

COMPANY LAW

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Chapter 10

Statutory Amalgamations¹

For further information on this topic, see Chapter 11 of the *British Columbia Company Law Practice Manual*, 2nd edition (Vancouver: CLE).

All legislative sections cited in this chapter and all references to the “BCA” are to the *Business Corporations Act*, S.B.C. 2002, c. 57, as amended, unless otherwise stated. All references to “Reg.” are to provisions of Regulation 65/2004, as amended.

[§10.01] Amalgamations

The term “amalgamation” is often used, in a loose, non-legal sense, to refer to a coming together or merger of two or more corporations. This merger can be accomplished in various ways, including a purchase by one corporation of the shares of another, a purchase by one corporation of the assets of another, or a dissolution or liquidation of one corporation into its parent, and by compulsory acquisitions, arrangements and statutory amalgamations, pursuant to the provisions of a particular corporate law statute.

The essence of a statutory amalgamation under the *BCA* is that two or more corporations amalgamate and continue as one amalgamated corporation with all the assets and liabilities of the amalgamating corporations. For legal purposes, it is generally recognized that the amalgamating corporations do not cease to exist, but continue and that the amalgamated corporation is not a new corporation.

The *BCA* deals with several kinds of amalgamations. One kind is where a British Columbia company amalgamates with one or more foreign corporations, with the resulting amalgamated corporation being a foreign corporation (see §10.13).

The other kinds of amalgamations all result in an amalgamated company that is a British Columbia company (see the definition of “company” in s. 1(1)).

These other kinds of amalgamation can be divided into what are commonly called “long-form amalgamations” and “short-form amalgamations”. Long-form amalgamations require amalgamation agreements and shareholder approvals, and give rise to dissent rights; short-form amalgamations do not.

There are two kinds of short-form amalgamations, namely, vertical (between a holding corporation and its wholly owned subsidiaries) and horizontal (between wholly owned subsidiaries of the same holding corporation).

Another distinction is between what are loosely called “court approved amalgamations” and “non-court approved amalgamations”. Both long-form amalgamations and short-form amalgamations can be either court approved amalgamations or non-court approved amalgamations.

[§10.02] Amalgamating Corporations

Section 269 provides that two or more companies may amalgamate, and that one or more companies may amalgamate with one or more foreign corporations. In either case, under s. 269, the resulting amalgamated company must be a company. But note that the amalgamating corporations can be either companies (companies recognized under the *BCA* or a former *Companies Act* which have not ceased to be companies; see s. 1(1)) or foreign corporations (essentially, non-British Columbia corporations; see s. 1(1)), provided that at least one of the amalgamating corporations is a company.

If not all of the corporations intending to amalgamate are British Columbia companies, those that are not, which cannot get the necessary authorization to amalgamate directly from their home jurisdiction, must first continue into British Columbia and then amalgamate.

[§10.03] Name of Amalgamated Company

In the case of long form amalgamations, the name of the amalgamated company may be the name of one of the amalgamating companies (s. 275(2)(b)(i)(A)), in which case there is no need to reserve the name.

If the name of the amalgamated company will not be the same as that of one of the amalgamating companies, it will be necessary to reserve the new name (s. 275(2)(b)(i)(B)). Section 22(2) permits the registrar to reserve the name longer than the normal 56 days and this probably would be done in the case of an amalgamation, if so requested by an amalgamating company.

If neither of the above applies, then the name of the amalgamated company will be the name created by adding “B.C. Ltd.” after its incorporation (amalgamation) number (s. 275(2)(b)(i)(C)).

In the case of short-form amalgamations, the name of the amalgamated company will be that of the holding company (in a vertical short-form amalgamation) or of the amalgamating company whose shares are not cancelled (in a horizontal short-form amalgamation).

¹ **John O.E. Lundell**, QC kindly contributed this chapter in January 2004. The author updated the chapter in November 2004 and again in November 2005.

[§10.04] Notice of Articles and Articles of Amalgamated Company

The notice of articles of the amalgamated company in a long-form amalgamation will be in the amalgamation application (ss. 275(2)(b)(ii) and 282(1)(b)(i)). The notice of articles must contain the required information set out in s. 11.

The first directors of the amalgamated company will be listed in the notice of articles.

The authorized share structure of the amalgamated company should be at least large enough and with the necessary classes (and series) of shares to permit exchanges of shares on the amalgamation.

A form of amalgamation application containing the information that will be in the (electronic) amalgamation application that will be filed with the registrar, and therefore including the notice of articles of the amalgamated company, must be attached to the amalgamation agreement (s. 270(2)(d)(ii)). Consequently, it will have to be prepared before the meeting (or resolution in writing) to approve the amalgamation agreement.

In a vertical short-form amalgamation the notice of articles of the amalgamated company is the notice of articles of the amalgamating holding company (ss. 273(1)(d)(ii), 275(2)(c)(ii) and 282(1)(b)(ii)) and in a horizontal short-form amalgamation it is the notice of articles of the amalgamating company whose shares are not cancelled (the “primary company”) (ss. 274(1)(c)(ii), 275(2)(d)(ii) and 282(1)(b)(iii)).

The articles of the amalgamated company in a long form amalgamation must also be attached to the amalgamation agreement and must be signed by at least one of the first directors of the amalgamated company (ss. 270(2)(d)(i) and 282(1)(c)(i)). The articles must comply with s. 12(1) and (2) (s. 270(2)(d)(i)).

If the proposed articles for the amalgamated company are attached to the amalgamation agreement and signed by at least one of the first directors of the amalgamated company, those are the articles for the amalgamated company (s. 282(1)(c)(i)).

On the other hand, if the proposed articles are not attached to the amalgamation agreement, or if they are so attached but are not signed by at least one of the first directors, the articles of the amalgamated company will be the articles set out in Table 1 (plus, if any of the amalgamating corporations is a pre-existing reporting company, the Statutory Reporting Company Provisions) (s. 282(1)(c)(ii)).

In the case of a vertical short-form amalgamation, the articles of the amalgamated company are those of the amalgamating holding company (s. 282(1)(c)(iii)) and in

the case of a horizontal short-form amalgamation, the articles of the primary company (s. 282(1)(c)(iv)).

[§10.05] Amalgamation Agreement (Long Form Amalgamation)

Unless the amalgamation is a short-form amalgamation, an amalgamation agreement between all the amalgamating corporations is required (s. 270(1)(a)). The amalgamation agreement must set out the terms and conditions of the amalgamation (s. 270(2)).

1. General Provisions

Among the common provisions in an amalgamation agreement is one whereby the amalgamating corporations agree to amalgamate under the provisions of the *BCA* and to continue as one company under the terms and conditions set out in the agreement.

Another provision states the name of the amalgamated company. If the name is not the same as that of one of the amalgamating companies, the agreement should recite that the name has been reserved, or that the name will be the amalgamated company’s incorporation number followed by “B.C. Ltd.”.

Another states that the notice of articles (or the information contained in it; see §10.04, fourth para.) and articles (signed by a director, as mentioned) of the amalgamated company shall be in the forms set out in the schedules to the agreement (note that the notice of articles will be part of the amalgamation application attached to the agreement). See s. 270 (2)(d).

Another could provide that rights of creditors against the property, rights and assets of the amalgamating corporations and all liens on their property, rights and assets will be unimpaired by the amalgamation and, in particular, that all debts, liabilities and obligations of each of the amalgamating corporations will attach to and be assumed by the amalgamated company and can be enforced against it.

If the amalgamation is to be effective as of a specific date, or date and time, then that date, or date and time, could be put in the amalgamation agreement. Often there is a provision allowing the directors of the amalgamating companies to fix a later date and time, in case the amalgamation schedule is slipping.

2. Mandatory Terms

Section 270(2) sets out a few provisions that must be contained in the amalgamation agreement.

The first is the full names and prescribed addresses of the proposed first directors of the amalgamated company (s. 270(2)(a)). This information will also be in the form of notice of articles in the amalgamation application attached to the agreement. Consents to be directors should be obtained from these individuals.

The amalgamation agreement must set out how the issued shares of the amalgamating corporations will be exchanged on the amalgamation (s. 270(2)(b)).

Finally, the amalgamation agreement must contain “any other details necessary to perfect the amalgamation and to provide for the subsequent management and operation of the amalgamated company” (s. 270(2)(c)). These details can cover a multitude of items, and would normally include:

- the names and offices of the first officers of the amalgamated company;
- a provision permitting the directors or shareholders of any of the amalgamating companies to assent to any alteration or modification of the amalgamation agreement or to pull out of the amalgamation before the amalgamation is effective, or both;
- if applicable, a provision stating that the amalgamating companies will apply to the court to obtain an order approving the amalgamation; and
- the mechanics of cancelling and substituting share certificates on the share exchange.

The agreement could specify the locations of the registered office and records office of the amalgamated company (although this information is in the attached form of notice of articles).

A common provision states that all the properties, rights and interests of each of the amalgamating corporations continue to be the properties, rights and interests of the amalgamated company, without requiring any deeds, transfers or conveyances.

If the amalgamation is arm’s length, there could be extensive conditions in the amalgamation agreement (which must be satisfied before applying to the court, if applicable, and before submitting the amalgamation application to the registrar for filing), not unlike those found in an arm’s length share purchase agreement (for example, approval of securities regulatory authorities, no deterioration in the financial position of any of the amalgamating corporations and so on).

3. Exchange and Cancellation of Shares

Section 270(2)(b) requires that the amalgamation agreement specify how the issued shares of each amalgamating corporation will be exchanged for one or more of money, securities of the amalgamated company, or securities of any other corporation.

(a) Shares held by other amalgamating corporations

Note that s. 270(3) provides that if shares of one of the amalgamating corporations are held by, or on behalf of, another of the amalgamating corporations, the amalgamation agreement must provide for the cancellation of those shares on the amalgamation without any repayment of capital in respect of them. No provision may be made in the amalgamation agreement for the exchange of those shares for money or for securities of any corporation.

(b) Exchange of shares

If wholly owned subsidiaries are amalgamating with their parent corporation, the exchange of shares on the amalgamation is quite simple, in that each old share of the parent amalgamating corporation can be exchanged for one identical share of the amalgamated company (and the shares of the subsidiaries are cancelled). Similarly, if wholly owned subsidiary sister corporations are amalgamating, there can be a similar exchange of shares, one for one, for identical shares of the amalgamated company.

However, with the introduction of short-form amalgamations in the *BCA*, most amalgamations of the type mentioned above will follow the short-form route, without an amalgamation agreement.

When different amalgamating corporations have different shareholders, especially if they are at arm’s length, it becomes necessary to work out the share exchange ratios as between the shareholders of the amalgamating corporations. The first step is to determine the value of each corporation, which will involve professionals and business people reviewing the values of assets, the amounts of liabilities, business prospects, earnings, tax matters and so on. After the values of the amalgamating corporations between themselves are determined, the number of shares of the amalgamated company to be exchanged for shares of each amalgamating corporation can be determined. This summary is oversimplified and other factors could very well be involved,

for example, where there are different classes of shares with different rights and restrictions.

In these situations, it is important that the information circular or other material sent to shareholders for the meeting to approve the amalgamation be complete, particularly when this material explains how the share exchange ratios were determined, and such material must give sufficient information to enable a shareholder to decide whether the shareholder agrees with that determination.

(c) Capital and issue of shares

Care should be taken, for tax reasons, with respect to the paid-up capital and issue of shares of the amalgamated corporation.

Section 73 provides that if shares that are exchanged under an amalgamation agreement are fully paid, the capital of the amalgamated company with respect to the shares that are issued on the exchange is, at that time, the amount that was the capital of the amalgamating corporation with respect to the shares that were exchanged. Note also s. 65 (1)(b)(ii) and (3) with respect to the issue of shares.

(d) Exchange for securities

Shares of an amalgamating corporation can be exchanged not only for shares of the amalgamated company, but also for other securities of the amalgamated company (s. 270 (2)(b)(i)). The word “security” is not defined in the *BCA*, but it is defined in the *Interpretation Act* (s. 29) to include a security as defined in the *Securities Act*, which is extremely wide.

The comments above about valuations will apply in an exchange for securities as well, although with different considerations, depending on what the securities of the amalgamated company are.

(e) Exchange for money

Shares of an amalgamating corporation can also be exchanged for money (s. 270(2)(b)(iii)). Again, there will be the problem of determining the value of the shares being exchanged for money.

(f) Three-cornered amalgamations

The *BCA* provides for three-cornered amalgamations, whereby the shares of an amalgamating corporation can be exchanged for securities (including shares) of a corporation other than the amalgamated

company (s. 270(2)(b)(ii)). The above considerations will also apply here, with the added problem of determining the value of the other corporation and its shares (or other securities).

(g) General

Shares of an amalgamating corporation can be exchanged for any one or more of the above three things (shares or other securities of the amalgamated company, shares or other securities of some other corporation, and money) (s. 270(2)(b)).

4. Attached Articles and Amalgamation Application

The amalgamation agreement must have attached to it a copy of the articles for the amalgamated company (s. 270(2)(d)(i)). These articles must comply with s. 12(1) and (2) and must be signed by one or more of the individuals who are to be the first directors of the amalgamated company.

In addition, the amalgamation application (including the notice of articles for the amalgamated company) to be filed with the registrar with respect to the amalgamation (which will be in electronic form) must contain the information that is in the form of amalgamation application (including the notice of articles) attached to the amalgamation agreement (which will be in paper form) (s. 270(2)(d)(ii)).

[§10.06] Adoption of Amalgamation Agreement (Long Form Amalgamations)

1. Methods of Adoption

The shareholders of each amalgamating company must adopt the amalgamation agreement (s. 270(1)(b)).

Section 271(1)(a) provides that an amalgamation agreement can be adopted by the shareholders by unanimous resolution, that is, a resolution consented to in writing by all the shareholders entitled to vote on it, and in this case, it is all the shareholders of the company, whether or not their shares otherwise carry the right to vote.

If the unanimous resolution cannot be obtained, then the shareholders can adopt the amalgamation agreement at a meeting (s. 271(1)(b)).

At this meeting, if all the issued shares of the company carry the right to vote at general meetings, the adoption of the amalgamation agreement requires a special resolution (s. 271(6)(a)(i)).

If there are issued shares of the company which do not carry the right to vote at general meetings, then the amalgamation agreement must be adopted at a meeting of all the shareholders of the company, whether or not their shares otherwise carry the right to vote at general meetings (s. 271(7)). In this case, the amalgamation agreement must be adopted by a resolution passed by at least a special majority of the votes cast at the meeting (s. 271(6)(a)(ii)).

The one exception, where a separate vote of a class or series of shares is also required, is when the rights or special rights and restrictions attached to the shares of that class or series would be prejudiced or interfered with by the adoption of the amalgamation agreement. In this case, the holders of the shares of that class or series must approve adoption of the amalgamation agreement by a special separate resolution (s. 271(6)(b)).

2. Requirements for Meetings

If there is to be a meeting of shareholders to adopt an amalgamation agreement, there is an express requirement that the amalgamating company send notice of the meeting to each shareholder at least the prescribed number of days before the date of the meeting (s. 271(2) and see Reg. s. 3(1)).

There is a choice with respect to the type of information relating to the amalgamation agreement which is to be provided to the shareholders with a notice of meeting. The notice can be accompanied by:

- a copy of the amalgamation agreement, or
- a summary of the amalgamation agreement in sufficient detail to permit the shareholders to form a reasoned judgment concerning the matter, or
- a notification that each shareholder may, on request, obtain a copy of the amalgamation agreement before the meeting (s. 271(3)).

3. General

The above comments all apply when the amalgamating company is a company (a company recognized under the *BCA* or a former *Companies Act* (s. 1(1)). When an amalgamating foreign corporation is involved (that is, one which is authorized by its home jurisdiction to carry out a transborder amalgamation with a British Columbia company without first continuing into British Columbia) the adoption of the amalgamation agreement and approval of the amalgamation will be governed by the requirements of the foreign corporation's jurisdiction (for example, the equivalent of s. 284).

As the amalgamation application filing is done electronically and the authorization from the exporting jurisdiction will be in paper form, the latter should be filed with the registrar before filing the amalgamation application.

[§10.07] Short-Form Amalgamations

There are two kinds of short-form amalgamations, namely, vertical short-form amalgamations and horizontal short-form amalgamations.

Short-form amalgamations do not require amalgamation agreements. Nor do they require special resolutions (although that is an option), unanimous resolutions or resolutions passed by a special majority; they can be approved by directors' resolutions (see ss. 273(1)(c) and 274(1)(b)). Finally, they do not give rise to a right of dissent (see s. 272).

1. Vertical Short-Form Amalgamations

Section 273(1) provides that a holding corporation (see s. 2(4)) that is a company and one or more of its subsidiary corporations (see s. 2(2)) may amalgamate and continue as one company without complying with the long form amalgamation requirements of an amalgamation agreement and shareholder adoption of it.

Note that a subsidiary of a holding corporation can be a subsidiary of another corporation which itself is a subsidiary of a holding corporation (s. 2(2)(b)). However, also note that one or more of the amalgamating corporations must hold all the issued shares of each amalgamating corporation (s. 273(1)(b)).

Note that, unlike the holding corporation, the subsidiaries do not have to be companies, but can be corporations (s. 273 (1)), provided that they are foreign corporations (see s. 1(1)); see s. 269(b), which permits only amalgamations involving companies and foreign corporations.

The amalgamation must be approved by a special resolution or a directors' resolution of the holding corporation (s. 273(1)(c)). There are no resolutions required for the amalgamating subsidiary corporations.

The resolution of the holding corporation, in addition to approving the amalgamation generally under s. 273(1)(c), must contain three additional provisions:

- (1) that the shares of each amalgamating subsidiary corporation be cancelled on the amalgamation without any repayment of capital in respect of them (s. 273(1)(d)(i)).

- (2) that the amalgamated company have as its notice of articles and articles, the notice of articles and articles of the holding corporation (s. 273(1)(d)(ii)); and
- (3) that the amalgamated company refrain from issuing any securities in connection with the amalgamation (s. 273(1)(d)(iii)).

The capital of the amalgamated company is the same as the capital of the amalgamating holding corporation (s. 273(2)).

The net result is that, after the amalgamation, the amalgamated company is virtually identical to the amalgamating holding corporation, with the same name, directors (but not officers), registered and records offices, authorized share structure and shareholders, and the same notice of articles and articles. It is recommended that the directors of the holding corporation sign consents to act as directors of the amalgamated company.

If the holding corporation is a pre-existing company, it must do a transition rollover before the amalgamation (s. 273(1)(a)).

2. Horizontal Short-Form Amalgamations

Section 274(1) provides that two or more companies that are subsidiaries of the same holding corporation may amalgamate and continue as one company without complying with the requirements of an amalgamation agreement and long form amalgamation shareholder adoption of it.

Note that a subsidiary of a holding corporation can be a subsidiary of another corporation which itself is a subsidiary of a holding corporation (s. 2(2)(b)). However, also note that the holding corporation or another amalgamating company must hold all the issued shares of each amalgamating company (s. 274(1)(a)) and that all the shares of the amalgamating company whose shares are not being cancelled on the amalgamation (the “primary company”) must be held by the holding corporation (s. 274(2)).

If the primary company is a pre-existing company, it must do a transition rollover before the amalgamation (s. 274(1)(d)).

Note that all the amalgamating subsidiaries must be companies; in contrast with a vertical short-form amalgamation, none can be foreign corporations.

A horizontal short-form amalgamation must be approved by a special resolution or a directors’ resolution of each of the amalgamating companies (s. 274(1)(b)).

The resolutions of the amalgamating companies, while approving the amalgamation generally under s. 274(1)(b), must contain two additional provisions:

- (1) that the shares of all but the primary company be cancelled on the amalgamation without any repayment of capital in respect of those shares (s. 274(1)(c)(i)); and
- (2) that the amalgamated company have, as its notice of articles and articles, the notice of articles and articles of the primary company (s. 274(1)(c)(ii)).

The net result is that, after the amalgamation, the amalgamated company is virtually identical to the primary company, with the same name, directors (but not officers), registered and records offices, authorized share structure and shareholders and the same notice of articles and articles. It is recommended that the directors of the primary company sign consents to act as directors of the amalgamated company.

Note that on the amalgamation the capital of the other amalgamating companies is added to the capital of the primary company, other than any portion that is attributable to shares held by any other amalgamating company (s. 274(3)).

[§10.08] Non-court Approved Amalgamations

It is possible to carry out an amalgamation without having to obtain a court order to approve the amalgamation (s. 277(1)). However, a court approved amalgamation remains an option (see §10.09).

To carry out an amalgamation without court approval, an affidavit of an officer or director of each of the amalgamating companies must be obtained and deposited in the records office of the applicable amalgamating company (s. 277(1)).

Note that the word “company” is used, and if one of the amalgamating corporations is a foreign corporation, no such affidavit is required under the *BCA* with respect to it (but there might be some requirement in the foreign corporation’s jurisdiction; for example, the equivalent of s. 284(7)(a)).

The first part of the affidavit relates to the type of amalgamation. The affidavit must state that the particular amalgamating company of which the individual making the affidavit is a director or officer either has entered into an amalgamation agreement with the other amalgamating corporations and that the amalgamation agreement complies with s. 270 and has been adopted in accordance with s. 271 (the long-form amalgamation sections) (s. 277(2)(a)(i)), or that the company proposes to amalgamate with one or more

other corporations under, and that the amalgamation has been approved in accordance with, s. 273 or s. 274, as the case may be (the short-form amalgamation sections) (s. 277(2)(a)(ii)).

The second part of the affidavit must include whichever of the statements under s. 277(3) is applicable (s. 277(2)(b)).

Again, under s. 277(3) there are two possible statements, both dealing with creditors.

The affidavit can state that the director or officer making the affidavit believes, and has reasonable grounds for believing, that no creditor of the company will be materially prejudiced by the amalgamation (s. 277(3)(a)). If this statement can be made in the affidavit, then it is not necessary to go any further. Note the double requirement—not only must the director or officer so believe, but there must also be reasonable grounds for that belief.

If the director or officer cannot make the above statement relating to no material prejudice of creditors in the affidavit, then the affidavit and the requirements relating to it become much more complicated, and involve notices to creditors, responses to those notices and various steps the company can or must take depending on the circumstances; all as set out in great detail in s. 277(3)(b) and s. 278.

If the affidavit of the director or officer of the amalgamating company cannot state that he or she believes, and has reasonable grounds for believing, that no creditor of the company will be materially prejudiced by the amalgamation (s. 277(3)(a)), proceeding under s. 277(3)(b) and s. 278 may be more trouble than it is worth. At this point, depending on the circumstances, it might be worthwhile considering going for a court approved amalgamation under s. 276.

[§10.09] Court Approved Amalgamations

As mentioned, court approved amalgamations under s. 276(1) will be available where the director or officer cannot swear that there is no material prejudice to a creditor under s. 277(3)(a) and where swearing the affidavit under s. 277(3)(b) and accordingly complying with s. 278 may be more trouble and time-consuming than it is worth. In these cases the court will probably be very interested in the positions of the creditors.

The court approved amalgamation will also be available when it is necessary to have the order approving the amalgamation state that it is fair and reasonable to shareholders for the purposes of an exemption from registration requirements under the United States Securities Act of 1933.

The following discussion deals with a court approved amalgamation under s. 276 (which section does not apply to a court approved amalgamation under s. 278(3)(b)(ii); see s. 278(3.1)).

1. Time for Application

The application to the court for an order approving the amalgamation must be made not less than six days nor more than two months after the amalgamation agreement has been adopted by the last of the amalgamating companies to do so in a long-form amalgamation under s. 271(1), or after the amalgamation is approved by the holding corporation under s. 273(1)(c) in a vertical short-form amalgamation or by the last of the amalgamating companies to do so under s. 274(1)(b) in a horizontal short-form amalgamation (s. 276(2)).

2. Notice to Creditors or Shareholders

A creditor or shareholder of an amalgamating company (not a foreign corporation) may require that the company give the creditor or shareholder 14 days' notice of the date, time and place of the hearing of the application to the court to approve the amalgamation. To do so, that creditor or shareholder must send a written notice to the registered office of the amalgamating company, which must be received not later than five weeks after the amalgamation agreement is adopted by all the amalgamating companies (if a long-form amalgamation), or, in the case of a short-form amalgamation, after the last of the approvals of the amalgamation under s. 273 or s. 274 is obtained, and, in any event, before the hearing of the application for the approving order (s. 276(3)).

3. Court Application Documents

(a) Petition

The application will be brought by way of petition. The petition can be short and simply set out the basic facts, such as the names of the petitioners (the amalgamating corporations), their authorized share structures, their businesses, the date of the amalgamation agreement entered into under s. 270 (if applicable), the adoption of the amalgamation agreement (if a long-form amalgamation) by the amalgamating companies, or the approval of the amalgamation (if a short-form amalgamation), the necessary authority and approval for any amalgamating corporation which is a foreign corporation, that the amalgamation will not materially adversely affect the rights and interests of creditors and

shareholders of the amalgamating companies (if correct) and any proposed effective date and time of the amalgamation.

A notice of hearing of petition will accompany this petition.

(b) Affidavits

The petition will be supported by an affidavit or affidavits of a director or officer of each of the amalgamating corporations.

The affidavit will attest to the validity of the facts set out in the petition and then go on to fill out certain relevant details of the amalgamation, such as confirmation that the amalgamating corporations are in good standing, whether they are public companies, what their authorized share structures and issued shares are, what the inter-company shareholdings (if applicable) are, and if the corporations are closely held, the other shareholders and numbers of shares of the amalgamating corporations held by them.

The affidavit will go on to state the basic facts relating to the amalgamation, such as the date of the amalgamation agreement, if any (which will be attached as an exhibit), the name of the amalgamated company and details of the reservation of the name (unless it is the name of one of the amalgamating companies or is to be the incorporation number plus "B.C. Ltd."), and dates of the adoption of the amalgamation agreement (if a long-form amalgamation) or approval of the amalgamation (if a short-form amalgamation), and with certified copies of the resolutions attached as exhibits (presumably details of any approval by any amalgamating foreign corporation could be added here).

The affidavit will specifically set out (or at least refer to) the provisions in the amalgamation agreement (if applicable) for the exchange (and cancellation, if applicable) of shares on the amalgamation.

(c) Creditors

The affidavit will set out information to enable the court to determine the effect of the amalgamation on any creditors of any of the amalgamating corporations.

Usually balance sheets of each of the amalgamating corporations as of the most recent practicable date are exhibits to the affidavit. The balance sheets should all be made up as of the same date. A pro forma balance sheet of the amalgamated company, as of the same date, is also prepared, showing

what the balance sheet of the amalgamated company would have looked like had the amalgamation taken place on the date of the other balance sheets. It would help to state that there has been no material adverse change in the status of the amalgamating companies since the date of the balance sheets.

The affidavit will usually provide more information than that shown on the balance sheets, giving the basic information contained in them (total assets, total liabilities, shareholders' equity/deficit); and also information with respect to the liabilities, and what they represent.

If creditors have given consents the amounts of their debts should be set out and the consents attached as exhibits. If an amalgamating corporation has very few creditors, it is usually possible to get consents from all the creditors, and it is helpful to be able to state in the affidavit that no creditor who had been requested to provide a consent refused to give one.

However, if any of the amalgamating corporations has a large and active business, there could be large numbers of creditors (mostly trade creditors). If any of these creditors are owed large amounts of money, then consents probably should be obtained from them, but it is not practicable (or possible) to get consents from all the smaller creditors. Normally, the affidavit would show what percentage (of total liabilities (in dollar terms)) of the creditors had consented, if any, and would also state that the trade creditors are paid off in the normal course of business (preferably a short period of time).

4. Court Order

The court has the power to dismiss the application, or to approve the amalgamation, either on the terms presented or substantially on those terms (s. 276(4)(c)), having regard to the rights and interests of each person affected by the amalgamation (s. 276(4)(b)).

The order normally approves the amalgamation in accordance with the terms presented or, if applicable, in accordance with the terms of the amalgamation agreement. The language in the order could state any proposed effective time and date of the amalgamation, but does not have to. The order should also dispense with notice to shareholders and creditors of the amalgamating corporations.

If a court order is being sought to obtain an exemption from the registration requirements of the United States Securities Act of 1933 with respect to the distribution of securities of the amalgamated company, it should contain a declaration that the amalgamation is approved as being fair and reasonable to the shareholders of the amalgamating companies.

[§10.10] Filings with the Registrar

In order to effect any amalgamation there must be filed with the registrar an amalgamation application and, if any of the amalgamating corporations are foreign corporations, certain other materials (s. 275(1)).

1. Amalgamation Application

If it is a court approved amalgamation, the amalgamation application must contain a statement that a copy of an entered court order approving the amalgamation has been obtained under s. 276 or s. 278(3)(b)(ii) and has been deposited in the records office of each amalgamating company (but not each amalgamating foreign corporation) (s. 275(2)(a)(i)).

If it is not a court approved amalgamation, the amalgamation application must contain a statement that all of the required affidavits under s. 277(1) have been obtained, and that the affidavit obtained from each amalgamating company has been deposited in the records office of that company (this does not apply to amalgamating foreign corporations) (s. 275(2)(a)(ii)).

If the amalgamation is a long-form amalgamation, the amalgamation application must set out the name of the amalgamated company. The name will either be the name of one of the amalgamating companies (not of any amalgamating foreign corporation) or a new name which has been (and remains) reserved (in which case, the amalgamation application must also set out the reservation number) or, failing both of these, there must be a statement that the name by which the amalgamated company is to be recognized is the name created by adding “B.C. Ltd.” after the incorporation (amalgamation) number of the amalgamated company (s. 275(2)(b)(i)). See also §10.03.

The amalgamation application must also contain a notice of articles for the amalgamated company that will reflect the information applicable to it on its recognition (s. 275(2)(b)(ii)). See also §10.04.

If the amalgamation is a vertical short-form amalgamation, the amalgamation application must adopt, as the notice of articles for the amalgamated

company, the notice of articles of the holding corporation (s. 275(2)(c)).

The notice of articles of the holding corporation will not be part of the amalgamation application because the registrar will already have that notice of articles in the corporate register. The amalgamation application will indicate which of the amalgamating companies is the company whose notice of articles will be adopted and its adoption in the corporate register will be automatic.

If the amalgamation is a horizontal short-form amalgamation, the amalgamation application must adopt as the notice of articles for the amalgamated company, the notice of articles of the primary company (s. 275(2)(d)).

As with a vertical short-form amalgamation, the notice of articles of the primary company will not be part of the amalgamation application, as the registrar will already have that notice of articles in the corporate register. The amalgamation application will indicate which of the amalgamating companies is the company whose notice of articles will be adopted and its adoption in the corporate register will be automatic.

An amalgamation application must not be submitted to the registrar for filing under s. 275(1)(a) unless, in the case of a long-form amalgamation, the amalgamation agreement has been adopted by each of the amalgamating companies under s. 271 (s. 275(3)(a)), or in the case of a short-form amalgamation, the amalgamation has been approved in accordance with s. 273(1)(c) or s. 274(1)(b) (s. 275(3)(b)).

An amalgamation application must be filed electronically (s. 407(a) and Reg. s. 30(2)(f)).

2. Amalgamating Foreign Corporations

If any of the amalgamating corporations are foreign corporations, s. 275(1)(b) gives the registrar the discretion to determine what records and information the registrar requires, including any proof regarding the standing of the corporation in the foreign corporation’s jurisdiction and an authorization (in writing) for the amalgamation from that jurisdiction. This should be provided before filing the amalgamation application (which is filed electronically).

3. General

All the amalgamating companies must be in good standing and, if not, the registrar may refuse to accept any filing relating to the amalgamation (s. 411(1)). A company will not be in good standing if its annual reports are not filed up-to-date or if the information in the corporate register shows that there is no director of the company.

4. Withdrawal

An amalgamation application can be withdrawn any time after it is filed with the registrar under s. 275(1)(a) and before the amalgamating corporations are amalgamated, in other words, where the amalgamation is to be later than the date or date and time the application is filed (s. 280). To withdraw an amalgamation application, there has to be filed with the registrar a notice of withdrawal in the form established by the registrar identifying the amalgamation application.

[§10.11] Amalgamations Generally

1. When Effective

The time of the amalgamation cannot be earlier than the date and time the amalgamation application is filed with the registrar. If the effective date is not to be the date the application is filed (see s. 279(a)), then the effective date and time of the amalgamation is the later date and time specified in the amalgamation application or, if the amalgamation application specifies a later date (but no time), then the date and time of the amalgamation is the beginning (12:01 a.m.) of the specified date (s. 279(b)), which later date (in both cases) cannot be more than ten days after the filing with the registrar (s. 410 and Reg. s. 31(c)).

This is subject to the court ordering otherwise and a copy of the entered order being filed with the registrar before the specified date or specified date and time (s. 279(b)).

2. Registrar

After the amalgamation is effective, the registrar must issue a certificate of amalgamation showing the names of the amalgamating corporations; if any of the amalgamating corporations is a foreign corporation, each foreign corporation's jurisdiction; the name of the amalgamated company; and the date and time of the amalgamation (s. 281(a)).

The registrar must furnish the certificate of amalgamation and, if requested, a certified copy of each of the amalgamation application and the amalgamated company's notice of articles to the

amalgamated company (s. 281(b)). In addition, the registrar must publish a notice of the amalgamation on a government website (s. 281(c) and Reg. s. 6).

3. Effect of Amalgamation

At the time amalgamating corporations are amalgamated and continue as an amalgamated company, there are numerous effects.

(a) Notice of articles and articles

Section 282(1)(b) and (c) deal with the notice of articles and articles of the amalgamated company; see further §10.04.

(b) Status of amalgamated company and shareholders

Section 282(1)(d) provides that the amalgamated company, at the time of the amalgamation, becomes immediately capable of exercising the functions of an incorporated company.

The shareholders of the amalgamated company have the powers and the liability provided in the *BCA* (s. 282(1)(e)) and each shareholder of each amalgamating corporation is bound by the amalgamation agreement, if there is one (s. 282(1)(f)).

At the time of the amalgamation, the property, rights and interests of each amalgamating corporation continue to be the property, rights and interests of the amalgamated company (s. 282(1)(g)). This is one of the hallmarks of a statutory amalgamation.

Section 282(2) states that an amalgamation does not constitute an assignment by operation of law, a transfer or any other disposition of the property, rights and interests of an amalgamating corporation to the amalgamated company.

At the time of the amalgamation, the amalgamated company continues to be liable for the obligations of each amalgamating corporation (s. 282(1)(h)). Any existing cause of action, claim or liability to prosecution is unaffected (s. 282(1)(i)). A legal proceeding being prosecuted or pending by or against any of the amalgamating corporations may be prosecuted, or its prosecution may be continued, by or against the amalgamated company (s. 282(1)(j)). A conviction against, or a ruling, order or judgment in favor of or against, any of the amalgamating corporations may be enforced by or against the amalgamated company (s. 282(1)(k)).

(c) Conclusive evidence of due amalgamation

Section 282(3) provides that, whether or not the requirements precedent and incidental to amalgamation have been met, a notation in the corporate register that corporations have been amalgamated as an amalgamated company is conclusive evidence, for the purposes of the *BCA* and for all other purposes, that the amalgamating corporations have been duly amalgamated on the date and time (if any) shown in the corporate register.

Section 282(1)(a) specifically provides that at the time of the amalgamation, the amalgamation and the continuation of the amalgamating corporations as one company becomes irrevocable.

- the property, rights and interests of the amalgamating company continue to be the property, rights and interests of the amalgamated foreign corporation (s. 285(a)),
- the amalgamated foreign corporation continues to be liable for the obligations of the amalgamating company (s. 285(b)),
- an existing cause of action, claim or liability to prosecution is unaffected (s. 285(c)),
- a legal proceeding being prosecuted or pending by or against the amalgamating company may be prosecuted or its prosecution continued by or against the amalgamated foreign corporation (s. 285(d)), and
- a conviction against, or a ruling, order or judgment in favor of or against, the amalgamating company may be enforced by or against the amalgamated foreign corporation (s. 285(e)).

It is not clear if s. 285 requires that its precise language be mirrored in the laws of the amalgamated foreign corporation's jurisdiction, but the laws of that jurisdiction certainly should be broad enough to cover everything in s. 285.

[§10.12] Dissent Rights

Section 272 provides that a shareholder of an amalgamating company may send a notice of dissent to that amalgamating company or, if the amalgamation has taken effect, to the amalgamated company, in respect of a resolution under s. 271(6) to adopt an amalgamation agreement (a long-form amalgamation). Note the requirements of s. 240.

There are no rights of dissent arising out of short-form amalgamations.

[§10.13] Amalgamations into Foreign Jurisdictions

Just as the *BCA* permits the amalgamation of a foreign corporation with a British Columbia company to form an amalgamated British Columbia company without an intervening continuation, so also does the *BCA* permit a direct amalgamation, without a continuation, between a British Columbia company and a foreign corporation that results in an amalgamated foreign corporation. This is covered in Division 4 of Part 9 (s. 283 to 287). Note the definitions in s. 283.

1. Prohibitions

The ability of a British Columbia company to amalgamate with a foreign corporation to create an amalgamated foreign corporation is prohibited if the laws of the amalgamated foreign corporation's jurisdiction do not contain provisions similar to those relating to an amalgamated British Columbia company having the assets and being subject to the obligations of the amalgamating corporations.

Section 285 specifically prohibits the amalgamation of a company with a foreign corporation to form an amalgamated foreign corporation unless the laws of the amalgamated foreign corporation's jurisdiction provide that

2. Prerequisites for Foreign Amalgamation

There are three prerequisites for the amalgamation of one or more companies with one or more foreign corporations to form an amalgamated foreign corporation.

The first is that the laws of each of the amalgamating foreign corporations' jurisdictions must allow the amalgamation (s. 284(1)(a)).

Next, each amalgamating foreign corporation must obtain the approval to the amalgamation required by its charter and must also comply with the laws of its jurisdiction with respect to the amalgamation (s. 284(1)(b)).

Finally, each amalgamating (British Columbia) company must be authorized by its shareholders and by the registrar to enter into the amalgamation (s. 284(1)(c)).

3. Shareholders' Authorization

The authorization required from the shareholders of an amalgamating company for a foreign amalgamation is very similar to that required for the adoption of an amalgamation agreement in a British Columbia long-form amalgamation.

The amalgamation can be approved by a unanimous resolution in writing of all the shareholders of the company, whether or not their shares otherwise carry the right to vote (s. 284(2)(a)).

If the unanimous resolution cannot be obtained, then the shareholders can approve the amalgamation at a meeting (s. 284(2)(b)).

At this meeting, if all the issued shares of the company carry the right to vote at general meetings, the approval of the amalgamation requires a special resolution (s. 284(4)(a)(i)).

If there are issued shares of the company which do not carry the right to vote at general meetings, then the amalgamation must be approved at a meeting of all the shareholders of the company, whether or not their shares otherwise carry the right to vote (s. 284(5)). In this case, the amalgamation must be approved by a resolution passed by at least a special majority of the votes cast at the meeting (s. 284(4)(a)(ii)).

In addition, where the rights or special rights or restrictions attached to the shares of a particular class or series would be prejudiced or interfered with by the amalgamation, the holders of the shares of that class or series must approve the amalgamation by a special separate resolution (s. 284(4)(b)).

4. Authorization of Registrar

A company seeking to amalgamate with one or more foreign corporations to form an amalgamated foreign corporation under s. 284(1) must, before entering into the amalgamation, deposit in its records office an affidavit of one of its directors or officers relating to creditors of the amalgamating company that complies with s. 277(2)(b) (see §10.08) and that further states that the necessary authorization by the shareholders required under s. 284(2) has been obtained (s. 284(7)(a)). Section 278 applies to a foreign amalgamation (s. 284(8)), presumably only if s. 277(3)(b) is applicable.

In addition, the amalgamating company must file with the registrar an application for authorization for amalgamation containing a statement that the affidavit required under s. 284(7)(a) referred to above has been obtained and deposited in the records office of the company (s. 284(7)(b)) and confirmation that the specific requirements of s. 285 are met.

Failure to file the application for authorization for amalgamation is an offence (see s. 426(1)(a)).

If the registrar is satisfied that the amalgamating company has filed with the registrar all records that the company is required to file under the *BCA* (that is, it is in good standing), the registrar must authorize the company to amalgamate with the amalgamating foreign corporations to form the amalgamated foreign corporation, unless the court orders otherwise and a copy of the entered order has been filed with the registrar before the authorization (s. 284(9)).

Note that the authorization the registrar gives under s. 284(9) expires after six months (s. 284(10)).

5. Post Amalgamation

Once the foreign amalgamation has taken place, the amalgamated foreign corporation must promptly file with the registrar a copy of any record issued to the amalgamated foreign corporation by its home jurisdiction to effect or confirm the amalgamation (s. 286(1)).

After that record has been filed with the registrar, the registrar must publish a notice on a government website that the particular amalgamating company has amalgamated to form the amalgamated foreign corporation (s. 286(2) and Reg. s. 6)).

The amalgamating company ceases to be a company within the meaning of the *BCA* when the company is amalgamated to form the amalgamated foreign corporation, not the date on which the record is filed with the registrar (s. 286(3)).

If the amalgamated foreign corporation is carrying on business in British Columbia, it must register as an extra provincial company within two months of the amalgamation (s. 375(1)).

6. Dissent Rights

Section 287 provides that a shareholder of an amalgamating company in a foreign amalgamation may send a notice of dissent to that amalgamating company or, if the amalgamation has taken effect, to the amalgamated foreign corporation, in respect of a resolution under s. 284(4) to approve the amalgamation. Note the requirements of s. 240.