

Major reform of corporate law in Quebec

BY [SYLVIE HÉBERT](#)

A substantial reform of corporate law is currently underway in Quebec. It began with the introduction of Bill 63, entitled the *Business Corporations Act*¹, by the Minister of Finance Raymond Bachand on October 7, 2009. The Bill was then passed and assented to this past December. It is expected to be enacted by order-in-council and take effect in January 2011, in particular, to allow the Quebec Enterprise Registrar to modernize its electronic systems.²

This new *Business Corporations Act* emerged after comprehensive consultation work which began in December 2007 when Monique Jérôme-Forget, then Minister of Finance, published a working paper³ in which interested parties were invited to voice their opinions on the broad guidelines of this overhaul.

Stikeman Elliott played an active role in this process, first by forming a task force that tabled a brief as part of the spring 2008⁴ public consultation process, and by subsequently having representation on the Quebec Bar and Canadian Bar Association committees, which were both consulted by the Minister of Finance in connection with the legislative drafting process. In addition, [Marc Barbeau](#), a partner in our firm and the head of our business law practice group, served on a committee of experts formed by the ministère des Finances to advise it on the main stakes of the reform.

Sought-after reform

As we and many other observers indicated in our briefs, the reform of the Québec *Companies Act*⁵ was not only judicious, it was necessary. In fact, this statute had not been significantly amended since the 1980s. In our brief, we noted that Quebec was in dire need of flexible, sophisticated, compatible and modern legislation which would stimulate business exchanges with our neighbors while protecting the various stakeholders. We also expressed the desire that the reform allow for effective and rapid transactions between companies and governmental agencies, by implementing, in particular, online communication methods. We believe that the new Act reflects these objectives.

Highlights of the reform

The working paper tabled in December 2007 had already announced that the reform would focus on the following major aspects:

- > shareholder protection;
- > directors' rights and duties;
- > improvement in rules of governance;
- > establishment of a more attractive and competitive legislative framework for Quebec businesses;
- > modernization of corporate law, including measures allowing for the use of new technologies in the Act's administration process.

Shareholder protection and rights

With regard to shareholder protection and rights, our task force promoted the adoption of measures similar to those set out in the federal statute,⁶ noting that by incorporating such measures, the Quebec legislation would follow international trends in this respect. We note that the new Act contains, among others, the following new measures:

- > right to demand the repurchase of shares if the shareholder votes against certain material decisions (ss. 372 and following);
- > right for any holder or beneficiary of voting shares of a corporation that is a reporting issuer or that has 50 or more shareholders to present proposals at annual meetings (ss. 194 and following);
- > right to vote per class under certain circumstances where the rights attaching to the shares are prejudicially changed (ss. 191-192);
- > approval by shareholders in the event of alienation of the corporation's property affecting a significant part of its business activity (ss. 271-275);
- > shareholder protection in the event of a squeeze-out transaction (ss. 221-223);
- > new remedies for holders and beneficiaries of securities⁷ who may apply to the court under the following circumstances:
 - for authorization to institute an action on behalf of the corporation or on behalf of a corporation that is one of its subsidiaries (ss. 445-449);
 - for an order directing an investigation of the corporation and any of its affiliates (ss. 421-438);
 - for an order to rectify a situation of abuse of power and iniquity ("oppression remedy") (ss. 450-453);
 - for an order compelling the corporation, its directors, officers, employees, mandataries and auditors to comply with the Act, the corporation's articles or by-laws or a unanimous shareholder agreement (s. 460).

Rights and duties of directors and rules of governance

The new Act provides that a director is subject to the same obligations as those imposed on any director of a legal person under the *Civil Code of Québec*⁸. It provides that the director and the officer are duty-bound to act with prudence, diligence, honesty and loyalty in the interest of the corporation (s. 119). The director will benefit from a presumption of prudent and diligent conduct similar to the one provided in the U.S. *Model Business*

Corporations Act if, in good faith and based on reasonable grounds, he or she has relied on a report, information or an opinion provided by certain specified individuals (officer of the corporation, legal counsel, expert, etc.) (s. 121).⁹

Various rules of governance are also provided, such as:

- > a framework governing the conclusion of a contract or the completion of a transaction by the directors or officers to which the corporation is party, involving, in particular, the disclosure of interest (ss. 122-133);
- > an obligation for the board of directors to determine the remuneration of the corporation's directors and officers. The by-law or a unanimous shareholder agreement may provide for a different rule except with respect to the remuneration of the corporation's president, chairman of the board, chief executive officer, chief operating officer and chief financial officer (ss. 117-118);
- > an obligation for the corporation to indemnify its directors, officers or their predecessors to the extent certain conditions are met (s. 159);
- > the mandatory disclosure of the existence or termination of a unanimous shareholder agreement to the enterprise registrar and, where such an agreement withdraws all powers from the board of directors and confers them on shareholders or third persons, the mandatory disclosure of the names and domiciles of those who assume such powers (ss. 215-216);
- > the possibility for shareholders, by means of a unanimous shareholder agreement, of choosing to not establish a board of directors (s. 216);
- > the possibility of shareholder meetings being held outside Quebec if the articles allow and all the shareholders entitled to vote agree (s. 164);
- > the right of the chairman of the shareholders' meeting to cast a tie-breaking vote unless otherwise provided in the by-laws (s. 188).

Corporate financing

Among the changes and improvements contained in new Act, we note some of the following measures affecting the share capital and the financing of corporations:

- > elimination of the obligation to issue at least one share at the organization meeting;¹⁰
- > elimination of bearer shares and implementation of a transitional measure to allow current holders of bearer certificates to replace them by a certificate in registered form (ss. 46 and 719);
- > possibility of issuing fractional shares with proportional right (s. 51);
- > continued possibility of shares (with or without par value) being issued whether or not they are fully paid (s. 53);
- > solidary liability for directors who approve the issue of shares for insufficient consideration (ss. 54 and 155);
- > express possibility of issuing instruments, certificates or other evidences of an exchange right, option or right to acquire shares (s. 56);
- > introduction of a mechanism to validate an irregular issue of shares (ss. 59-60);
- > possibility of issuing uncertificated shares¹¹ and harmonization with the *Act respecting the transfer of securities and the establishment of security entitlements*;¹²

- > possibility for a corporation of holding shares of its parent legal person or allowing its own shares to be held by its subsidiaries for a period not exceeding 30 days;¹³
- > elimination of restrictions on loans, security and other forms of financial assistance granted, given or furnished by the corporation to its shareholder and, consequently, elimination of the liability which the QCA currently imposes on directors under these circumstances;¹⁴
- > elimination of the “accounting” test¹⁵ in the event of the purchase or redemption of shares, the payment of dividends and the reduction of the share capital;¹⁶ however, in the event a corporation purchases or redeems its shares, it may not make a payment if such payment would make it unable, in the event of liquidation, to repay shares ranking higher than or equally with the purchased or redeemed shares.¹⁷

Attractive and competitive legislative framework

In its working paper, the legislator had announced that it wanted to implement various measures intended to offer a more attractive and competitive legislative framework for Quebec businesses. Among these measures, we draw your attention to the following (some have already been mentioned):

- > repeal of tests regarding the granting of financial assistance;
- > relief from directors’ liability, in particular, where a director can show a defence of due diligence;
- > maintaining the absence of a residency requirement for directors;
- > implementation of a more flexible regime for corporate amalgamations;¹⁸
- > possibility of continuing legal persons as corporations governed by the new Act (import) and continuing Quebec corporations under another jurisdiction (export);¹⁹
- > statutory arrangement regime based on the federal statute that replaces the more restrictive compromise regime under the QCA;²⁰
- > addition of provisions granting the court the necessary powers to reorganize a corporation that it is insolvent or on the verge of becoming insolvent;²¹
- > integration of the rules on liquidation in the new Act;²² the *Winding-up Act*²³ no longer applies to a corporation covered by the new Act;²⁴
- > possibility of determining not only the date but also the time of the constitution, amalgamation, continuance or arrangement of the corporation, or of certain other changes regarding the corporation;²⁵
- > possibility of reviving a dissolved corporation;²⁶
- > possibility of transferring a corporation’s head office to another judicial district without having to amend the corporation’s articles;²⁷
- > possibility for a corporation of identifying itself outside Quebec in a language other than French;²⁸
- > complete framework governing the amendment, correction, consolidation and cancellation of articles.²⁹

Modernization of corporate law

The new Act provides for an enhanced use of new technologies in the carrying out of administrative transactions with the enterprise registrar, housekeeping and relations with shareholders. For instance, remote participation at shareholder meetings for all corporations, including reporting issuers, will now be permitted unless otherwise provided in the corporation’s by-laws.³⁰ It will also be possible to file articles online.³¹

Note that pursuant to the new Act, the Minister of Revenue will have the power to determine the form of the articles and other documents filed with, or emanating from, the enterprise registrar, as well as the manner in which they are to be sent.³² In his published comments intended for parliamentarians, the Minister of Finance indicates that, with a view to lightening the regulatory and administrative burden, this power will be exercised administratively by the Minister of Revenue rather than by way of regulation.³³

We also note an effort to ease the formalities of constitution of a corporation. For example, it will no longer be mandatory to file a name search report along with the articles of incorporation. This document is replaced by a declaration stating that reasonable means have been taken to ensure that the chosen name complies with the law.³⁴

The new Act provides furthermore that the Minister of Finance must submit, every five years, a report to the government on the implementation of the Act and, if applicable, on the advisability of amending it.³⁵

Transitional provisions

Upon taking effect as scheduled in January 2011, the new Act will automatically apply to companies constituted, continued, or resulting from an amalgamation under Part IA of the QCA, without such companies having to intervene. These companies will then become “business corporations” governed by the new Act. The same will apply for insurance companies within the meaning of the *Act respecting insurance*³⁶, to which Part IA of the QCA currently applies.

In contrast, companies constituted, continued, or resulting from an amalgamation under Part I of the QCA will have five years to send articles of continuance to the enterprise registrar in compliance with the new Act. If they fail to comply within this time period, they will be dissolved.

In the case of insurance companies within the meaning of the *Act respecting insurance*, or trust companies or savings companies within the meaning of the *Act respecting trust companies and savings companies*³⁷, to which Part I of the QCA currently applies, articles of continuance will have to be sent to the enterprise registrar no later than two years after the new Act comes into force. Otherwise, effective on that date, the new Act will be deemed to apply to such companies or corporations, except for certain specific provisions,³⁸ with such modifications as are necessary and subject to the provisions of the *Act respecting insurance*.

Note that the new Act does not replace Part III of the QCA, which continues to apply to joint stock companies and non-profit legal persons and associations. The law governing non-profit associations is also being completely overhauled but no bill is yet available.³⁹

Conclusion

Because the new Act will automatically apply to Part IA companies upon its coming into force, such companies would be well advised to familiarize themselves with the provisions of the new Act, including the transitional measures. As a result, companies with existing unanimous shareholder agreements will, for example, be required to disclose the existence of such agreements on a date which will be specified by order-in-council. In addition, certain stock holdings by some sub-subsidiaries, which are permitted under the current law, will be prohibited when the new Act comes into force. Companies which such holdings will have to divest themselves of the shares within five years.⁴⁰

Some companies may also want to take this opportunity to review and update their by-laws and articles so that they reflect the new corporate procedures and the terminology set out in the new Act. Directors will have to take into consideration the new rights that will be granted to shareholders under the new Act and assess the extent to which these rights will impact their management practices. As the upcoming annual meetings will be the last such meetings under the existing regime (unless special meetings are called), it would be advisable for reporting

issuers governed by Part IA to examine the new legislation early on in 2010, in order to lay the groundwork and determine whether changes should be made to their articles even before the new Act comes into force.

We are available to advise clients on this new Act and we will be offering presentations on the subject over the course of the year.

The author thanks Marc Barbeau and Professor Stéphane Rousseau for their valuable comments.

For more information, please contact your Stikeman Elliott representative, the author listed above, or any member of our Corporate Finance & Securities Group listed at www.stikeman.com.

¹ S.Q. 2009, c. 52 (the "new Act").

² [Press release](#) from the Office of the Minister of Finance published on December 1, 2009 when Bill 63 was passed.

³ [Ministère des Finances Working Paper - Reform of the Companies Act](#). To access the resources published by the ministère des Finances in connection with the reform, click on this [link](#).

⁴ [Brief by Stikeman Elliott's task force – Reform of the Companies Act – April 18, 2008](#).

⁵ R.S.Q., c. C-38 ("QCA").

⁶ *Canada Business Corporations Act*, R.S.C., c. C-44, also referred to as the "federal statute."

⁷ See the broad definition of the term "beneficiary" in section 2 of the new Act.

⁸ R.S.Q., c. C-1991.

⁹ See the comments made with regard to section 121 of the new Act in the [Reference Document \(Volume I\)](#) (in French only) published by the ministère des Finances and providing certain explanations and comments to parliamentarians on the provisions of the Act.

¹⁰ Section 11 of the new Act. Section 123.17 QCA currently sets out this obligation.

¹¹ See the transitional measure under section 718 of the new Act for shares already issued but for which a certificate has not yet been issued to the shareholder.

¹² S.Q. 2008, chapter 20. See in particular sections 61, 64-66, 81, 85, 393 and 721 of the new Act.

¹³ Section 86 of the new Act.

¹⁴ Sections 123.66 to 123.69 QCA.

¹⁵ Currently set out under sections 123.53 to 123.56, 123.63 and 123.70 QCA.

¹⁶ Sections 95-98, 103-105 and 101 of the new Act.

¹⁷ Section 96 of the new Act.

¹⁸ Sections 276-287 of the new Act.

¹⁹ Sections 288-296 and 297-303 of the new Act.

²⁰ Sections 414-420 of the new Act.

²¹ Sections 411-413 of the new Act.

²² Sections 323-364 of the new Act.

²³ R.S.Q., chapter L-4.

²⁴ Section 592 of the new Act.

²⁵ Sections 10, 249, 264, 286, 293, 302, 303, 321, 348, 370, 420, 467, 473 of the new Act.

²⁶ Sections 365-371 of the new Act.

²⁷ Section 5 of the new Act. Moreover, section 722 provides that the mention of the judicial district in the articles of a company that becomes subject to the new Act is deemed unwritten. No amendment to the articles is therefore required in this respect when the new Act comes into force.

²⁸ Section 22 of the new Act.

²⁹ Chapter IX of the new Act.

³⁰ Section 174 of the new Act.

³¹ Section 470 of the new Act.

³² Sections 470, 478 and 495 of the new Act.

³³ [Reference Document - Volume II](#) (in French only), section 495.

³⁴ Section 8, paragraph 3 of the new Act.

³⁵ Section 496 of the new Act.

³⁶ R.S.Q., c. A-32.

³⁷ R.S.Q., c. S-29.01.

³⁸ Chapter X, Division II of Chapter XII and Chapters XIII, XIV, XVI and XVII of the new Act will not apply to such companies or corporations.

³⁹ To access the Working Paper published by the ministère des Finances in October 2008 in connection with the reform of the law governing non-profit associations and the briefs filed during the public consultation process, click on this [link](#).

⁴⁰ Sections 86 and 720 of the new Act.

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