
Canada

Financial Assistance

IBA Corporate and M&A Law Committee 2022

Contact

Jay A Lefton

Fasken Martineau DuMoulin, Toronto, Ontario

jlefton@fasken.com

Contents

	Page
THE CORPORATE LAW REGIME	2
THE ORIGIN OF FINANCIAL ASSISTANCE PROHIBITIONS	2
FINANCIAL ASSISTANCE REGIMES IN CANADA	3
OTHER CONSIDERATIONS	10

THE CORPORATE LAW REGIME

In Canada, there are 13 provinces and territories; each of those jurisdictions has its own business corporations legislation (although the territories of Nunavut and Northwest Territories share the same corporate statute). In addition, the federal government has established its own corporate law regime under the Canada Business Corporations Act (the CBCA). As a result, in total there are 13 different corporate statutes in Canada.

While 'financial assistance' prohibitions (dealing with restrictions on loans, guarantees and other kinds of financial assistance that can be given by a corporation) were historically commonplace in Canadian corporate statutes, over time many of the statutes repealed such provisions or replaced them with provisions more focused on transparency.

Currently, the CBCA, as well as the corporate statutes in Ontario, Quebec, Manitoba, Nova Scotia, Prince Edward Island and Yukon, have no express statutory provisions dealing with financial assistance.

THE ORIGIN OF FINANCIAL ASSISTANCE PROHIBITIONS

Historically, case law was interpreted to prevent a company from advancing money on the security of its own shares, purchasing its own shares and converting shares into debt, among other things. Many of these common law principles were subsequently codified and expanded to provide restrictions on loans, guarantees and other kinds of financial assistance that can be given by a corporation. The policy concerns that were relevant in the original common law had been expanded by the legislative framework.

Those statutory prohibitions typically addressed two situations:

- providing financial assistance to categories of specified persons who have a connection with the corporation; and
- providing financial assistance to any person for the purchase of shares issued by the corporation or an affiliated corporation.

For the purposes of the categories of specified persons, the corporate statutes generally referred to a prohibition of providing such financial assistance to any shareholder, director, officer or employee of the corporation or affiliated corporation, or to an associate of any such person, for any purpose. In many cases, these statutory provisions expressly prohibited a corporation from giving financial assistance where the directors have reasonable grounds for believing that, as a result of such financial assistance, the corporation either is or would become insolvent, or the corporation's assets either are or would be less than all of its liabilities and stated capital.

To emphasise the seriousness of the issue, the corporate statutes typically provided that directors who authorise financial assistance contrary to the provisions of the statute are personally liable to the corporation for the amount (although it is common for the statutes to allow directors to avoid liability if they have relied in good faith upon the financial statements or a report of a lawyer, accountant or other professional).

Notwithstanding the strict prohibitions, the corporate statutes generally permitted certain financial assistance to be given. For example, financial assistance would generally be permissible by means of a loan, guarantee or otherwise:

- to any person in the ordinary course of business if the lending of money is part of the ordinary business of the corporation;
- to any person on account of expenditures incurred or to be incurred on behalf of the corporation;
- to its holding body corporate if the corporation is a wholly owned subsidiary of the holding body corporate;
- to a subsidiary body corporate of the corporation;
- to employees of the corporation or any of its affiliates:
 - to enable or assist them to purchase or erect living accommodation for their own occupation; or
 - in accordance with a plan for the purchase of shares of the corporation or any of its affiliates.

The term 'financial assistance' was not itself defined in the corporate statutes, although the legislation refers to 'financial assistance by means of a loan, guarantee or otherwise. Although most examples of financial assistance are quite obvious, depending on the facts, financial assistance regulated by statute could take many forms, including:

- a comfort letter by a corporation to a lender in support of loans to be made to a body corporate associated with such corporation (even though such comfort letter is not a guarantee);
- a subordination by a corporation of a receivable owed to it from a body corporate associated with such corporation in favour of a creditor of such body corporate where there is inadequate consideration to support such subordination;
- a forgiveness of a debt owed to a corporation by a body corporate associated with such corporation where there is inadequate consideration to support such forgiveness; or
- a joint and several covenant given by a corporation and an associated body corporate.

Not every financial dealing between associated parties should necessarily be considered to be financial assistance. For example, where a subordination or forgiveness of debt is supported by adequate consideration or where a lease is entered into between associated parties on normal commercial terms and at a fair rental and, in either case, there is no intention to confer financial assistance, there would appear to be a reasonable argument that there is no 'financial assistance'. This is because 'to assist' means to help, to aid or to give support. Where there is adequate consideration, eg in the form of a reasonable and fair business deal and where, even though the parties are associated, they are in fact dealing on an arm's-length basis, it is arguable that there is no help, aid or support.

FINANCIAL ASSISTANCE REGIMES IN CANADA

Of the 13 corporate statutes in Canada, the CBCA (being the federal corporate statute) as well as the corporate statutes in Ontario, Quebec, Manitoba, Nova Scotia, Prince Edward Island and Yukon have no express statutory provision dealing with financial assistance.

The Alberta Business Corporations Act

The Alberta Business Corporations Act (the Alberta Act) defines financial assistance as 'financial assistance by means of a loan, guarantee or otherwise', and then provides (in section

45(2)) that 'a corporation may give financial assistance to any person for any purpose'. The statute does, however, provide that (except as hereinafter contemplated) a corporation must disclose to its shareholders financial assistance that the corporation gives to:

- a shareholder or director of the corporation or of an affiliated corporation;
- an associate of a shareholder or director of the corporation or of an affiliated corporation; or
- any person for the purpose of or in connection with a purchase of a share issued or to be issued by the corporation or an affiliated corporation.

A corporation is not required to disclose to its shareholders financial assistance that it gives:

- to any person in the ordinary course of business if the lending of money is part of the ordinary business of the corporation;
- to any person on account of expenditures incurred or to be incurred on behalf of the corporation;
- to a holding body corporate if the corporation is a wholly owned subsidiary of the holding body corporate;
- to a subsidiary body corporate of the corporation;
- to employees of the corporation or any of its affiliates:
 - to enable them to purchase or erect, or to assist them in purchasing or erecting living accommodation for their own occupation, or
 - in accordance with a plan for the purchase of shares of the corporation or any of its affiliates to be held by a trustee; or
- to any person if all the shareholders have consented to giving the financial assistance.

A disclosure under the Alberta Act must include the following information:

- the identity of the recipient of the financial assistance and the recipient's relationship to the corporation;
- a description of the financial assistance, which must include:
 - the nature and extent of the financial assistance given;
 - the amount of the financial assistance;
 - the terms on which the financial assistance was given; and
 - the purpose of the financial assistance.

The corporation must make the disclosure by sending the information to be disclosed to the shareholders within 90 days of providing the financial assistance. A corporation must disclose to the shareholders any increase in the amount of the financial assistance and any changes to the terms on which the financial assistance was given within 90 days of the change.

Where a disclosure required by the Alberta Act has previously been made, and the obligation of the recipient or the corporation in respect of the financial assistance is still outstanding, the corporation must place before the shareholders at each annual meeting a document disclosing:

- the outstanding balance, as of the end of the most recent fiscal year of the corporation:
 - on any loan made to the recipient by the corporation; or
 - on any loan of the recipient guaranteed by the corporation; and
- the nature and extent of any breach by the recipient of the recipient's obligation to repay the loan made by the corporation, or whether any liability under a guarantee has been invoked in respect of a loan of the recipient guaranteed by the corporation.

The Alberta statute also provides that a contract made by a corporation in contravention of those provisions may be enforced by the corporation or by a lender for value in good faith without notice of the contravention.

Moreover, the statute does provide (in section 118(1)) that directors of a corporation who vote for or consent to a resolution authorising financial assistance contrary to section 45 are jointly and severally liable to restore to the corporation any amounts so paid and the value of any property so distributed, and not otherwise recovered by the corporation. A director is not liable for a contravention of the financial assistance requirements if the director proves that the director did not know and could not reasonably have known that the financial assistance was given contrary to section 45.

The British Columbia Business Corporations Act

Section 195 of the British Columbia Business Corporations Act (the BC Act), like the Alberta Act, provides that a corporation may give financial assistance to any person for any purpose by means of a loan, a guarantee, the provision of security or otherwise, subject to disclosure requirements.

Except as set out below, a company must disclose any financial assistance that is material to the company and that the company gives to:

- a person known to the company to be a shareholder of, a beneficial owner of a share of, a director of, an officer of or an employee of the company or an affiliate of the company;
- a person known to the company to be an associate of any of the persons referred to above; or
- any person for the purpose of a purchase by that person of a share issued or to be issued by the company or an affiliate of the company.

The BC Act provides that a corporation need not make disclosure in respect of financial assistance that is given:

- to a person in the ordinary course of business, if the lending of money is part of the ordinary business of the company;
- to a person on account of expenditures incurred or to be incurred on behalf of the company;
- to a corporation of which the company is a wholly owned subsidiary;
- to a corporation that is a wholly owned subsidiary of the company;
- to a corporation if the company and the corporation are:
 - wholly owned subsidiaries of the same holding corporation; or
 - wholly owned by the same person;
- to the person, other than a corporation, who holds all of the shares of the company or of a corporation of which the company is a wholly owned subsidiary;
- to employees of the company or of any affiliate of the company to enable or assist them to purchase or erect living accommodation for their own occupancy; or
- to employees, or trustees for employees, of the company or of any affiliate of the company, in accordance with a plan for the purchase of shares of the company or of any affiliate of the company to be beneficially owned by those employees.

Similarly, a company need not make disclosure if that disclosure is waived by the court. The BC Act provides that following information must be disclosed in respect of financial assistance for which disclosure is required under this section:

- a brief description of the financial assistance, including the nature and extent of the financial assistance given;

- the terms on which the financial assistance was given;
- the amount of the financial assistance given.

The information must be disclosed:

- in a written record deposited in the company's records office before or promptly after the giving of the financial assistance;
- in a consent resolution of the directors passed before or promptly after, or in order to authorise, the giving of the financial assistance;
- in the minutes of the directors' meeting at which the giving of the financial assistance is authorised; or
- in the minutes of the directors' meeting that follows the giving of the financial assistance.

The New Brunswick Business Corporations Act

In 2015, the Government of New Brunswick published a discussion paper proposing major modifications to the province's corporate statute, including the repeal of the financial assistance restrictions. No action was taken in response to that proposal until March 2022 when *An Act to Amend the Business Corporations Act* was introduced in the New Brunswick legislature; no amendments relating to financial assistance were contained in that proposed legislation.

Under Section 43 of the New Brunswick Business Corporations Act, except as contemplated below or where the articles provide, a corporation or any corporation with which it is affiliated shall not, directly or indirectly, give financial assistance by means of a loan, guarantee or otherwise:

- to any shareholder, director, officer or employee of the corporation or of an affiliated corporation; or
- to any associate of a shareholder, director, officer or employee of the corporation or of an affiliated corporation;

if there are reasonable grounds for believing that:

- the corporation is, or after giving the financial assistance would be, unable to pay its liabilities as they become due; or
- the realisable value of the corporation's assets after giving the financial assistance, excluding the amount of any financial assistance in the form of a loan or in the form of assets pledged or encumbered to secure a guarantee, would be less than the aggregate of the corporation's liabilities and stated capital of all classes.

Similarly, except as contemplated below, a corporation or any of its affiliates shall not, directly or indirectly:

- make a loan to any person that is secured by a share of the corporation; or
- give financial assistance to any person, by means of a loan, guarantee or otherwise, for the purpose of or in connection with a purchase of a share issued or to be issued by the corporation.

A corporation may give financial assistance by means of a loan, guarantee or otherwise:

- to any person in the ordinary course of business if the lending of money is incidental to the ordinary business of the corporation;
- to any person on account of expenditures incurred on behalf of the corporation;

- to a holding body corporate if the corporation is a wholly-owned subsidiary of the holding body corporate;
- to a subsidiary body corporate of the corporation; or
- to or for the benefit of employees of the corporation or any of its affiliates
 - to enable or assist them to purchase or erect living accommodation for their own occupation; or
 - in accordance with a plan for the purchase of shares of the corporation or any of its affiliates by a trustee.

A contract made by a corporation in contravention of this section may be enforced by the corporation or by a lender for value in good faith, without notice of the contravention.

Newfoundland and Labrador Corporations Act

Section 78 of the Newfoundland and Labrador Corporations Act (the NL Act) provides that, except as set out below, where 'circumstances prejudicial to the corporation exist', a corporation or a corporation with which it is affiliated may not, directly or indirectly, give financial assistance by means of a loan, guarantee or otherwise:

- to a shareholder, director, officer or employee of the corporation or affiliated corporation or to an associate of the person for any purpose; or
- to a person for the purpose of or in connection with a purchase of a share issued or to be issued by the corporation or a corporation with which it is affiliated.

The NL Act provides that 'circumstances prejudicial to the corporation exist' in respect of the foregoing financial assistance where there are reasonable grounds for believing that:

- the corporation is, or would after giving the financial assistance be, unable to pay its liabilities as they become due; or
- the realisable value of the corporation's assets after giving the financial assistance, excluding the amount of financial assistance in the form of a loan and in the form of assets pledged or encumbered to secure a guarantee, would be less than the aggregate of the corporation's liabilities and stated capital of all classes.

Notwithstanding the foregoing, section 79 of the NL Act provides that a corporation may give financial assistance to a person by means of a loan, guarantee or otherwise:

- in the ordinary course of business, where the lending of money is part of the ordinary business of the corporation;
- on account of expenditures incurred or to be incurred on behalf of the corporation;
- to a holding body corporate where the corporation is a wholly owned subsidiary of the holding body corporate;
- to a subsidiary body corporate of the corporation; and
- to employees of the corporation or an affiliate:
 - to enable or help them to purchase or erect living accommodation for their own occupation, or
 - in accordance with a plan for the purchase of shares of the corporation or an affiliate to be held by a trustee.

The NL Act provides that directors of a corporation who vote for or consent to a resolution authorising financial assistance contrary to the foregoing provisions are jointly and individually liable to restore to the corporation amounts so distributed or paid, and not otherwise recovered by the corporation.

Northwest Territories Business Corporations Act

As noted above, the Territories of Nunavut and Northwest Territories share the same corporate statute, being the Northwest Territories *Business Corporations Act* (the Territories Act). Under Section 46 of the Territories Act, except as contemplated below, a corporation or any corporation with which it is affiliated shall not, directly or indirectly, give financial assistance by means of a loan, guarantee or otherwise:

- to a shareholder, director or officer of the corporation or of an affiliated corporation or to an associate of any such person for any purpose; or
- to any person for the purpose of or in connection with a purchase of a share issued or to be issued by the corporation or affiliated corporation;

(together, the 'Affected Persons') where there are reasonable grounds for believing that:

- the corporation is, or after giving the financial assistance would be, unable to pay its liabilities as they become due; or
- the realisable value of the corporation's assets after giving the financial assistance, excluding the amount of any financial assistance in the form of a loan and in the form of assets pledged or encumbered to secure a guarantee, would be less than the aggregate of the corporation's liabilities and stated capital of all classes.

Under the Territories Act, a corporation may give financial assistance by means of a loan, guarantee or otherwise:

- to any person in the ordinary course of business if the lending of money is part of the ordinary business of the corporation;
- to any person on account of expenditures incurred or to be incurred on behalf of the corporation;
- to a holding body corporate if the corporation is a wholly owned subsidiary of the holding body corporate;
- to a subsidiary body corporate of the corporation; and
- to employees of the corporation or any of its affiliates:
 - to enable or assist them to purchase or erect living accommodation for their own occupation; or
 - in accordance with a plan for the purchase of shares of the corporation or any of its affiliates to be held by a trustee.

A contract made by a corporation in contravention of this section may be enforced by the corporation or by a lender for value in good faith, without notice of the contravention.

Unless disclosure is otherwise made by a corporation, annual financial statements of a corporation shall contain the following information with respect to each case in which financial assistance is given by the corporation, by way of loan, guarantee or otherwise, to any of the Affected Persons, if the financial assistance was given during the financial year or period to which the statement relates or remains outstanding at the end of that financial year or period:

- the identity of the person to whom the financial assistance was given;
- the nature of the financial assistance given;
- the terms on which the financial assistance was given; and
- the amount of the financial assistance initially given and the amount, if any, outstanding.

Directors of a corporation who vote for or consent to a resolution authorising financial assistance contrary to the foregoing provisions are jointly and severally liable to restore to the

corporation any amounts so paid and the value of any property so distributed that is not otherwise recovered by the corporation.

Saskatchewan Business Corporations Act

The Saskatchewan Business Corporations Act provides (in section 42) that a corporation or any affiliate of a corporation may give financial assistance by means of a loan, guarantee or otherwise to any of the persons described below if the corporation or affiliate of the corporation discloses that giving of financial assistance in accordance with the legislation.

These requirements apply to the giving of financial assistance to:

- a shareholder, director, officer or employee of the corporation or an affiliate of the corporation, or an associate of any of those persons; or
- any person for the purpose of, or in connection with, a purchase of a share issued or to be issued by the corporation or an affiliate of the corporation.

For a private corporation, the disclosure requirements do not apply to the giving of financial assistance to employees of the corporation or any of its affiliates that:

- is for the purpose of enabling or assisting them to purchase or erect living accommodation for their own occupation; or
- is in accordance with a plan for the purchase of shares of the corporation or any of its affiliates to be held by a trustee.

A private corporation shall give a notice to all shareholders within 90 days after the giving of financial assistance. Special rules apply for public corporations. The required disclosure must contain the following information:

- the identity of the person to whom financial assistance was given;
- the nature of the financial assistance given;
- the terms on which the financial assistance was given;
- the amount of the financial assistance given; and
- the amount of financial assistance that remains outstanding.

A contract made by a corporation in contravention of this section may be enforced by the corporation or by a lender for value in good faith without notice of the contravention. Directors of a corporation who vote for or consent to a resolution authorising financial assistance contrary to section 42 are jointly and severally liable to restore to the corporation any amounts so distributed or paid and not otherwise recovered by the corporation.

Summary of the Canadian financial assistance rules

	No express statutory restrictions	Qualified permission	Disclosure requirements
Federal	[•]		
Alberta	[•]		[•]
British Columbia	[•]		[•]
Manitoba	[•]		
Nova Scotia	[•]		
New Brunswick		[•]	
Newfoundland		[•]	
Northwest Territories		[•]	[•]

Ontario	[●]		
Prince Edward Island	[●]		
Quebec	[●]		
Saskatchewan	[●]		[●]
Yukon	[●]		

OTHER CONSIDERATIONS

Notwithstanding that certain jurisdictions in Canada have removed the specific financial assistance restrictions from their corporate legislation, persons dealing with such matters in Canada should be aware of some other associated issues.

Directors of corporations must consider two factors in their deliberations and actions that may otherwise relate to financial assistance:

- Almost all Canadian corporate statutes expressly provide that directors are required to act honestly and in good faith with a view to the best interests of the corporation (which essentially codifies the common law duties of directors which exist in those provinces where the standards have not been codified). As a result, in approving any form of financial assistance, the board of directors must determine that providing the financial assistance is in the best interests of the corporation.
- Most Canadian corporate law statutes provide for a broadly drafted oppression remedy which, generally speaking, grants a 'complainant' the right to bring a court action against a corporation where conduct has occurred which is oppressive, unfairly prejudicial or which unfairly disregards the interests of a shareholder, creditor, director or officer. This remedy essentially imposes a general standard of 'fair' conduct on each corporation and its management. Complainants are permitted to apply to court for an order rectifying the allegedly oppressive conduct. Similarly, a court may make any order it thinks fit in the circumstances.

In addition, most corporate statutes in Canada have specific tests associated with a corporation's ability to acquire its shares. These tests are generally referred to as 'corporate solvency' tests because they are not necessarily subject to a 'solvency' test as one would think of them in a bankruptcy scenario. Under the CBCA (the federal corporate legislation), for example, a corporation shall not make any payment to purchase or otherwise acquire shares issued by it if there are reasonable grounds for believing that:

- the corporation is, or would after the payment be, unable to pay its liabilities as they become due; or
- the realisable value of the corporation's assets would, after the payment, be less than the aggregate of its liabilities and stated capital of all classes.

The 'stated capital' is, generally speaking, the amount which was originally paid for the shares on their initial issuance (although the amount in the stated capital account is subject to increase or decrease in accordance with the applicable corporate statute). Similar tests apply in the case of a redemption of shares in accordance with the particular provisions of the shares.

There are both federal and provincial laws that may invalidate transactions or transfers of property which were purported to be effected when a person was insolvent or on the eve of insolvency, and which:

- have the effect of preferring one creditor over another;
- which transfer value that would otherwise be available to creditors for less than fair value;
or
- that were made with the intent to defeat the interests of creditors or other persons.

It is beyond the scope of this article to discuss these reviewable transactions or the steps a secured party should take to properly secure the obligations of a debtor.