



Tech Futures:
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By [Michael Volker](#)

New Corporations Act Explained

This month's column is mainly about the legal and regulatory environment in which B.C. companies operate. We'll shed some light on the major changes relating to two Acts: the **Securities Act** and the new **Business Corporations Act**. With the increased emphasis on proper corporate governance, I believe that it is necessary for company directors and executives to be familiar with these changes.

Building a technology business in British Columbia has never been better - at least with respect to rules and regulations. There have been two noteworthy developments: first, the securities regulations respecting the raising of equity capital have been entirely revamped. This makes it easier for growing companies to access investors' capital. Second, the new **Business Corporations Act**, will soon replace the outdated **B.C. Company Act (BCCA)** providing the first major legislative updates in over three decades.

Growing technology ventures often opt to incorporate federally under the **Canada Business Corporations Act (CBCA)**, rather than incorporate under the B.C. Company Act (BCCA) because of various restrictions in the BCCA.

To help us better understand the new corporate regime, I posed a number of questions to **Herb Ono**, a partner with the Corporate Finance/Securities Department at the Vancouver law firm of **Clark, Wilson**.

Herb, let's start with some basics. First of all, the changes that are being made pertain mainly to two Acts - the Business Corporations Act (to replace the B.C. Company Act) and the overhauled Securities Act, correct?

Herb: *Correct. The new Business Corporations Act will introduce a number of modern corporate reforms. It was originally expected to come into force in November, 2003, but its implementation has been delayed until some time early next year.*

The Securities Act has not yet been "overhauled" in the same sense - the replacement of the Securities Act with new legislation is not as imminent as the replacement of the Company Act by the Business Corporations Act. But the British Columbia Securities Commission has used its rule-making power to help facilitate capital-raising in this Province.

For the past year and a half, the British Columbia Securities Commission has also been leading a charge towards a more streamlined, principles-based approach to regulation (with fewer detailed regulatory requirements), which is now embodied in a recently released draft Securities Act and Rules. The changes, if implemented, will be so far-reaching that this initiative is referred to as the "BC Model". The protection of investors and market integrity remain as key objectives of the draft legislation, but in a manner that seeks to minimize the regulatory burden on market participants. The Commission is seeking comments on the draft Securities Act and Rules before making final recommendations to the British Columbia government at the end of 2003.

*I am pleased that one of my partners, **Bernard Pinsky**, is assisting the Commission in this process, as a member of the Securities Law Advisory Committee. Like myself, Bernard is also a member of the California Bar, and brings a unique cross-border perspective to securities law and practice.*

The BC Model has not been embraced by all Canadian securities regulators, some of whom - most notably

David Brown, Chair of the Ontario Securities Commission - have raised concerns that the BC Model may be too lax. I personally think that the BC Model makes a lot of sense in this day and age.

Mike: In general, why are these changes so important to companies, especially to growing technology ventures?

Herb: *It may sound a little clichéd, but we live in a global economy. Technology ventures, in particular, tend to look beyond our borders not only for their customers, but also for their human resources and capital. Competition for these resources is fierce not only locally, but also internationally. Outdated legislation or over-regulation can seriously hinder a company's ability to compete with competitors subject to a more flexible regulatory regime. By the same token, modern legislation and a balanced approach to regulation can in many instances help to level the playing field. (Note in this context that more flexible legislation and regulatory policies do not necessarily translate to a more lax regulatory environment – a point that **Doug Hyndman**, Chair of the British Columbia Securities Commission, has made much more eloquently.)*

It may be helpful to illustrate this with an example: Let's suppose the majority of a company's important customers are located in the United States, and it makes sense to appoint two well-respected U.S. residents with specific industry-related experience to fill two vacancies on the three-person board. But there's a problem: The existing B.C. Company Act requires that the majority of the directors be persons ordinarily resident in Canada, and that at least one director be ordinarily resident in British Columbia.

This scenario is not uncommon. I have acted for several public companies which have continued under the laws of a jurisdiction whose corporate laws do not have residency requirements for corporate directors (e.g. Yukon Territory).

The new B.C. Business Corporations Act will not have any residency requirements for directors, which will undoubtedly be good news to many local technology companies with business interests overseas.

Securities legislation can also prove to be a significant obstacle to raising financing. As a general rule, a person must not distribute a security unless the distribution has been qualified by a prospectus, or unless an exemption from the prospectus requirement is available. The B.C. prospectus requirements (and related registration requirements) will apply clearly if a company issues shares or other securities (such as debentures) to any B.C. residents. It is less well known that, under existing regulatory policies, these requirements can also apply to distributions of securities to persons resident outside of British Columbia, and even if the issuer of the securities has been formed outside British Columbia, if the issuer's "mind and management" is located in British Columbia.

For example, let's suppose that a closely-held technology company is incorporated under the laws of Mauritius, but that the majority of its board of directors and all of its senior officers reside and are headquartered in Kelowna, British Columbia. The company wishes to raise capital by effecting a private placement to two residents of the State of California. The transaction would have to comply with the corporate – and possibly the securities – laws of Mauritius, the securities laws of British Columbia, the federal securities laws of the United States and the "blue-sky" laws of California. It will be seen that overly restrictive securities laws in any one of these jurisdictions could seriously impair the company's ability to access much-needed capital. Worse still, assuming that the private placement could be effected under US law but not under BC law, a competitor of the company that is wholly based in the United States would be able to proceed with a private placement to the same investors!

Mike: So, will the new Corporations Act entirely replace the old B.C. Company Act?

Herb: *Once the new BC Business Corporations Act is proclaimed in force, it will repeal the existing B.C. Company Act, and every company then existing under the Company Act – referred to in the new Act as "pre-existing companies" - would immediately become subject to the BC Business Corporations Act. There will be a two-year transitional period during which every pre-existing company would have to take certain steps to bring themselves into compliance with the new Act. However, every pre-existing company should be planning for this transition now, and closely reviewing their articles against the new requirements. The BC Business Corporations Act prescribes certain mandatory provisions for inclusion in corporate articles, as*

well as many optional ones, so the review process can potentially take significant time and attention on the part of management and the company's professional advisers. Any company that does not bring itself into compliance with the Business Corporations Act within the two-year transitional period will risk being dissolved by the Registrar of Companies.

Is the new Corporations Act more like the CBCA? In what ways is it different (or better) than the CBCA?

Herb: The Canada Business Corporations Act is based in large part on a US statutory model of incorporation, and is premised on a statutory division of powers between directors, officers and shareholders. The existing BC Company Act and the new BC Business Corporations Act are based on a so-called "contractarian" model rooted in English company law, where the corporate constitution is essentially a contract among the Company and each of the shareholders. Corporate theory aside, from the point of view of day to day operations, this difference is transparent.

It is fair to say that the CBCA is a more modern form of corporate statute than our existing Company Act. However, the choice of which statute to incorporate under has traditionally been business-driven. For example, a CBCA corporation can use its name anywhere in Canada, subject to compliance with applicable extra-provincial registration requirements of provincial statutes. Thus, many corporations intending to carry on business in two or more provinces (including Canadian subsidiaries of large multi-national concerns) have been formed under the CBCA.

Apart from the advantage that federal incorporation affords to a company seeking to use its name in more than one jurisdiction in Canada, the new BC Business Corporations Act appears at first sight to remove many of the relative disadvantages that incorporation under the BC Company Act would give rise to, as opposed to incorporation under the CBCA.

For example, the pre-emptive rights contained in the existing BC Company Act, which requires the directors of a company that is not a reporting company to first offer any allotment of shares to the existing shareholders of the company on a pro rata basis, have from time to time proved troublesome for private BC companies seeking to raise financing or complete other types of commercial transactions where share consideration is involved. Neither the CBCA nor the BC Business Corporations Act provides for such rights (except with respect to pre-existing corporations in the case of the BC Business Corporations Act).

Mike: Herb, let me interrupt here and ask what is meant by reporting company and reporting issuer - terms often heard.

Herb: The concept of "reporting issuer" is essentially a securities law concept; the Company Act contains a definition of "reporting company". The securities concept is broader because it applies to a broader range of entities than merely companies - e.g. limited partnerships, unit trusts, etc.

I should note that the CBCA was significantly amended in November 2001. The result of these amendments was to make the CBCA a truly modern corporate statute. For example, the somewhat troublesome financial assistance provision formerly contained in section 44 of the CBCA was repealed, and electronic communications between corporations and their shareholders were clearly made permissible.

As an aside, prior to the November 2001 amendments, one major disincentive for incorporating a closely-held corporation under the CBCA was the requirement for any corporation whose consolidated gross revenues exceeded \$10 million or whose consolidated gross assets exceeded \$5 million to prepare audited financial statements, and to file them with the director appointed under the CBCA. Such financial statements would be available for inspection by the public - including the corporation's employees and competitors. This requirement has been repealed under the CBCA. (There is no equivalent provision in the BC Company Act or in the BC Business Corporations Act.)

When the CBCA was amended, the residency requirements for directors was relaxed. In place of the old requirement that not less than a majority of the directors be resident in Canada, and subject to some limited exceptions, the CBCA now requires that not less than 25% of the directors be resident in Canada. As discussed above, the BC Business Corporations Act offers more flexibility in this regard, as it does not impose any residency requirements at all on directors.

In summary, both the CBCA and the new BC Business Corporations Act should prove to be very good platforms for modern businesses. Given the recent reforms at both the federal and provincial levels, it may well be that the choice between incorporation under the CBCA or the BC Business Corporations Act will essentially be driven by where the company will be carrying on business. Since a CBCA corporation will have to become extra-provincially registered in BC if it wishes to carry on business here, it may well make sense for a truly local business to incorporate under the BC Business Corporations Act.

Mike: Let's look at some of the major changes under the new Act. Starting with Governance, what does it mean for us? (e.g. directorship requirements, shareholders, etc)?

Herb: *As I indicated earlier, one of the most significant changes has been the removal of the residency requirements for directors. This should provide greater flexibility to companies seeking directors with specific skill-sets or industry experience.*

The Company Act requires that a company have a president and a secretary - who, except in a company with only one member, must be different persons – and that the president also be a director. These requirements have not been carried over to the Business Corporations Act, which simply provides that subject to the memorandum (of a pre-existing company) and articles of the company: the directors may appoint officers and specify their duties; any individual, including a director, may be appointed to any office; and two or more offices of the company may be held by the same individual. As is the case under the Company Act, a person who is not qualified to act as a director of a BC company may not serve as an officer.

I expect that there will be cases where a company would welcome the flexibility to appoint a president or chief executive officer who is not a director. For example, under the existing Company Act, a director would have to resign in order to accommodate a new president if the company has no room left to appoint any additional directors and it is desirable for the existing president to remain on the board.

Under the BC Business Corporations Act, it will be possible for the articles of a company to restrict the powers of the directors to manage or supervise the management of the company's business and affairs, and to transfer the restricted powers to one or more other persons. This could be used, for example, to transfer the management of the company to the shareholders. The person or persons to whom the management powers are transferred will, however, face all of the potential liabilities now faced by directors without necessarily being covered by the company's directors and officers insurance policy (if any).

The fiduciary obligations of directors and officers to act honestly and in good faith with a view to the best interests of the company, and the standard of care required of them, remain unchanged under the new Business Corporations Act. However, the Business Corporations Act contains a much more developed set of rules for dealing with conflicts of interest faced by directors and senior officers.

The requirement under the Company Act for court approval for indemnification by a company of a director or officer, or of a former director or officer, has been removed. Indemnification is not possible in some circumstances, including the case where proceedings are brought against the director or officer by or on behalf of the company or an associated corporation – for example, a derivative action. However, it will still be possible for the company, or the director or officer, to apply for a court order directing the company to provide indemnification.

Mike: So, could a company concoct a "creative" title such as Chief Yahoo instead of CEO?

Herb: *You are correct that under the new BC Business Corporations Act, a company could presumably pick unconventional titles for its officers, but this will likely lead to complications in the real world. Third parties, like banks providing loans and suppliers, like to know who - in terms of the company's internal pecking order - they are dealing with. Accordingly, I would recommend that companies pick titles which conform generally to the officers' respective roles.*

Mike: What about Corporate Finance? (e.g. share structures - par value vs non-par value, share capital, share pricing, etc.)

Herb: Unlike the Company Act, the Business Corporations Act will allow a company to have an unlimited number of authorized shares. A company may also make provision for separate classes and series of shares, as is the case under the Company Act. It will also be possible for the company to have shares with par value as well as shares without par value. This flexibility should help to facilitate certain financing and tax planning transactions.

Shares will still have to be fully paid for before they are issued, either in cash, property or past services; "property" does not include a note or other evidence of indebtedness. However, the prohibition contained in the Company Act against a company providing financial assistance in connection with a purchase or subscription for shares or convertible debt of the company has not been incorporated into the Business Corporations Act. Subject to certain exceptions, the company will be subject to certain disclosure requirements if it provides material financial assistance to any person in connection with the purchase of shares of the company or of an affiliate of the company. (These disclosure requirements will also apply if the company gives material financial assistance to: (a) a shareholder (including a beneficial owner of shares), director, officer or employee of the company or of an affiliate of the company; or (b) their respective associates.)

As I mentioned earlier, the pre-emptive rights (also commonly referred to as rights of first refusal) currently found in section 41 of the Company Act have not been carried over to the new Business Corporations Act, except in relation to pre-existing companies that are not public companies. This is a welcome change, since obtaining waivers of such pre-emptive rights in advance of a private placement financing transaction can be a time-consuming and cumbersome process. Moreover, the restrictions on waivers contained in section 41 of the Company Act can create traps for the unwary, which can prove very problematic later on since issuing any shares without complying with section 41 has the effect of invalidating the issuance of such shares

There is a similar right of first refusal in the Company Act which applies when a company is proposing to repurchase or redeem some of its outstanding shares. Subject to certain exceptions, the offer to purchase or the redemption must be made proportionately to all of the shareholders of the same class or series of shares. This provision has not been carried over into the Business Corporations Act, except in relation to pre-existing companies. This should provide more flexibility to companies seeking to restructure.

Mike: What about the Securities Act? Does this overlap with the Company Act? There have been some very major changes here, haven't there? What are some of these changes and how will they benefit technology companies (e.g. in the raising of capital).

Herb: As I indicated earlier, the British Columbia Securities Commission has released for comment a draft Securities Act and Rules which, if enacted, will introduce significant reforms to securities regulation in this Province. The draft legislation will form the cornerstone of the BC Model of securities regulation, which will put greater emphasis on continuous disclosure of material information by reporting issuers and regulation of secondary market trading activity, as well as a more streamlined, "principles-based" approach to regulation of market participants such as registered securities dealers and advisers. There will be fewer detailed requirements for market participants, but they will be required to comply with a code of conduct with investor protection as its focus.

The envisioned changes will be accompanied by increased enforcement powers for Commission staff. In this regard, I should note that the duties of directors and officers of companies (and their counterparts in other types of issuers) are contemplated to be included in the securities legislation, with the result that breach of the duties could be subject to enforcement action, in addition to being actionable in a court action under parallel corporate legislation.

The BC Model could form a topic unto itself, and will undoubtedly be subject to further changes. Accordingly, I propose to focus the rest of my discussion on recent changes to the capital raising regime here in British Columbia:

Effective April 4, 2002 and March 30, 2002, respectively, the British Columbia and Alberta Securities Commissions adopted Multilateral Instrument 45-103 which significantly changed the private placement regime in both provinces. The changes are centered around four new and expanded exemptions from the registration and prospectus requirements.

Private Issuer Exemption

MI 45-103 provides for an enhanced private issuer exemption from the registration and prospectus requirements. Previously, in order to have qualified as a "private issuer," an issuer had to meet several conditions, including the requirement that it must not have distributed any securities to the public. Given the broad meaning ascribed to the word "public" by regulators and in the case law, this effectively limited private issuers to a very narrow group of potential investors, each of whom were generally required to have close "bonds of association" with one or more principals of the issuer.

A private issuer can now issue securities without a prospectus not only to those with close bonds of association with a principal of the issuer, but also to "accredited investors". As I will explain later, "accredited investors" can include a person who would be a member of the "public".

Family, Friends and Business Associates Exemption

MI 45-103 provides for registration and prospectus exemptions in respect of a trade in a security if the purchaser is: (a) a director, senior officer or control person of the issuer, or of an affiliate of the issuer; (b) a spouse, parent, grandparent, brother, sister or child of a director, senior officer or control person of the issuer, or of an affiliate of the issuer; (c) a close personal friend of a director, senior officer or control person of the issuer, or of an affiliate of the issuer; (d) a close business associate of a director, senior officer or control person of the issuer, or of an affiliate of the issuer, or (e) a person or company that is wholly-owned by any combination of the foregoing categories of persons or companies.

The new family, friends and business associates exemption bears similarities certain prospectus exemptions available formerly available in British Columbia, but is far more expansive in that: (a) it is available not only to TSX Venture Exchange issuers, but all issuers and their shareholders; (b) it applies to trades to a greater class of qualifying purchasers; and (c) it is not subject to limitations on the number of purchasers and aggregate purchase price.

Offering Memorandum Exemption

MI 45-103 provides registration and prospectus exemptions with respect to a trade by an issuer in a security if the issuer delivers an offering memorandum to the purchaser and obtains a straightforward risk acknowledgement from the purchaser in prescribed form.

In Alberta, unlike British Columbia, the offering memorandum exemption is subject to a cap on a single purchaser's investment of not more than \$10,000 unless the purchaser qualifies as an "eligible investor". As defined in MI 45-103, an eligible investor will include a person or company who: (a) has net assets, alone or with a spouse, in excess of \$400,000, net income; (b) has net income before taxes in excess of \$75,000 in each of the two most recent years and who expects to exceed that income level in the current year; (c) has net income before taxes combined with a spouse in excess of \$125,000 in each of the two most recent years and who reasonably expects to exceed that income level in the current year; or (d) has obtained advice regarding the suitability of the investment from an investment dealer, securities dealer or their equivalent registered under applicable Canadian securities legislation.

The prescribed forms of offering memorandum are relatively simple disclosure documents, compared to the previous form of offering memorandum prescribed under the BC Rules. The offering memorandum must contain a certificate that states, "This offering memorandum does not contain a misrepresentation." The certificate must be signed not only by the issuer's chief executive officer and chief financial officer, but also on behalf of the directors of the issuer by: (a) any two directors (other than any directors signing the certificate in their respective capacities as CEO or CFO), or (b) all of the directors and each of the promoters of the issuer.

In contrast to the previous form of offering memorandum prescribed under the BC Rules, there is a positive obligation on the issuer to give potential purchasers an update to the offering memorandum if a material change occurs after initial delivery of the offering memorandum and the closing of the offering. The update must include a newly signed and dated certificate.

Each purchaser now has the right, which must be described in the offering memorandum, to cancel the purchase agreement by written notice to be delivered not later than midnight on the second business day after the purchaser signs the agreement. During this period, the issuer must arrange for any subscription proceeds to be held in trust on behalf of the purchaser. If the offering memorandum contains a misrepresentation, the purchaser can sue the issuer as well as any director of the issuer at the date of the offering memorandum and any other person who signed the offering memorandum.

Assuming that the issuer is prepared to bear the time and cost of preparing an offering memorandum, it greatly increases the universe of potential investors in the issuer. It should be borne in mind, however, that an offering of securities must comply also with the securities laws of the jurisdiction in which the purchaser of the securities is resident, if he or she lives outside of British Columbia. Many other jurisdictions – most notably Ontario – have much more restrictive private placement rules than BC.

Accredited Investor Exemption

In similar fashion to Ontario Securities Commission Rule 45-501, MI 45-103 permits an exempt distribution to "Accredited Investors", which includes: certain financial institutions; governments; municipalities; high net worth or high income individuals; a person or company registered under Canadian securities legislation as an adviser or dealer (other than a limited market dealer registered under the Securities Act (Ontario)); a regulated pension fund; a registered charity; a company, limited partnership, limited liability partnership, trust or estate other than a mutual fund or non-redeemable investment fund, that had net assets of at least \$5,000,000 as reflected in its most recently prepared financial statements; certain types of mutual funds or non-redeemable investment funds; and a person or company in respect of which all of the legal and beneficial owners of direct and indirect interests are person or companies that are accredited investors.

The high net worth or high income individual accredited investor categories are limited to: a) an individual who beneficially owns, or who together with a spouse beneficially own, financial assets (i.e., cash, securities or any contract of insurance or deposit or evidence thereof that is not a security) having an aggregate realizable value that, before taxes but net of any related liabilities, exceeds \$1,000,000; or b) an individual whose net income before taxes exceed \$200,000 in each of the two most recent years or whose net income before taxes combined with that of a spouse exceeded \$300,000 in each of those years and who, in either case, has a reasonable expectation of exceeding the same net income level in the current year.

Certain investors - particularly individuals - who would otherwise qualify for the \$97,000 private placement exemption under British Columbia and Alberta securities legislation may not qualify as an "accredited investor". Accordingly, the BC Securities Commission has indicated that the \$97,000 private placement exemption is being retained indefinitely.

Mike: I'm involved with a number of startups at the moment. Most of these are confused as to what they can or cannot do, i.e. do they go with the current rules or start operating under the new rules? For example, one company is worried about getting more than 50 shareholders. Why should they be concerned about this?

Herb: Under MI 45-103 - and under BC securities legislation that preceded it - a "private issuer" must have not more than 50 shareholders (not including shareholders who are employees or former employees) and its shares must be subject to restrictions on transfer. More significantly, the issuer must not have distributed any securities to the "public," other than accredited investors. Thus, even if a issuer has less than 50 shareholders, it (and its shareholders) will cease to qualify for the private issuer exemption if it issues any securities to a member of the public other than an accredited issuer. Thereafter, all sales of the issuer's securities will have to be qualified by a prospectus or effected pursuant to other, more specific, prospectus exemptions. Generally, use of these prospectus exemptions will require filings with the Commission.

Mike: Something that's not well understood is the matter of being a "reporting issuer" vs being a "public company". Can you shed some light on this? Have these definitions changed under the new rules?

Herb: For the purposes of the BC Securities Act, a "reporting issuer" can best be understood as an issuer that has become subject to the continuous disclosure requirements of BC securities legislation, generally by having had a prospectus receipted by the Commission. The insiders of a reporting issuer are also subject to

various regulatory requirements, including the requirement to file insider reports. Reporting issuer status in British Columbia is a prerequisite for having freely trading stock in British Columbia: The rationale for this is to ensure that investors in the issuer's publicly traded securities will have ready access to publicly available financial and other information about the company and its affairs, in order to permit them to make a reasoned investment decision – i.e. the decision to buy or sell the securities. Thus, all public companies that are listed on the TSX Venture Exchange must be reporting issuers under BC securities legislation (as well as in Alberta).

Securities issued to a resident of British Columbia under a prospectus exemption are subject to a hold period under Multilateral Instrument 45-102 (which may be substantially amended in the near future), as adopted by the BC Securities Commission. If the issuer of the security is not a reporting issuer in any Canadian jurisdiction, the hold period will be indefinite, and the security holder will essentially have to find a prospectus exemption in order to trade the security. On the other hand, the security will be subject to a 12-month hold period (or if the issuer meets certain requirements for a "Qualifying Issuer," a four-month hold period), even if the issuer is not a reporting issuer in BC, provided that the issuer:

- ? is a reporting issuer in Alberta, Manitoba, Nova Scotia, Ontario, Quebec or Saskatchewan;
- ? has been subject to continuous disclosure requirements in one of the foregoing participating jurisdictions for at least 12 months (or, if a Qualifying Issuer, for at least four months); and
- ? files its continuous disclosure filings electronically on the System for Electronic Document Analysis and Retrieval (SEDAR) maintained by CDS Inc. on behalf of the Canadian Securities Administrators.

A public company is colloquially understood to mean any company whose securities are publicly traded, wherever the market for those securities might be. It will be seen that a company can be a public company without being a reporting issuer in British Columbia. For example, a public company whose shares trade on the New York Stock Exchange will not necessarily be a reporting issuer in British Columbia or in any other Canadian jurisdiction.

"Public company" is specifically defined in the new Business Corporations Act to mean a reporting issuer (as defined in the BC Securities Act), a "reporting issuer equivalent" (that is, a corporation that is a reporting issuer or the equivalent of a reporting issuer in any other Canadian jurisdiction), a company that has registered its securities in the United States under the Securities Exchange Act of 1934, or a company that has any of its securities traded on a securities exchange or quotation system. The definition is important for certain purposes of the Business Corporations Act. For example, consistent with the existing Company Act requirements for "reporting companies," a public company must have a minimum of three directors, and an audit committee constituted by at least three directors (a majority of whom must be not be officers or employees of the company or of an affiliate of the company).

Mike: Have there been any attempts to move us into the electronic age? i.e. are there any changes pertaining to electronic filings or reporting that we should be aware of?

Herb: Since 1997, reporting issuers in Canada have been required to file their continuous disclosure filings - such as annual and quarterly financial statements, material change reports, and proxy solicitation materials – electronically via the SEDAR system, which is the conceptual equivalent of the US Securities and Exchange Commission's EDGAR system. Since June of this year, insiders of reporting issuers have been required to file their insider reports electronically via the System for Electronic Disclosure by Insiders (SEDI).

The changes to the resale regime introduced under MI 45-102, discussed earlier, represent a clear acknowledgement by the Canadian of the wide accessibility of electronic regulatory filings: The fact that an issuer is not a reporting issuer in the jurisdiction of residence of a selling securityholder is no longer a bar to the aging of an applicable hold period, so long as the issuer is a reporting issuer in another qualifying Canadian jurisdiction and a SEDAR filer, since it was recognized that a potential purchaser of those securities could instantly access a reporting issuer's electronic regulatory filings.

The Canadian Securities Administrators have also published National Instrument 11-201, wherein they prescribe certain procedures for electronic delivery of documents – for example, proxy solicitation materials

- that would satisfy certain delivery requirements contained in securities legislation. However, the BC Company Act generally requires that management of a company with more than 15 shareholders send an information circular to the shareholders by prepaid mail, in connection with a proxy solicitation.

The CBCA also requires a management information circular to be furnished to shareholders in connection with a proxy solicitation, unless the corporation is not a "distributing" (i.e., a public) corporation and has 50 shareholders or less. However, when the CBCA was amended in November 2001, provision was made for electronic delivery of documents, with the shareholder's consent. The new Business Corporations Act goes one better by not speaking to proxy solicitation, leaving this to be covered by securities legislation. Accordingly, it should be possible for many public companies to save printing costs in connection with shareholder meetings.

Both the CBCA and the Business Corporations Act also permit both director and shareholder meetings to be held electronically or telephonically.

Finally, the Registrar of Companies is ramping up a new electronic filing system to be known as Corporate Online, and many filings under the Business Corporations Act will be required to be filed on Corporate Online.

Mike: Similarly, do the changes provide the public with any better access to corporate information - especially pertaining to non-reporting companies? On the other hand, I also understand that reporting companies no longer need to disclose who their investors are (when doing financings) - is this indeed, true?

Herb: I understand that the electronic Corporate Online service will be publicly accessible, which should improve the transparency of corporate filings. However, some significant documents, such as corporate articles and documentation with respect to amalgamations and corporate alterations, will no longer be required to be filed; in their place, companies will be required to file one or two-page notices.

Like the Company Act, the Business Corporations Act prescribes certain corporate records to be kept at its records office, including the company's articles, and provides for public access to some of those records. Like the Company Act, the Business Corporations Act provides that minutes of directors' meetings and directors' consent resolutions, and proceedings of committees of directors, are available for inspection only by directors and, in certain circumstances, former directors. If the corporation is not a public company, a broader range of records are protected from public access, including minutes and consent resolutions of the shareholders and financial statements.

Based on a preliminary review of the provisions of the Business Corporations Act, apart from electronic accessibility to a broader range of corporate filings via Corporate Online, I don't believe that the public will be afforded markedly better access to the corporate records of a non-public company than was the case under the Company Act.

Both reporting and non-reporting issuers are generally required to file reports of exempt distribution in connection with private placements. The notable exception is private placements effected under the private issuer exemption. The report of exempt distribution is filed with the Commission on Form 45-103F4, the schedule to which still requires disclosure of each investor's name and residential address. However, the schedule does not form part of the public record of the company maintained by the Commission, and should therefore be protected from public scrutiny.

Mike: Well, Herb, I want to thank you for your detailed comments on this subject. I'm hopeful that all these changes will, on balance, be good for tech companies and your answers would indicate this to be the case. On the negative side, though, it looks like all companies will have to go through a transition stage that will cost them some time and expense and knowing some of the details as you've explained may mitigate that pain somewhat.

Herb Ono is a partner with **Clark, Wilson's Corporate Finance/Securities Law Group** (website: www.cwilson.com). The Group assists companies listed on Canadian and U.S. stock exchanges and over-the-counter trading markets, including NASDAQ, Amex, TSX and the OTC Bulletin Board. With lawyers qualified to practice in various Canadian and United States jurisdictions, the Group has experience in

Canadian, U.S. and cross-border transactions; U.S. and Canadian regulatory filing and SEC registrations; reverse takeovers; and mergers and acquisitions. If you have any questions about this article or any securities matter, please feel free to contact Herb at 604.643.3140; email: hio@cwilson.com.

VEF UPDATE

The [Vancouver Enterprise Forum](#) is back in action this Fall - starting Tues Sept 30th, with its early stage financing forum. Two seasoned technology entrepreneurs and financiers, **Michael Brown** and **Glenn Ballman**, will talk frankly about how to finance and build an early-stage technology venture. In the sound-bytes portion of the evening, you'll hear Basil Peters and yours truly espouse the virtues of their new early stage funds - the **BC Advantage Fund** and the **WUTIF Fund**.

A complete calendar of local technology events can be found on [T-Net's Events page](#).

Footnotes

If you're an entrepreneur looking for a place to get your company started; there's some great space available at Harbour Centre downtown. The **New Media Innovation Centre** (NewMIC) and **SFU's TIME Centre** have teamed up to provide not only office space but also access to various resources, e.g. tech advisors, access to capital, mentors, etc. Worried about the high cost of being downtown? Well, not to worry - they'll even reduce the fees and take some payment in the form of equity. Check www.sfu.ca/time for contact info.

A reminder: SFU's TIME Centre is open for business - business folks, that is. TIME is an acronym for **Technology, Innovation, Management, and Entrepreneurship**. TIME supports the growth and development of the tech industry in B.C. TIME features a "BusinessCentre" (looks like an airport business lounge) which is open to technology entrepreneurs and business people to use as a drop-in downtown office facility. Need to plug-in? Make some calls? Do some work? Hold a meeting? There are some great facilities for holding your company's AGM. Why hang out at MacDonald's when you can work productively at the TIME Centre? Drop by and check it out! It is located at SFU's downtown campus at 515 West Hastings St.

Michael Volker, a technology entrepreneur, is Director of the University/Industry [Liaison Office](#) at Simon Fraser University, Chair of the B.C. Advanced Systems Institute, Chair of the [Vancouver Angel Network](#) and past Chair of the [Vancouver Enterprise Forum](#). He owns shares in many of the companies he writes about. Copyright, 2003.

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