

**COMPANY LAW****CONTENTS****DISSOLUTION**

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## Chapter 14

### Dissolution<sup>1</sup>

For further information on this topic, see Chapter 12 of the *British Columbia Company Law Practice Manual*, 2<sup>nd</sup> 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. References to “Reg.” are to provisions in B.C. Regulation 65/2004, as amended.

#### [§14.01] Dissolution by Registrar for Failure to Comply

##### 1. Introduction

Section 422(1) provides that the registrar may dissolve a company or cancel the registration of an extraprovincial company when the company or extraprovincial company:

- (a) has for two consecutive years failed to file with the registrar its annual report or any other record as required by the *BCA* or any predecessor act;
- (b) fails to comply with an order of the registrar, including an order to change its name or assumed name;
- (c) fails, without reasonable excuse, to return an erroneous record to the registrar within 21 days after a request under s. 420(1);
- (d) tenders a cheque for fees under s. 431 which is dishonoured;
- (e) in the case of a pre-existing company, fails to observe the transition provisions in s. 370 or s. 436; or
- (f) in the case of an extraprovincial company, fails to ensure it has an attorney for service under s. 386 or breaches an undertaking to use an assumed name under s. 26(2).

##### 2. Procedure

The registrar first sends a letter informing the company of its failure to comply with the *BCA* and of the registrar’s powers of dissolution, or, when an extraprovincial company, of cancellation of its registration (s. 422(2)).

If, within one month after the date of the letter, the registrar does not receive a response indicating that the failure has been, or is being, remedied or an otherwise satisfactory response, the registrar publishes a notice on a government website (Reg. s. 6) that the company will be dissolved or, in the case of an extraprovincial company, that its registration will be cancelled, at any time after one month from the date the notice is published unless:

- (a) “cause to the contrary is shown” (s. 422(4)(b)(i));
- (b) the company or extraprovincial company satisfies the registrar that it is not in default, that the default has been remedied or that all reasonable steps are being taken to remedy the default (s. 422(4)(b)(ii)); or
- (c) a copy of an entered court order to the contrary is filed with the registrar (s. 422(4)(b)(iii)).

Failing those exceptions, the registrar may dissolve the company or cancel the registration of the extraprovincial company at any time after the one month from publication of the notice (s. 422(5)), at which point the company is dissolved or, in the case of an extraprovincial company, its registration is cancelled. Another notice is then published indicating that the company has been dissolved (s. 424 and Reg. s. 6).

##### 3. “Letting it Die”

Having the company dissolved for a failure to comply with the *BCA* is often used as an inexpensive form of dissolution when the company has no assets or liabilities. The company simply fails to file annual reports, and then at any time after two years, two months and one day after the effective date of the last filed annual report, the company can be dissolved as set out above. The same result will happen when a pre-existing company fails to carry out a mandatory transition rollover within the required time.

Similarly, the registrar will cancel the registration in British Columbia of an extraprovincial company for failure to file annual reports in such a situation (s. 422(1)(a)). There is no practical reason for adopting this method of cancelling registration,

<sup>1</sup> **John O.E. Lundell**, QC, using Chapter 12 of the *British Columbia Company Law Practice Material*, 2<sup>nd</sup> edition (Vancouver: CLE) contributed by Mary N. Childs and Peter D. Fairey of McCarthy Tétrault, kindly contributed this chapter to PLTC in January 2004. John Lundell reviewed the chapter in November 2004 and November 2005.

however, as the same result can be achieved by simply sending a notice to the registrar that the company has ceased to carry on business in British Columbia (s. 397(b)).

It may be inappropriate to counsel a client not to file annual reports, or do a mandatory transition rollover, in order to be dissolved, because that is counselling the client to disobey a statute. Nevertheless, it is fairly common for a lawyer to point out the option of letting the company die.

The *BCA* requires the annual reports to be filed and the mandatory transition rollover to be done, and, in the case of annual reports, the failure gives rise to certain penalties.

Furthermore, when a company does have some assets at the time of its dissolution those assets will vest in the government in accordance with s. 4(1) of the *Escheat Act* (in the case of land) or s. 344(2) of the *BCA* (in the case of other assets).

If a company is to be “allowed to die” it may be prudent to use a simple form of conveyance to transfer all assets to the shareholders with a power of attorney to survive the dissolution.

*Act* or the *Winding-up and Restructuring Act*, the company will still exist and can only be dissolved by action taken in accordance with the procedures of the *Business Corporations Act*.

## 2. Procedure

### (a) Required steps

A company can be dissolved in a short-form dissolution if it

- (i) passes an ordinary resolution authorizing it to be dissolved (s. 314(1)(a)), and
- (ii) files with the registrar an application for dissolution containing a statement that an affidavit complying with s. 316(2) and sworn by a director has been obtained and deposited in the company’s record office (s. 316(1)(b)).

Section 314(2) permits a company that has not issued any shares to be dissolved if it is authorized to do so by a directors’ resolution rather than an ordinary resolution.

Special resolutions authorizing the dissolution are also acceptable (because a special resolution by definition is also an ordinary resolution).

When the company has remaining assets to be distributed, a special resolution should be passed because of s. 301, if not exempted by ss. 301(6)(d) or (f). Note that this special resolution gives rise to a right of dissent (s. 301(5)) and note the requirements of s. 240.

The company must be in good standing at the time the application for dissolution is filed.

Upon filing the application for dissolution, the registrar publishes a notice on a government website (Reg. s. 6) and issues a certificate of dissolution showing the date and time of dissolution, and furnishes a copy of the certificate to the applicant and to the person required under s. 351 to retain the records of the company (s. 345).

### (b) The affidavit

The person swearing the affidavit must be a current director of the company (s. 316(1)(a)).

The wording of the affidavit must follow s. 316(2) and must state that:

- the company’s dissolution has been duly authorized in accordance with s. 314(1)(a) or (2), as the case may be;

## [§14.02] Dissolution by Request

### 1. Introduction

Also known as “short-form dissolution”, dissolution by request under s. 314 is generally used when all the company’s debts and liabilities have been paid or discharged or adequately provided for or when the assets of a subsidiary have been transferred or “rolled” into its parent, often under the *Income Tax Act*. A company having significant assets or liabilities may need to use the liquidation provisions of ss. 319 to 343, also called “long-form dissolution”. This is often the case with large or active businesses.

Section 313 limits all dissolution and liquidation proceedings to solvent companies. When a company is unable to pay its debts as they come due and wants to dissolve, the directors should either make adequate provision for the payment of each of its liabilities (see §14.02.2(b)), or proceed under one of the available statutes for insolvent persons. (See §14.01 for ethical concerns about counselling a client to simply allow a company to die for failing to file returns.) When a company is found to be insolvent under the *Bankruptcy and Insolvency Act*, any dissolution proceedings under the *Business Corporations Act* must be stayed (s. 313). After the assets of a company have been liquidated and distributed under the *Bankruptcy and Insolvency*

- the company has no assets; and
- the company has no liabilities as a result of s. 315(6) or otherwise, or has made adequate provision for the payment of each of its liabilities.

When a director cannot swear such an affidavit, the longer liquidation procedures should be followed.

A debt or liability that has been assumed by a third party, without the consent of the original creditor in the form of either a novation or a release in favour of the company, remains a debt or liability for the purposes of the affidavit. Without such a release or novation, it is not possible to swear an affidavit that the company has no liabilities in those circumstances.

This problem has been addressed in s. 316(2)(c)(ii), which permits the director to swear an affidavit that the company has made adequate provision for the payment of each of its liabilities. Presumably, this would include the assumption of the company's liabilities by a financially healthy parent company.

(c) Documentation

Various instruments are required to transfer assets when registration is required, such as a Form A freehold transfer for real property, a bill of sale for goods not in possession, motor vehicle transfer forms and so on. In addition, there should be an assumption and distribution agreement or general conveyance agreement assigning the assets of the company to the shareholder or shareholders. The party assuming liabilities should be careful not to inadvertently assume liabilities for which it would not otherwise be responsible. Often the purpose of dissolution is to leave behind a failed company, and having another party assume its liabilities may defeat this purpose. However, this raises the question of whether the affidavit can comply with s. 316(2)(c)(ii) (see above).

(d) Surviving power of attorney

Using an agreement with general assignment language will avoid the problem of unknown or forgotten assets being forfeited to the government. One of the most important provisions in such an agreement is the grant of an irrevocable power of attorney coupled with an interest from the dissolving company to the parent company or its president, or to a

shareholder (if the dissolving company is not a subsidiary) to file all necessary tax returns and elections and to do and execute all acts and transfers necessary to complete the assignment of the assets to the recipient. Otherwise, because the company does not exist, it cannot execute documentation. Note the requirements of the *Power of Attorney Act*.

(e) Indemnifying directors and officers

It is frequently desirable to have the parent company (if it has the power and capacity) of a dissolving subsidiary agree to indemnify the officers or directors of the subsidiary for liabilities related to their acting to dissolve the company, including with respect to income taxes.

3. Extraprovincial Companies

A foreign entity that wants to have its registration as an extraprovincial company cancelled can simply file with the registrar a notice of ceasing to carry on business in British Columbia (s. 397(b)).

Alternatively, the extraprovincial company may simply stop filing annual reports (but see §14.01.3 with respect to counselling this), in which case its registration will eventually be cancelled by the registrar under s. 422(1)(a).

The registrar will also cancel the registration of an extraprovincial company if he or she receives notice from the registrar (or equivalent authority) of the foreign entity's jurisdiction that the foreign entity has ceased to exist (s. 397(a)). The registrar cannot dissolve an entity that has been incorporated in another jurisdiction; it can only cancel the registration of the extraprovincial company in British Columbia.

**[§14.03] Voluntary and Court Ordered Liquidation**

1. Introduction

Liquidation is the process by which a company with assets and liabilities is "wound up", as its debts and liabilities are satisfied, and any remaining assets distributed to the shareholders, following which the company is dissolved.

The liquidation process can be voluntary or under a court order. The shareholders of the company initiate a voluntary liquidation; a court may order liquidation on application of any one of a number of "appropriate" persons.

For the most part, the process of liquidation is the same regardless of whether the liquidation is voluntary or court ordered. The same powers and responsibilities are attached to the role of the liquidator, for instance.

See §14.02.1 with respect to insolvent companies.

## 2. Voluntary Liquidation

### (a) Introduction

Voluntary liquidation under Division 3 of Part 10 is used when the company to be dissolved has extensive debts and liabilities, not all of which may be known at the commencement of proceedings. In contrast to dissolution by request, a company can be fully “wound up”, even if it has assets that have not been distributed or debts that have not been paid.

### (b) Special resolution and shareholders’ meeting

A voluntary liquidation begins with a special resolution resolving to liquidate the company (s. 319(1)). For a voluntary liquidation, “commencement of the liquidation” is defined in s. 312 as the later of the time and date that the special resolution is passed, and the time and date specified in the special resolution (or, if no time is specified, the beginning of the date specified).

### (c) Appointment of liquidator

At the shareholders’ meeting (or in a consent resolution in writing), the shareholders also appoint (by ordinary resolution) a liquidator to liquidate the company and distribute the company’s assets (s. 319(2)).

The liquidator must be someone who is qualified to be a receiver or receiver-manager under s. 64(2) of the *Personal Property Security Act*; although when all the shareholders of the company give their written consent, a person mentioned in s. 64(2)(e) of the *Personal Property Security Act* (an insider or auditor of the company or of an affiliate) is qualified to be the liquidator (s. 327(1)).

No act of a liquidator is invalid merely because of any defect in the liquidator’s appointment or qualifications (s. 328).

The company must, promptly after the resolutions to liquidate and appoint a liquidator are passed, file with the registrar a statement of intent to liquidate (s. 321(1)). Unless the liquidator’s appointment is reflected in a filed statement of intent to liquidate, the liquidator

must file with the registrar a notice of appointment within 10 days of the commencement of the liquidation (s. 329(1)(a)), or “promptly” if appointed after such commencement (s. 329(1)(b)).

### (d) Notices

The liquidator must publish, promptly after the commencement of the liquidation (s. 330(a)), a notice in the Gazette, and in a newspaper that is distributed generally where the company has its registered office, that the company is in liquidation (s. 331(1)(a)). The notice must require any person:

- indebted to the company to pay the amount owing to the liquidator (s. 331(2)(a)),
- having custody or control of any property, rights or interests of the company to deliver them, or provide control of them, to the liquidator (s. 331(2)(b)),
- with a claim against the company to provide particulars to the liquidator within two months after the date of publication in the Gazette (s. 331(2)(c)).

The liquidator must also, promptly after publishing the notice of liquidation, send a notice to the last known address of each known creditor (s. 331(1)(b)). The notice must also be sent to any creditor of whose claim the liquidator becomes aware within two months after the date on which the notice was published in the Gazette (s. 331(4)).

The notice must disclose that the company is in liquidation and must include:

- a statement of the amount, if any, that the liquidator in good faith accepts is owing by the company to the particular creditor;
- a statement that the liquidator will provide to that recipient a list of all the company’s known creditors and amounts the liquidator accepts are owing to them; and
- a statement that the recipient of the notice has four months from the date of publication of the notice in the Gazette to pursue any claim for money owed by the company in excess of the amount stated in the notice (s.331(3)).

## (e) Limits on claimants

Section 332(1) limits those who may claim against a company in liquidation or against its liquidator, unless the court orders otherwise (s. 332(1)(d)), to:

- those in receipt of notices;
- those to whom the liquidator refused or neglected to send a notice; or
- persons who provide written notice of their claim to the liquidator within two months of the notice published in the Gazette and to whom the liquidator refuses or neglects to send a notice under s. 331(4).

Creditors in receipt of notices must not claim amounts greater than those specified in the notice unless they bring legal proceedings to dispute the specified amount, or persuade the liquidator that a greater amount is owing to them, within four months after the publication of the Gazette notice, unless the court orders otherwise (s. 332(2)).

## (f) Powers and duties of liquidator

## (i) general

The liquidator must take into the liquidator's custody or control the company's property, rights and interests of the company (s. 330(b)) and must:

- dispose of the assets of the company other than assets to be distributed in kind to the shareholders (s. 330(d));
- invest money in investments approved for trustees pending distribution to creditors and shareholders (s. 330(h)); and
- after paying or providing for all liabilities, distribute the remaining assets in money or in kind among the shareholders according to their rights and interests in the company (s. 330(m)).

## (ii) keeping records

The liquidator must keep proper records of all matters relating to the liquidation (s. 330(e)). The liquidator must indicate that the company is in liquidation on every invoice, order for goods and business letter issued by the liquidator or on which the name of the company appears (s. 330(f)) and use the designation of "liquidator" on any record on which

the liquidator's name appears (s. 330(g)).

The liquidator must file with the registrar an annual liquidation report instead of an annual report for the company (s. 330(k)).

The liquidator must also take into his or her custody or control the company's corporate records (s. 330(b)(i)) and other records (s. 330(b)(ii)), and ensure that the corporate records are maintained and made available as required under Division 5 of Part 2 of the *BCA* (s. 330(c)).

The liquidator must establish a liquidation records office (s. 333(1)) in British Columbia (s. 333(2)) where certain records relating to the liquidation will be retained and where access to such records may be made available during statutory business hours.

## (iii) managing the company

The liquidator has very broad powers to manage or supervise the management of the company and to exercise those of its powers not required to be exercised by the shareholders (s. 334(1)(a) and (b)). The powers of the directors and officers cease on appointment of the liquidator except to the extent that the liquidator approves their continuation (s. 334(1)(a)).

## (iv) cease carrying on business

The company must cease carrying on business after the commencement of the liquidation except to the extent that the liquidator considers necessary or advisable for the liquidation (s. 340(2)). When the company is carrying on business during the liquidation, the liquidator must produce financial statements for the company at least once every 12 months (s. 330(j)).

## (v) recovery of property

Any past or present director, receiver, receiver-manager, officer, employee, banker, auditor, shareholder, beneficial owner of shares or agent of a company in liquidation, or of any its affiliates, must deliver any property of the company in that person's custody or control to the liquidator and must also provide full disclosure to the liquidator with respect to any such property, or property which has

been disposed of by the company, except any disposed of in the ordinary course of business of the company (s. 335 (1)).

(vi) distributing assets

A liquidator may distribute assets of the company to the shareholders in kind, or may exchange all or substantially all those assets for securities of another corporation, which the liquidator will then distribute to the shareholders (s. 336(1)).

(vii) preparing accounts

Accounts of the liquidation, showing how it has been conducted and the disposition made of the company's assets, must be prepared at least once in every 12-month period after the appointment of the liquidator, and whenever directed by the court or (in a voluntary liquidation) an ordinary resolution. They must also be prepared at two stages of the liquidation: before the liquidator pays or makes provision for the liabilities of the company, and promptly after making such payment or provision but before distributing the assets of the company to shareholders (s. 338(1)).

(viii) when a creditor or shareholder cannot be located

When the whereabouts of a creditor or a shareholder are unknown, s. 337 provides a mechanism whereby the liquidator may, after making reasonable efforts to determine the whereabouts of the creditor or a shareholder, pay or deliver amounts or property due to that party to the administrator under the *Unclaimed Property Act*.

(g) Powers of shareholders in voluntary liquidations

The shareholders can restrict the power of the liquidator by requiring shareholder approval of certain matters (s. 320(1)).

The shareholders also have the power to remove the liquidator by a special resolution passed at a general meeting, if notice has been given to the liquidator and to each creditor whose unpaid claim exceeds \$1,000 (s. 322(1)(b) and Reg. s. 24). Given the use of the words "passed at a general meeting", a consent resolution is probably insufficient.

A vacancy in the office of a liquidator may be filled by an ordinary resolution or by the directors if they have been authorized to do so by an ordinary resolution (s. 322(3)).

(h) Reversing a voluntary liquidation

At any time after a statement of intent to liquidate is filed and before the company is dissolved, the company, or any other person who appears to the registrar to be an appropriate person to do so, may file a notice of withdrawal and thereby withdraw the statement of intent to liquidate (s. 323).

(i) Completion of liquidation

Within three months after all the assets of the company have been distributed to the shareholders, the liquidator must prepare final accounts showing how the liquidation has been conducted and how the assets of the company have been disposed of (s. 341(1)(a)). The liquidator must deposit those accounts in the liquidation records office and send a notice to the shareholders informing them that they may inspect and receive a copy of the final accounts for a period of at least three months from the date of the notice (s. 341(1)(b) and (c)). The liquidator must not apply for dissolution of the company until that three-month period has expired (s. 341(3)).

Before distributing assets to shareholders, the liquidator should obtain the usual statutory clearance certificates (for example, *Income Tax Act*, *Canada Pension Plan*, *Social Service Tax Act*, *Employment Insurance Act* and so on).

Promptly after the expiry of the three-month period during which shareholders may inspect the final accounts, the liquidator must file with the registrar an application for dissolution stating that the final accounts have been prepared and deposited in the liquidation records office and, in the case of a court ordered liquidation, that a copy of an entered order under s. 342 approving the dissolution of the company has also been deposited in the liquidation records office (s. 343).

In the case of voluntary liquidation, the company will be dissolved on the beginning of the day one month after the date on which the application for dissolution is filed with the registrar (s. 343(2)(b)). In the case of a court ordered liquidation, the company will be dissolved when the application is filed, or on any later date (and time, if any) specified in the

application (s. 343(2)(a)). The court may defer this date (s. 343(3)).

(j) Changes with respect to liquidators

A liquidator who ceases to act must file a notice of ceasing to act as liquidator with the registrar within seven days (s. 329(1)(d)).

(k) Remunerating the liquidator

The shareholders may by ordinary resolution either set or authorize the directors to set the remuneration for each liquidator appointed in a voluntary liquidation (s. 319(2)(b) and s. 322(5)).

Section 326 provides that the court must set the remuneration of a liquidator appointed by the court.

3. Court Ordered Liquidation

A court ordered liquidation may be initiated by an application made by the company, a registered or beneficial shareholder, a director or any other person (including a creditor of the company) whom the court considers an appropriate person to make such an application (s. 324(1)).

The court may order that a company be liquidated and dissolved if an event occurs which triggers liquidation according to the memorandum or articles of the company, or if the court otherwise considers it “just and equitable” to order the liquidation and dissolution of the company (s. 324(1)(a) and (b)).

When the court makes such an order, it must, in that order, appoint one or more liquidators (s. 324(4)). The appointment of the liquidator takes effect on the commencement of the liquidation (s. 324(5)), which is the date of the liquidation court order, or the later date (and time, if any) specified in the order (s. 312).

The liquidator’s responsibilities under a court ordered liquidation are substantially the same as under a voluntary liquidation. Many of the provisions of the *BCA* governing liquidation (and most of the above comments) apply to both a court ordered and a voluntary liquidation. Some of the differences have been mentioned above, and others are:

- a court ordered liquidation cannot be discontinued without a court order under s. 325(3)(v);
- if a court appointed liquidator is not qualified to act, the liquidator is not required to resign but instead must seek directions

from the court (s. 327(2)(b)); and

- a court appointed liquidator must obtain a court order approving the dissolution (s. 342(1)).

4. Dissolution Following Liquidation

As mentioned, a liquidator appointed by the court must, before applying for dissolution of the company, obtain an order of the court approving that dissolution (s. 342). No court approval is required for dissolution in a voluntary liquidation.

In addition s. 342(3) specifies that the court may order that the liquidator be discharged effective on the dissolution of the company or at any other time the court orders. A liquidator in a voluntary liquidation can be discharged by a court order under s. 350(1). The order discharges the liquidator from all liability in respect of any act or default of the liquidator (ss. 342(3) and 350(3)). The liquidator’s liabilities, if any, will survive the dissolution (s. 347), unless the liquidator’s liabilities are discharged by the order.

After dissolution, the registrar must issue a certificate of dissolution and furnish a copy to each liquidator, and publish a notice of the dissolution (s. 345).

**[§14.04] Post-Dissolution Matters**

1. Survival of Liabilities

Proceedings may be continued against a company after its dissolution or brought against a company within two years after its dissolution as if the company had not been dissolved (s. 346 (1)).

Section 347 provides that subject to ss. 348(2) and (4) and 350(3), the liability of every director, officer, liquidator and shareholder of a dissolved company shall continue and may be enforced as if the company had not dissolved.

When assets of the company are distributed to a shareholder in anticipation of, during, or as a result of the company’s liquidation or dissolution, the court may add the shareholder as a party to litigation, determine the amount for which the shareholder is liable and the amount the shareholder must contribute to satisfaction of the plaintiff’s claim and direct payment of those amounts (s. 348(1)), provided that the shareholder is not liable unless added as a party within two years after the date of dissolution (s. 348(2)). The shareholder’s liability is limited to the value of the assets he or she received, as at the date of

distribution (s. 348(4)).

It is usually advisable for all the officers and directors to resign well in advance of dissolution. When a company is restored and persons have not resigned, they are also reinstated in their respective roles as officers and directors.

## 2. Record-Keeping

Sections 351 to 353 establish how the records of a dissolved company required under s. 42 and, if a liquidator was appointed, of the liquidation required under s. 333(1), are to be maintained and how one may obtain access to them.

The person responsible for the records will be the person shown in the application for dissolution as having custody of the records (s. 351(2)(a)(i) and (b)), or if there was no application for dissolution, the person responsible will be whoever had custody of the records at the time of dissolution (s. 351(2)(a)(ii)).

The records must be retained for two years or until the expiration of any shorter period the court orders (s. 351(2) and Reg. s. 25).

The obligation to retain the records includes the requirement that the records be made available for inspection during statutory business hours by any person who would have been entitled to inspect the company's records before dissolution (s. 352). A party entitled to inspect the records is also entitled to a copy of any of them.