matters, such as plans of arrangement, that require prompt access to the court.
9. Under the CBCA, directors are liable for unpaid wages up to 6 months. However, they are not liable if they took reasonable steps to ensure that the wages were paid or were unaware that the wages had not been paid.
10. The CBCA Director administers the CBCA and can provide exemptions from certain parts of the CBCA in certain circumstances.
11. Directors and officers have a fiduciary duty and duty of care. The fiduciary duty is to act in the best interests of the corporation, not of the shareholder who selected them to be on the board.
12. It is not uncommon for tech companies to accumulate more than 50 shareholders over successive rounds of financing. The requirement to hold an annual meeting and prepare a proxy circular is often an unwelcome surprise for a private company. It is possible to obtain a waiver annually from the CBCA Director in certain circumstances. It is also possible to comply with the obligation with some modest effort. However, it is nonetheless something that would be better to avoid if possible.
13. Every CBCA company is required to have an auditor unless all shareholders (voting and non-voting) agree to waive that requirement annually. This is often done through a mechanic in a unanimous shareholders agreement. However, it is also frequently overlooked in which case it could be problematic if the shareholders disagree that an auditor is not required.
14. Clearance of a name by the government for use as the company name does not guarantee that the name can be used free of challenges from others. If the name is important, a trademark should be registered in Canada and any other jurisdictions in the world where the trademark is likely to be used.
15. If the name is purely descriptive or is similar to other existing names, approval can be a challenge. A name search must be submitted with the incorporation documents.
16. The filing is fairly simple but it is another administrative burden with an associated modest fee.

17. As part of their fiduciary duty, directors and officers have an obligation to bring opportunities that could benefit the corporation to the corporation, and not take them for themselves or use them for another company. This duty applies only to directors and officers, not shareholders.
18. “GAAP” means generally accepted accounting principles. Canadian tech companies often carry on business primarily in the United States and primarily in U.S. currency with U.S. investors. In those circumstances, it may be desirable to use U.S. GAAP. That is not permissible under the CBCA for private companies.
19. This list must identify any individual with 25 percent or more equity interest in the company.
20. As part of sale transaction tax planning, increasing stated capital is a technique commonly used. If such a technique is required, the company can be moved (continued) at the relevant time to a province (such as British Columbia) that permits such increases, provided that applicable shareholder approval is obtained at that time.
21. It is not well known that insider trading and tipping restrictions in the CBCA apply to private companies.
22. It is common practice to provide a business address rather than residential but that is not in accordance with the requirements.
23. “Carries on business” is a defined term that normally includes some sort of physical presence in the province.
24. Referred to as stated capital in other jurisdictions.



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## ***Incorporation Forum Shopping in Canada: Considerations for Canadian Tech Startups,*** **December 2024**

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