CANADA BUSINESS CORPORATIONS ACT

DISCUSSION PAPER

GOING-PRIVATE TRANSACTIONS

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EXECUTIVE SUMMARY

GOING-PRIVATE TRANSACTIONS

Introduction

The term going-private transaction (GPT) is a generic label which applies to a variety of corporate transactions that result in termination of shareholder interests with compensation but without consent and without a replacement of equivalent value in a participating security.

Although GPTs are a common part of the current corporate landscape, their treatment under the Canada Business Corporations Act (CBCA) has been less than thorough. This may have caused confusion in the marketplace. This paper examines GPTs, parallel statutory models and various areas for potential reform. No final determinations have yet been made by Industry Canada. Preliminary recommendations are identified simply to help focus discussion.

Current CBCA Regime

The current CBCA does not expressly permit all forms of GPTs. Rather, in section 206, it prescribes the rules for a limited form of GPT, often referred to as a compulsory acquisition. A compulsory acquisition can occur when an offeror who has obtained 90% of shares to which a take-over bid relates, though excluding shares already held by the offeror or a related party, offers to acquire the remaining shares at the same price originally offered in the bid.

A policy of the former Director under the CBCA took the position that any GPT other than a compulsory acquisition was prohibited by the CBCA. The 1994 policy of the current Director reversed that position and advised that GPTs would be permitted under the CBCA where fairness was ensured. In turn, the statutory gauge for fairness was cited as the oppression remedy under section 241.

Other Canadian Statutory Models

Some provinces do emulate the CBCA approach in whole or in part in respect of GPTs, while others do not deal with GPTs at all. A number of key corporate and securities regulators have very defined approaches to the GPT issue.

The Business Corporations Act (Ontario) (OBCA) in section 189 includes a right of compulsory acquisition, which is very close to section 206 of the CBCA. The OBCA also allows for a right of compelled acquisition: under section 188, a shareholder of a class where one control block owns 90% or more of that class may compel the corporation to repurchase his or her shares. The CBCA has no similar provision.

Section 190 of the OBCA deals only with offering corporations, but permits GPTs when the minority is treated fairly. The section enumerates three criteria for fairness which are referred to under Issue 2 of the discussion paper.

Ontario Securities Commission (OSC) Policy 9.1 and Quebec Securities Commission (QSC) Policy 27 take a similar approach toward GPTs. The British Columbia Securities Commission has also emulated this approach in part.

The Issues

ISSUE 1 - SHOULD THE CBCA BE AMENDED TO EXPRESSLY PERMIT GPTS? SHOULD ARTICULATED STANDARDS OF FAIRNESS BE DEFINED?

Given the 1994 policy of the CBCA Director, it is possible that a workable scheme exists under the current regime so as to allow GPTs as well as compulsory acquisitions but not compelled acquisitions where fairness to the minority is ensured. On the other hand, there is some concern based on common law that GPTs are not permitted under the CBCA. A statutory amendment would add more clarity.

The most serious concern as with any system bereft of specific standards, lies in the protection of the minority. The enforcement of fairness under the current regime arises in two ways. First, most CBCA offering corporations must comply with the Securities Act (Ontario) or the Securities Act (Quebec) and both have strict requirements to ensure fairness. Second, those offering corporations which are not regulated by the said legislation and all CBCA corporations which are private companies turn to the standards which might be imposed under the oppression remedy to set out appropriate standards of fairness. Therefore, the minority is forced to engage the judicial system at its own expense which lessens the efficacy and real ability of this remedy to ensure fairness.

The preliminary recommendation is to amend the CBCA to clarify that GPTs are permissible in certain circumstances.

ISSUE 2 - IF THE CBCA IS AMENDED TO EXPRESSLY DICTATE THE STANDARDS OF FAIRNESS FOR GPTS, WHAT SHOULD THOSE STANDARDS BE?

The OSC, OBCA and QSC all refer to three fundamental pre-conditions to the existence of fairness. These pre-conditions are (i) approval by a majority of the minority, (ii) independent valuations and (iii) enhanced disclosure. Amendment of the CBCA to include a GPT regime may include these safeguards as well. Presumably, these safeguards would take the form of regulations to the CBCA to ensure that they could be amended with ease as required.

In addition to these three preconditions, minority shareholders have a dissent right under which they may dispute the value at which their shares are acquired.

The conditions of fairness are quite complicated and require more detailed study. Moreover, they naturally form part of a regulatory regime, not a statutory regime. Therefore, no recommendations in this regard are made.

ISSUE 3 - SHOULD GPTS BE ALLOWED FOR PRIVATE COMPANIES? IF SO, IN WHAT CIRCUMSTANCES?

Currently accepted indicia of fairness in a GPT (namely a majority of the minority approval, independent valuation and enhanced disclosure) apply to offering corporations. But proper indicia of fairness in a GPT involving a private company may be entirely different. In fact, from a policy perspective, GPTs in a private company may not be permissible.

GPTs or a version thereof frequently occur by virtue of contractual agreements among shareholders. In those cases, fairness is evidenced by the consensus of the parties.

In larger companies, unanimity may be impossible and resort may have to be made to the rules otherwise applicable to public companies in the event of a GPT. The alternative for minorities is to seek fairness under the oppression remedy and the dissent right, which may not be sufficient, given that both involve engaging the court system.

ISSUE 4 - SHOULD THE CBCA BE AMENDED TO CONFIRM THAT SHARE CONSOLIDATIONS TRIGGER DISSENT AND APPRAISAL RIGHTS?

Some concern exists that the current language of the CBCA does not create a dissent right when a GPT is effected through a share consolidation. Dissent rights are critical to all existing GPT regimes and so the CBCA needs clarification to ensure that the right ensues.

ISSUE 5 - SHOULD THE CBCA BE AMENDED TO ALLOW COMPELLED ACQUISITIONS?

To ensure harmonization with the OBCA and to give the minority greater protection from what may be the tyranny of the majority, compelled acquisitions should form part of the CBCA regime on GPTs.

A number of other technical and minor amendments are also put forward in the paper.

CANADA BUSINESS CORPORATIONS ACT

GOING-PRIVATE TRANSACTIONS

INTRODUCTION

[1] The term "going-private transaction" or "GPT"[1] is a generic label applying to a variety of corporate transactions. These transactions result in the interests of a shareholder in the shares of the corporation being terminated with compensation but without consent and without the substitution of an interest of equivalent value in a participating security of the original corporation or a third party.

[2] Going-private transactions share two common traits:

(i) The transactions are initiated at the behest of the majority or a third party.

(ii) The minority is essentially given no option to remain as a participating player in corporate affairs.

[3] Although most common in the context of corporations whose shares are widely-held, going-private transactions can also include those transactions which terminate the interests of shareholders in private company settings.

[4] GPTs are not expressly referenced in the CBCA although they are certainly part of current corporate marketplace practices. Given the uncertainty caused by the silence of the CBCA on GPTs, this paper examines GPTs, including compelled acquisitions and compulsory acquisitions,[2] to determine the merits of and need for revision of the CBCA. This paper also attempts to present options and related advantages and disadvantages thereof. Statutory reform having regard to institution of a GPT regime, institution of a right of compelled acquisition, GPT regulation of private corporations, treatment of share consolidations and other minor clarifications are put forward. Preferred positions are identified to help focus discussion and to indicate current leanings of Industry Canada. No final determinations have yet been made by Industry Canada although preferred positions are identified again simply to help focus discussion.

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[1] Throughout this paper, share acquisitions which are not expressly referenced in the Canada Business Corporations Act (CBCA) or which are sanctioned in section 190 of the Business Corporations Act (Ontario) (OBCA) shall be referred to as "going-private transactions" or "GPTs". Statutorily-sanctioned acquisitions by offerors, such as under section 206 of the CBCA or section 188 of the OBCA shall be referred to herein as "compulsory acquisitions". Statutory-based acquisitions compelled by a minority shareholder, as under section 189 of the OBCA, shall be referred to herein as "compelled acquisitions". While a compulsory acquisition is a form of GPT, the distinction in nomenclature is made to ensure clarity.

[2] See definitions in note 1.

OVERVIEW OF "DEFINITIONS"

[5] Different definitions of GPTs are found in corporate and securities laws and the treatment of GPTs, compelled acquisitions and compulsory acquisitions, or non-treatment as the case may be, varies across these jurisdictions. The CBCA does not refer to GPTs as such anywhere in its text or in the associated regulations.

[6] By comparison, subsection 190(1) of the OBCA[3] provides that a:

> "going private transaction" means an amalgamation, arrangement, consolidation or other transaction carried out under this Act by a corporation that would cause the interest of a holder of a participating security of the corporation to be terminated without the consent of the holder and without the substitution therefor of an interest of equivalent value in a participating security that,
>
> (a) is issued by the corporation, an affiliate of the corporation or a successor body corporate, and
> (b) is not limited in the extent of its participation in earnings to any greater extent than the participating security for which it is substituted,
>
> but does not include,
>
> (c) an acquisition under section 188,
> (d) a redemption of, or other compulsory termination of the interest of the holder in, a security if the security is redeemed or otherwise acquired in accordance with the terms and conditions attaching thereto or under a requirement of the articles relating to the class of securities or of this Act, or
> (e) a proceeding under Part XVI.

[7] Similarly, the Ontario Securities Commission (OSC) Policy 9.1[4] in Part I describes a GPT as:

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[3] Section 190 is reproduced in full in Appendix A.

[4] The future of OSC Policy 9.1 was likely affected by the Ainsley decision and will likely be affected as a consequence of recent amendments to the Securities Act (Ontario) in respect of rule-making authority which provide the Commission rule-making authority in respect of issuer bids, insider bids, GPTs and related party transactions. See Appendix B for the full text of the OSC Policy 9.1. (Ainsley Financial Corporations v. Ontario Securities Commission 16 OSCB 4077, 14 O.R. (3rd) 280 (Gen. Div. - Commercial List).

> ... an amalgamation, arrangement, consolidation or other transaction involving an issuer as a consequence of which the interest of a holder of a participating security of the issuer in that security may be terminated without the consent of that holder and without the substitution therefor of an interest of equivalent value in a participating security of the issuer or of a successor to the business of that issuer or of another issuer that controls the issuer or the successor to the business of the issuer but does not include the acquisition of participating securities pursuant to a statutory right of acquisition.[5]

[8] Notably, OSC Policy 9.1 and Quebec Securities Commission ("QSC") Policy Q-27[6], a similar document, also cover CBCA corporations which are reporting issuers.

[9] GPTs, though not expressly referenced in the CBCA, have been an increasingly prevalent fact of corporate life for CBCA corporations over the past two decades.[7] The absence of an express statutory basis for GPTs in the CBCA given the existence of such bases in the legislation of some jurisdictions, has led to uncertainty in the marketplace as to the availability of GPTs under the CBCA generally, as distinct from compulsory acquisitions specifically.[8] Furthermore, the evolution of provincial corporate and securities laws in this area has raised certain issues of

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[5] As the definition indicates, a GPT is a generic term covering various forms of transactions all of which effect a similar result. The two most common forms of GPT, beyond compelled acquisitions and compulsory acquisitions, are amalgamation squeeze-outs and share consolidations.

A share consolidation, also known as a reverse stock split, is a corporate transaction in which the number of outstanding shares is reduced by effecting a consolidation. What distinguishes reverse stock splits from everyday consolidations is the creation of fractional shares instead of whole shares which ultimately cause the shareholder's exit. When used to effect a GPT, a ratio is established in such a manner that only those shareholders having control are left with a whole number of shares. Each minority holder is left with only a fraction of a share. Scrip certificates are then issued for these fractional shares pursuant to subsections 49(15) and (16) of the CBCA. Where the scrip certificates are not exchanged for a full share within a certain period of time, they become void.

An amalgamation squeeze-out, as the name implies, refers to a transaction where a private company is incorporated, the shareholders of which are the controlling shareholders of the company being taken private. The two corporations are amalgamated and the equity shares in the amalgamated company are held only by the original controlling shareholders. The original minority shareholders may be cashed-out or they may receive non-voting redeemable preference shares in the amalgamated company.

[6] Appendix C contains the full text of QSC Policy 27.

[7] Some commentators are of the view that much of the GPT activity in the last seven years is directly attributable to the 1987 market crash and the post-crash activity which sought to correct market buoyancy. See J. Kerbel, "Going Private Techniques" in Corporate Structure, Finance and Operations - Essays on the Law and Business Practice, L. Sarna, ed. vol. 6 (Toronto: Carswell, 1990)

[8] Infra. See discussion at page 7 hereof.

harmonization and modernization in respect of GPTs, compulsory acquisitions and compelled acquisitions for the CBCA regulator. Broadly speaking, therefore, the question for debate is whether the status quo is acceptable. If not, should any of the existing statutory models be emulated to provide some degree of harmonization? And if so, what are the ingredients of a parallel model?

REVIEW OF STATUTORY REGIMES

[10] A fundamental knowledge of the current CBCA regime as compared with a model provincial corporate regime is required if one is to fully appreciate the issues at hand. The OBCA and OSC regimes will be referenced throughout as possible models for the sake of contrast and demonstration. The provincial regimes governing GPTs beyond Ontario vary. QSC Policy 27 resembles OSC Policy 9.1 in its approach and philosophy. The British Columbia Securities Commission, while not adopting all of OSC Policy 9.1, has issued a notice indicating that,

> until a new local policy statement is in place, commission staff will continue to deal with related party transactions in accordance with the fundamental principles of fairness underlying OSC Policy 9.1.[9]

[11] No other securities commission has formulated as detailed an approach to GPTs as those of Ontario or Quebec.

[12] In respect of the corporate regulators, Alberta, New Brunswick, Newfoundland, British Columbia and Saskatchewan emulate the CBCA approach. Appendix D describes this aspect of provincial legislation. A short description of comparable regimes in the United States, United Kingdom and Australia is also included in Appendix E attached hereto.

[13] Beyond those situations where OSC Policy 9.1 or QSC Policy 27 may apply to a CBCA corporation, the current CBCA does not comprehensively regulate GPTs. The CBCA, in Part XVII dealing with take-over bids, devotes one section, section 206, to compulsory acquisitions.[10] Section 188 of the OBCA similarly describes compulsory acquisitions.[11] A comparison of the two regimes discloses a common underlying philosophy and approach with only slightly divergent mechanisms and time requirements. Also, unlike the CBCA regime, the OBCA deals with post-issuer bid compulsory acquisitions in section 188 distinctly from other non-issuer bid compulsory acquisitions.

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[9] See NIN #91/12 of the British Columbia Securities Commission dated July 11, 1991.

[10] See Appendix F for the full text of section 206 of the CBCA.

[11] See Appendix G for the full text of Section 188 of the OBCA.

[14] Subsection 206(2) of the CBCA allows an offeror who has obtained 90% of shares to which a take-over bid relates to offer to acquire the remaining shares at the same price originally offered in the bid. Notably, the 90% calculation does not include shares then held by the offeror or a related party. An offeree, referred to as a dissenting offeree, may accept the offer pursuant to subparagraph 206(3)(c)(i) or conversely may elect to demand fair value pursuant to subparagraph 206(3)(c)(ii). In either event, upon payment by the offeror to the corporation of the consideration, the shares are endorsed to the offeror. Where a dissenting offeree elects for fair value, the offeror is expected to initiate a court process, failing which the offeree may do so under subsection 206(10). Failure to engage the court deems a dissenting offeree to have tendered his or her shares pursuant to subsection 206(11). Where a court is engaged, its decision is binding on all dissenting offerees having elected for fair value by virtue of paragraph 206(14)(b).

[15] Unlike the CBCA regime, the OBCA, in section 189, grants a right to a compelled acquisition, which allows a shareholder of a class wherein one control block owns 90% or more of that class of shares, to compel the corporation to purchase his or her shares.[12] This right is not necessarily triggered by a take-over bid or issuer bid. The corporation is obliged to set a price for the shares and again the offeree is able to accept that price or elect fair value.

[16] Beyond compulsory acquisitions and compelled acquisitions, the OBCA, through section 190 defines and establishes a set of preconditions for GPTs. These preconditions include independent valuations, enhanced disclosure and majority of the minority approvals.

[17] Complementing section 190 of the OBCA is OSC Policy 9.1 dealing with insider bids, issuer bids, GPTs and related party transactions. Part IV of OSC Policy 9.1 deals exclusively with GPTs and Part III deals exclusively with issuer bids. Like the OBCA, OSC Policy 9.1 allows GPTs upon compliance with various preconditions, including enhanced disclosure, valuation and majority of the minority approvals.[13]

[18] The fundamental premise behind section 190 of the OBCA and OSC Policy 9.1 is that GPTs can be beneficial for the parties to the transaction, they can promote cost reduction and efficiency and they are only harmful to the public interest where they transcend the bounds of codified fairness. Enhanced disclosure, the availability of independent valuations and mandatory approvals by the majority of the minority are the means chosen by the OBCA and OSC Policy 9.1 to promote fairness.

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[12] See Appendix H for the full text of section 189 of the OBCA.

[13] The OSC generally treats a transaction that would otherwise be a GPT, but for the use of participating securities of equivalent value in that transaction, as a related party transaction. As a result, the extent of the regulation of GPTs by the OSC is slightly broader than may appear at first blush.

THE THRESHOLD QUESTION

[19] The prime difficulty occasioned by the CBCA is the uncertainty which is bred by its silence on GPTs. The Director under the CBCA has recently conducted a review of the common law and her predecessor's policy on this issue. She has issued a policy indicating that she interprets the CBCA in a manner which allows GPTs in certain circumstances.[14] In the absence of any express statutory or regulatory protections to ensure fairness, the oppression remedy under section 241 has been flagged as the CBCA standard of fairness. Clearly, however, precise indicia of fairness are not currently prescribed.

[20] What this paper does not attempt to do, is reopen the analysis on the acceptability of GPTs generally. Some case law finds GPTs permissible where protections exist[15]; a number of judicial decisions appear to proceed in the opposite direction.[16] Recent regulatory efforts, however, clearly come down on the side of allowance assuming certain fundamental safeguards.

[21] Efficiencies can be gained from GPTs. From the management perspective, stream-lined ownership may result in more cost efficient and speedy decision-making. From the perspectives of some minority shareholders, they may favour a GPT mechanism that encourages the majority to buy them out of a shareholding position that is in an illiquid market or that has ceased to be influential in corporate decision-making.

[22] The key issue in analyzing GPTs, at least from first principles, is whether traditional rights of ownership should invariably unseat whatever corporate efficiencies might be gained from a stream-lined ownership. The answer seems to lie in the negative provided that reasonable protections are accorded to the minority investors.

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[14] Infra, page 7.

[15] See Neonex International v. Kolasa, [1978] 2 W.W.R. 593; (1978), 3 B.L.R. 1 (B.C.S.C.); Jepson v. Canadian Salt Co., [1979] 4 W.W.R. 35; (1979), 7 B.L.R. 181 (Alta. S.C.); Domglass Inc. v. Jarislowsky, Fraser & Co. (1982), 138 D.L.R. (3d) 521, 22 B.L.R. 121 (Que. C.A.) affg (1980), 13 B.L.R. 135 (Que. S.C.); Re Ferguson v. Imax Systems Corp. (1983), 43 O.R. (2d) 128: 150 D.L.R. (3d) 718 (C.A.). All these cases seem to sanction GPTs in the CBCA context.

[16] For example, see Burdon v. Zellers Ltd. (1981), 16 B.L.R. 59 (Que. S.C.)

THE ISSUES

ISSUE NO. 1

[23] **Should the CBCA be amended to expressly permit GPTs under the CBCA and should articulated standards of procedural and substantive fairness also be defined?**

Background

[24] As a matter of policy, GPTs of all varieties have historically come under scrutiny because of the inherent conflict of interest, whether perceived or real, faced by the majority and management. The majority has an interest in striking as favourable a bargain for itself as possible; nevertheless, management in responding to all shareholders must be cognizant of minority concerns. In an effort to respond to the potential inequities occasioned by the conflict question, regulators have seen fit to develop objective standards of fairness which, when met, are deemed sufficient to offset any inequities arising from the conflict potential. The CBCA Director's recent policy confirms this approach in respect of CBCA corporations though the policy is clearly her own interpretation of a statute which may require clarification.

[25] There has been confusion in the marketplace concerning the CBCA and GPTs. A 1989 Policy of a previous CBCA Director advised that, in his view, multi-step GPTs, that is to say, all GPTs not being compulsory acquisitions, were prohibited by the CBCA.[17] The 1994 Policy of the current Director reversed that position and advised that GPTs would be permitted when effected by CBCA corporations where the transaction was not oppressive.[18] Undoubtedly between 1989 and 1994 and possibly even before 1989, the silence of the CBCA, coupled with the Director's 1989 Policy and the permissiveness of many non-CBCA regimes, caused uncertainty in the marketplace.

[26] In all likelihood, because GPTs were and are an increasingly common transaction, CBCA corporations conducted GPTs notwithstanding the 1989 Policy, and possibly in full knowledge that they were disregarding the then Director's policy. The statutory silence and associated uncertainties did not necessarily prevent transactions; some corporations simply chose to proceed without compliance. And while the 1994 Policy of the Director does alleviate confusion and allay concerns over non-compliance, it still cannot provide the certainty of express statutory language.

[27] Preliminary consultations on the Director's 1994 Policy, conducted by the Corporations Directorate of Industry Canada did disclose a desire for statutory clarification. While some

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[17] See Appendix I for the full text of the 1989 Policy.

[18] See Appendix J for the full text of the 1994 Policy.

parties felt clarification was unnecessary, the majority of commentators suggested that a clarification would assist legal advisors in providing opinions. Still others reminded the Directorate of the Varity case, which was a clear judicial warning to respect statutory parameters, and in so doing, strongly advocated for a clear statutory mandate.[19] Varity may be said to stand for the proposition that any decision or position of the Director in an area not directly addressed by the statute may be imperiled. In the absence of express shareholder rights or regulatory authority in a given area therefore, no such rights or authority exist.

[28] One further question exists in the generic debate over GPTs. If the CBCA were not amended to expressly allow GPTs or if the amendment were a simple section noting the permissibility generally of GPTs, do the standards of fairness emerge from the CBCA so as to adequately protect exiting shareholders? The 1994 Policy of the CBCA Director speaks to the ability of the present CBCA, otherwise silent on GPTs, to properly promote fairness. The reach of the oppression remedy was noted to provide the rigours of fairness. Is this sufficient? Certainly the oppression remedy has emerged from virtually all Canadian corporate statutes as dictating a measurement of fairness. Admittedly, the remedy may be all but illusory to those minority shareholders who cannot afford to initiate litigation. Nevertheless, the remedy appears to be flexible enough, but accordingly not specific, to cope with virtually all corporate action. Also, given the move towards class action proceedings and contingency fees in certain provinces, the oppression remedy may be used more regularly and with more satisfying results in the future.

OPTIONS

A. MAINTAIN THE STATUS QUO

Arguments For

(i) Notwithstanding statutory silence, the 1994 Policy of the Director does lend more certainty to the regulatory treatment of GPTs than existed previously.

(ii) Provincial securities laws would continue to apply to almost all GPTs. Unfortunately, corporations not covered by the Ontario, Quebec and to a lesser extent British Columbia legislation would not enjoy the same certainty.

(iii) The oppression remedy may prove to be a sufficiently responsive arbiter of what is fair so as to preclude the need for a greater codification.

Arguments Against

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[19] Re Canada (Director of Corporations under the Canada Business Corporations Act), 3 O.R. (3d) 336; 80 D.L.R. (4th) 619.

(i) The CBCA Director's interpretation of GPTs lacks the certainty of express statutory support.

(ii) Notwithstanding the 1994 Director's Policy, the Varity case could leave the door open to a judicial challenge.[20] Although the policy was based on a review of case law pertaining directly to CBCA GPTs, the decision of the court in Varity may nevertheless raise concerns.

(iii) Given the increasing frequency of GPTs in the corporate marketplace, it would seem illogical to construct a corporate regime which acknowledges and regulates "fundamental changes" yet ignores other very significant transactions. It is difficult to understand why GPTs would be any less deserving of legislative treatment than arrangements or amalgamations for example.

B. AMEND THE CBCA IN PART XV SO AS TO CLARIFY THAT GPTs ARE ALLOWED BUT WITHOUT A DETAILED CODIFICATION OF FAIRNESS

Arguments For

(i) Enhanced certainty as to the allowance of GPTs would be ensured. And while GPTs would be expressly permitted, fairness would not be constrained by concrete statutory or regulatory articulation. The flexibility and responsiveness of the oppression remedy in tandem with action by provincial securities commissions could be sufficient to protect minority stakeholders at least for offering corporations in certain jurisdictions.

Given the shifting sands of fairness, by not prescribing objective standards of fairness but rather leaving development of standards to case law, fairness can essentially be more responsive to both changing times and to distinct factual situations. A descriptive regulatory scheme would have to be amended periodically to be responsive. Similarly, the factual diversity of GPTs means that not every indicia of fairness will necessarily be applicable to every case. Also, various markets may have different concepts of fairness. It is entirely possible that because of corporate sophistication, expediency or stakeholder demands, minority investors in distinct marketplaces may have distinct needs; in other words, the form of fairness may change depending on circumstances. Similarly, though this consideration is less compelling, different corporations may have different capacities depending on a host of factors such as location or capitalization; realistically therefore, the ability of a company or an individual to provide fairness likely also varies.

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[20] Ibid.

(ii) The standard set by the oppression remedy may in fact be sufficient to ensure fairness. This is simply because corporations, motivated by caution, may choose to minimize their risk of litigation by leaning towards a more rigorous definition of fairness in the abstract as compared with what enunciated dictates of fairness might demand. Where corporations willingly lean towards fairness, the likelihood of litigation under the oppression remedy decreases.

Arguments Against

(i) An objective assessment of fairness is more apt to ensure certainty, consistency and ease of regulation.

(ii) Compliance with the CBCA is fostered where certainty is evident. To rely on general standards of fairness or obscure measurements from policy documents may not make fairness as abundantly evident as it should be. It could also be argued that the policy considerations behind GPTs and the requirements of fairness are so fundamental as to require codification in the regulations.

(iii) Leaving an adjudication of the fairness of GPTs to the oppression remedy may not constitute sufficient minority shareholder protection. As previously indicated, as a matter of policy, GPTs have been allowed in the non-CBCA jurisdictions only because they are counterbalanced by well-known, accepted and predictable safeguards. It is arguable that allowing GPTs without a concomitant codification of those safeguards unduly disregards minority rights. Enforcement of objective rather than subjective standards is always comparatively easier and, in the case of GPTs, the objective standards would likely result in greater overall protection to the minority. Use of the oppression remedy shifts the burden of compliance from the majority to the minority which must take active enforcement steps in the courts. It is possible that minority shareholders will, as a matter of course, choose to live with unpalatable results when the only alternative is costly litigation.

(iv) Reliance only on section 241 to prescribe fairness may simply not be sufficient. Individual stakeholders involved in disputes concerning GPTs would still have to look to the common law for discernable trends.

(v) The CBCA will not be harmonized with the OBCA or OSC Policy 9.1 unless indicia of fairness are prescribed. Arguably though, a harmonization of sorts could occur through the fairness prescribed by the oppression remedy at least in instances of the Director's intervention, since the Director is likely to seek those requirements that the OSC and QSC would otherwise demand. In other words, while the oppression remedy does not create objective measurements of fairness as do section 190 of the OBCA and OSC Policy 9.1, already established market indicia of fairness extrapolated from section 190 and Policy 9.1

might also emerge from judicial interpretation of section 241 of the CBCA, at least in respect of public corporations.

C. AMEND THE CBCA SO AS TO (i) CLARIFY THAT GPTs ARE ALLOWED AND (ii) ALLOW FOR PRESCRIBED STANDARDS OF FAIRNESS IN THE REGULATIONS TO THE CBCA

Arguments For

(i) Certainty and predictability may result if standards are codified.

(ii) Because regulatory amendment tends to occur more quickly than statutory amendment, codifying fairness in regulations should also result in responsiveness even where periodic amendments are required.

(iii) Those GPTs which involve CBCA corporations and which occur beyond the reach of the OSC or the QSC would be subject to a regulatory regime.

Arguments Against

(i) Over time, non-harmonization becomes a risk given the overlapping jurisdiction of the CBCA and provincial corporate regulators and securities commissions.

(ii) An attempt to "objectivize" a subjective standard like fairness may result in a product which is never entirely satisfying to regulated parties or the parties who benefit from regulatory protection. In the absence of residual discretion and therefore, by necessity, a vigorous review process by the CBCA Director, articulated standards of fairness may prove too harsh or too lenient in various cases. Flexibility is therefore critical. And to assume that the self-enforcing nature of the CBCA in respect of GPTs, seen in the dissent and appraisal mechanism, will mitigate what is too harsh or too lenient, is likely to entrust too much to that mechanism.

(iii) Arguably, the codification of fairness would result in regulatory duplication affecting public corporations. In respect of offering corporations, again arguably, the securities regulators, the OSC and the QSC, would review most GPTs.

Preliminary Recommendation

[29] Adoption of Option C seems advisable.

ISSUE NO. 2

[30] **If the CBCA is amended to expressly dictate the standards of fairness for GPTs, what should those standards be?**

Background

[31] If articulated indicia of fairness are necessary, what indicia are appropriate? Three common indicia have already been identified by other corporate and securities regulators, namely approval by a majority of the minority, independent valuation and enhanced disclosure.

[32] Admittedly, it is not the purpose of this paper to exhaustively examine these indicia or other alternatives. Rather, as standards of fairness would more than likely have to be deferred to regulation, extensive research and consultations would have to ensue at the time the regulations were enacted.[21] Accordingly, the following is intended to be a very brief review of the three commonly accepted indicia of fairness for the purposes of discussion only. No options or recommendations in that regard are presented in this paper.

[33] Valuations have received much attention and have been criticized almost as much as they have been acknowledged to help the minority. Majority shareholders have often bitterly complained that the cost of independent valuations can make otherwise viable GPTs impossible to conduct. Minority shareholders, equally bitterly, have decried the difficulty in interpreting valuations particularly given the discrepancies in various valuations depending on the methodology employed. Valuations would appear to be the most controversial of the fairness indicia and in that regard would therefore demand special attention in any regulatory review.

[34] Disclosure to the minority in any GPT is fundamental and a heightened standard of disclosure and vigilance is equally fundamental. There is no reason to believe that in a revamped CBCA scheme that would be otherwise. Critics of enhanced disclosure do occasionally question the value to the user of the disclosure. Where information is presented with a lack of clarity or if the materials are simply too complex, even sophisticated investors will encounter difficulty extracting significance from the disclosure documentation. In light of the diversity of participants in current capital markets, which includes the most and the least sophisticated investors in one

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[21] As for where the indicia of fairness could be identified, one option is to proceed in regulation as opposed to the statute because regulatory amendment is generally far more expedient. If the CBCA approach were revised towards an articulated code of fairness for GPTs, there is no compelling reason to deviate substantially from currently existing securities law models. Based on that desire for harmonization, or at least some degree thereof, and the longer period required for statutory as opposed to regulatory reform, a vehicle more responsive than the statute will have to enshrine the codification if harmonization is a long term objective. Some stakeholders may disagree that regulatory codification is appropriate because ease of amendment may equate to ease of lessening protective standards. That concern, if expressed, would obviously have to be addressed by the regulator.

small pond, tailoring disclosure to one's audience and his or her comprehension level can be difficult.

[35] One option would be to require a basic level of "up front" disclosure to shareholders (like OSC Policy 9.1) but, in addition, permit minority shareholders full access to information in the possession of the corporation being taken private and in the possession of any insider involved in the transaction. This could include access to all evaluations of the corporation, all draft reports and background work, all financial information and all minutes of directors and committee meetings.

[36] Such access might well be considered as highly intrusive to corporate affairs as it could release valuable corporate proprietary information. Indeed, some commentators may argue that this enhanced disclosure would facilitate a kind of "tyranny of the minority." On the other hand, GPTs by their nature involve the expropriation of property interests. Full disclosure may be a fair cost for the extraordinary right to terminate a minority shareholder's property interests in the corporation. Shareholders seeking access to such information could be made subject to a statutory confidentiality requirement. As with shareholder lists (section 21 of the CBCA), the shareholder could be required to prepare an affidavit stating that the information will only be used for the limited purpose of evaluating the GPT.

[37] Majority of the minority approval has also evolved into a classic indicium of fairness. Of course being the last of the fairness hurdles, the significance of a vote is only as telling as the information which precedes it and upon which it is likely based.

Other Safeguards

[38] Beyond these three safeguards, dissent and appraisal rights are generally available through the corporate statute to the minority in GPTs. Dissent rights are very important to minority shareholders whose interests in the corporation are being terminated because if such shareholders feel the offered price is unfair, the dissent right presents a vehicle for challenge. It is logical that this right stand at the plateau of the majority's ascent to complete share ownership. The current CBCA language, however, may not sufficiently ensure the dissent right in every form of GPT.[22]

[39] While some commentators may criticize this potential omission, others would dismiss it as irrelevant in any event because of the virtual inaccessibility of the right to shareholders[23]. Prohibitive legal expenses and inaccessible legal systems preclude most individual shareholders from reaping the benefits of the dissent right. Increasingly, even economically significant investors similarly find that cost alone precludes any possibility of real success.

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[22] Infra., page 20. See the discussion on share consolidations.

[23] See, for example, M. Leith, "The Dissent Route, Once is Enough" (Jan. 1993) 5 Corporate Governance Review (Allenvest Group Ltd.) 7.

[40] No doubt, majority shareholders and corporate managers do not like disruptions in corporate affairs such as may be occasioned by a more fulsome minority remedy. Therefore, changes to the dissent right may be censured as either not addressing the real issue (fundamentally redesigning it to make it more user-friendly for shareholders, which is beyond the scope of this paper) or seeking to broaden a remedy which may already be too intrusive in corporate affairs.

[41] Nevertheless, some changes could be made to the dissent right in respect to GPTs which would address some concerns of minority shareholders. For instance, the amount offered to the minority shareholders[24] could be paid to them immediately on surrender of their share certificates, while the dissent right process is used to determine fair value. Of course, this could change the dynamics of the dissent right significantly. Another option could be to prescribe broader judicial powers which in turn would ensure timely availability of information and prevention of abuse of process. Timing is an additional factor which would be critical in any GPT regime. Given the sheer weight of materials and information to be reviewed in any GPT, sufficient time must be allowed for the analysis of that information and subsequent decision making.

[42] Leaving aside the dissent right and timing, the most challenging aspect of analyzing fairness, after individual aspects of fairness are isolated, is to formulate when and which of the isolated indicia should occur together and in what combinations. Essentially then, the issue is one of legislative discretion. That discretion can be exercised through an exemption process much like the OSC has used with respect to OSC Policy 9.1. Alternatively, discretion can be accomplished through a self-regulating system which earmarks some common indicia but uses a broad test, like the oppression remedy. The regulator does not review each transaction; rather, complaints to the regulator trigger a review of the transaction's compliance with the indicia. Beyond the need for an exemption mechanism, the enforcement challenges presented do not form the subject of this paper.

[43] Complicating this balance in the CBCA context is the fact of diverse markets. What is fair in one regime may not be fair in another. What is commercially viable in one regime may be less appealing in another. This balancing act therefore compels the CBCA regulator to advocate for a system designed to mete out fairness which is flexible, responsive yet predictable.

[44] On a related note, the question of the authority of the CBCA Director to prescribe fairness safeguards must be unchallenged and clear if any reforms, beyond leaving fairness to section 241, are to be effective. If it is determined that indicia of fairness are to be spelled out, the logical forum would be in regulation. Again, based on Varity and recent difficulties faced by other regulators, it is crucial that the CBCA clearly recognize that fairness will be spelled out in regulation and that the legislation expressly permits enactment of regulations and exemptions on the issue of fairness as necessary.

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[24] I.e. as offered by the directors pursuant to subsection 190(2) of the OBCA. Perhaps this amount should be reduced by 10 or 15 percent should a court find that the "fair value" is less than that offered.

Preliminary Recommendation

[45] No recommendation is made at this time.

ISSUE NO. 3

[46] **To what extent, if at all, should GPTs be permitted in the context of CBCA corporations which are not distributing shares to the public? Should the oppression remedy be the sole yardstick of the fairness of GPTs, including compulsory acquisitions, in the private company setting?**

Background

[47] Most policy discussions of GPTs have focused on the privatization of offering corporations. Are the considerations for a non-offering corporation any different?

[48] The current CBCA does not include a definition of private company.[25] Instead, it occasionally cites a numerical threshold of fifteen shareholders or fewer. It does, however, also draw the distinction between corporations which have made a distribution of its shares and those which have not. Other discussion papers in the current round of CBCA reform, on a preliminary basis, indicate that the CBCA's current approach should in fact include the private company definition as opposed to the 15 shareholder threshold. For the purposes of this discussion, we will assume, that the CBCA will ultimately include such a private company definition.

[49] Both section 190 of the OBCA and OSC Policy 9.1 deal with offering corporations. Because of case law, however, the availability of GPTs, including compulsory acquisitions, to a

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[25] Securities Act (Ontario) R.S.O. 1990, c. 5.5 as amended, subsection 1(1).

"Private company" means a company in whose constating document,

(a) the right to transfer its shares is restricted,

(b) the number of its shareholders, exclusive of persons who are in its employment and exclusive of persons, who, having been formerly in the employment of the company, were, while in that employment, and have continued after termination of that employment to be, shareholders of the company, is limited to not more than fifty, two or more persons who are the joint registered owners of one or more shares being counted as one shareholder, and

(c) any invitation to the public to subscribe for its securities is prohibited ("compagnie fermée").

non-offering corporation is less than certain.[26] In defining an "exempt offer", section 194 of the CBCA seems to already preclude GPTs or more certainly, compulsory acquisitions, in respect of corporations with fewer than fifteen shareholders. Since a take-over bid is an antecedent to section 206 and since an exempt offer is excluded from the definition of a take-over bid, the CBCA seems to question whether compulsory acquisitions can occur in close corporation settings, at least based on the CBCA notion of a close corporation.

[50] Practically speaking, contractual agreements among shareholders of a private company, which contemplate some form of GPT, are commonplace. Buy-sell provisions in shareholder agreements may give rise to a form of GPT though often the identity of the party which must exit is initially undetermined. The end result is the same: a shareholder has been excluded. The difference is that a greater degree of consensus, by virtue of contractual agreement, is seen to exist. It is hard to envisage situations in which a contractually derived consensus should be disallowed or even modified by legislative stipulation. Conceivably, there could be cases where the contract could be set aside for issues of capacity, interpretation, etc., but they would hardly represent the norm.

[51] It is really only in the absence of consent evidenced by a shareholder or pooling agreement that GPTs in the private company setting become policy quagmires. Cogent arguments exist in favour of both disallowance and allowance. In many private company settings, a partnership-like environment is prevalent, the expectation therefore being prolonged presence and participation. A non-consensual exit would obviously obliterate those expectations. On the other hand, a streamlined ownership can produce tangible benefits even for a private corporation.

[52] The next dilemma to be addressed is whether or not to codify standards of fairness. In respect of shareholder protection, one wonders why private company minority shareholders would be any less deserving of protection than their public company counterparts? In fact, given their distinct expectations, it is arguable that fairness demands greater protection for private company shareholders than for public company shareholders. The cost, however, to an offeror of providing procedural fairness can be daunting and sometimes prohibitive. For example, having to obtain valuations or fairness opinions for a company with only five minority shareholders may be unnecessary where the shareholders are intimately aware of the financial situation and prospects of the corporation. Of course, valuing the minority shares in a private company is no easy task

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[26] See General Accident Assurance Co. of Canada v. Lornex Mining Corp. Ltd. (1988), 66 O.R. (2d) 783; 40 B.L.R. 299 (H.C.). The High Court of Ontario held that notwithstanding the statutory language (Part XV of the OBCA) which referred only to offering corporations, an amalgamation squeeze-out could occur in the private company setting with the oppression remedy acting as a protection from abusive conduct. Compulsory acquisitions under the CBCA are expressly disallowed in situations involving fewer than fifteen voting shareholders because of the interplay of the definition of "exempt offer" and "take-over bid" in section 194 and an addition to the definition of "take-over bid" in section 206. A copy of section 194 is annexed hereto as Appendix K.

particularly given the general absence of a market. This is not to say the task is impossible. Courts frequently assess valuation issues in oppression and winding-up cases.

[53] Arguably, the factual challenges presented by GPTs in the private company setting are even more diverse than those of public corporations. Shareholders typically participate actively in the business, not as passive members of the public. Investment may have been motivated by sheer capital growth expectation or alternatively by employment expectations. And, while a company may be privately held, public interest issues may nevertheless arise.

[54] If GPTs in a private company are allowed, the question obviously is how best to balance the need for protections with sufficient freedom of action to make GPTs possible. Preliminary consultations conducted by the Corporations Directorate on the Director's 1994 Policy indicate that the best compromise may be simply to fall back on the oppression remedy.

[55] Articulated standards of fairness would therefore not be required. The flexibility of the remedy, both in terms of available orders and because of the lack of prefabricated tests of behaviour, could offer the responsiveness which seems to be necessary.

[56] Minority shareholders could argue that the cost of litigation is such that in many cases where fairness has been ignored, the GPT will go unchallenged notwithstanding the availability of the oppression remedy. Other commentators have suggested that a GPT in a private company, like any other fundamental change, simply needs a dissent and appraisal right attached to it to be completely fair. Given recent criticisms of the functionality of the right to dissent and the associated expense, it may not be prudent to rely on the dissent right as the guarantor of fairness.

OPTIONS

A. DISALLOW GPTs IN ALL CBCA PRIVATE CORPORATIONS

Arguments For

[57] Complete disallowance would offer protection to the minority.

Arguments Against

(i) To disallow GPTs completely would be to ignore a now accepted form of corporate reorganization.

(ii) Even in private corporations, and perhaps especially in private corporations, being bought out may be preferable to maintaining an otherwise non-liquid asset.

B. ALLOW GPTs IN CBCA PRIVATE CORPORATIONS ONLY WHERE A CONTRACT CONTEMPLATING A GPT IS IN PLACE AND HAS BEEN EXECUTED BY ALL SHAREHOLDERS WHO FACE AN EXIT POSSIBILITY

Arguments For

(i) Consensus and unanimity are the best determinants of what is fair. The corporate participants themselves decide what is fair and then comply with their own agreement.

(ii) The subjectivity and therefore arbitrariness of measuring fairness is not at issue. Fairness is defined by consensus.

Arguments Against

[58] Certain private corporations due to the large number of their shareholders simply do not have shareholder agreements and therefore could not transact a GPT. Perhaps the only alternative in this instance would be to allow the company to comply with public company standards of fairness. Where it did so, its GPT could proceed; where it did not, its GPT would be blocked.

C. ALLOW GPTs IN CBCA PRIVATE CORPORATIONS GENERALLY AND RELY ON A PRESCRIBED RIGHT TO DISSENT AND/OR RECOURSE TO THE OPPRESSION REMEDY TO PROTECT MINORITY STAKEHOLDERS

Arguments For

[59] All private corporations, irrespective of size, would be potential subjects of GPTs while some measure of shareholder protection would still be ensured.

Arguments Against

[60] Recourse to a statutory remedy to be enforced in the courts in the absence of any statutory guidance defining fairness may be to invite abuse in a close company setting. Majority shareholders, gauging the reticence of the minority to engage either
section 241 or the dissent and appraisal right, may determine that the minimal threat of potential litigation is offset by the gains of a GPT.

D. ALLOW GPTS IN CBCA PRIVATE CORPORATIONS WHERE STANDARDS OF FAIRNESS ARE THE SAME AS THOSE APPLICABLE TO PUBLIC COMPANIES

Arguments For

(i) Because public company standards of fairness are rigorous, this pre-condition would ensure a high threshold thus protecting minority shareholders.

(ii) Already established and tested indicia of fairness would be available.

Arguments Against

(i) The burden on a private company of complying with public company standards would be quite onerous. The rules of OSC Policy 9.1 and QSC Policy 27 were hand-crafted for the public company setting.

(ii) Public company standards may not be adaptable to the private company setting. For example, establishing fair value may be awkward. Most private companies have no market for their shares. Would this fact result in corporations being faced with very high share valuations or the reverse?

Preliminary Recommendation

[61] An express allowance of GPTs in private company settings seems logical with two conditions. The GPT may occur in either of two instances: (i) where the offeror has complied with the fairness provisions otherwise imposed by the CBCA on a public company (Option D) or (ii) where a unanimous contract exists which expressly permits a GPT. (Option B). The second condition will ensure consensus. Alternatively, where consensus is not available, the offeror will be forced to comply with onerous rules. Presumably then, only the most economically significant of the private companies will be able to comply.

ISSUE NO. 4

[62] **Should section 190 of the CBCA be amended to confirm that share consolidations trigger dissent and appraisal rights?**[27]

Background

[63] Some concern has been expressed that in the current CBCA regime, share consolidations occurring under subsection 173(h) do not attract dissent and appraisal rights under section 190 because of the wording of that section. Corporations often effect a share consolidation and then

[27] This issue, in a slightly broader context, is also considered in the Industry Canada discussion paper concerning technical amendments.

issue scrip certificates evidencing a fractional share. The scrip is voided if it has not been exchanged for full shares. The uncertainty lies in whether the voiding of the scrip certificate triggers the dissent and appraisal right.

OPTIONS

A. TO CLARIFY SECTION 190 OF THE CBCA TO CONFIRM THAT SHARE CONSOLIDATIONS TRIGGER DISSENT AND APPRAISAL RIGHTS

Arguments For

[64] Minority shareholders in a share consolidation situation may well be completely without defined recourse beyond oppression. This is true notwithstanding that other forms of GPTs, such as are achieved through amalgamation or arrangement, do clearly trigger dissent and appraisal rights. The certainty provided by such a statutory clarification would assist legal advisors. It would also ensure consistency of practice in that the current uncertainty means that some share consolidations include the right to dissent and some do not.

Arguments Against

[65] There are no apparent disadvantages to ensuring the dissent and appraisal right in share consolidations which result in a GPT beyond the fact that the right may exist, but may be seen by minority shareholders as an inefficient protection.

B. MAINTAIN THE STATUS QUO

Arguments For

[66] Section 190 of the CBCA has already been criticized as unduly complicated. Adding another trigger to it would add to this complexity.

Arguments Against

[67] Notwithstanding the complexity of section 190, an amendment to section 190 to clarify the law, to ensure consistency and to protect minority shareholders is likely worth the added complexity.

Preliminary Recommendation

[68] Adoption of option A seems advisable.

ISSUE NO. 5

[69] **Should the CBCA be amended so as to allow compelled acquisitions?**

Background

[70] Section 189 of the OBCA permits shareholders in certain circumstances to compel the corporation to purchase their shares. Whereas section 188 enshrines the right of a shareholder to buy out the minority, section 189 enshrines the right of that minority to demand to be bought out, not by a majority shareholder but by the company. The value offered is set by the corporation or may be fixed by a court. The CBCA has no similar right of compelled acquisition.

[71] From a policy perspective, the logic behind a compelled acquisition is quite rigorous. With a shrinking minority comes decreased liquidity and a smaller secondary market. A compelled acquisition allows a minority shareholder to assess if or when the market will contract and to act accordingly. Fair value, as would have been determined by that market, is guaranteed. Similarly, a shrinking minority means decreased participation or at the least, decreased significance of participation. When a company has less than a 10% minority, the voice of that minority may well be uncompelling to management.

[72] Conversely, compelled acquisitions, or at least the threat of them, do pose serious difficulties for corporations. The expense of sending out a notice as prescribed by the OBCA can be significant. The frequency of such mailings is also an issue. The sheer burden of the capital expenditure necessitated by a compelled acquisition may be prohibitive; for corporations with minorities hovering at the 10% level, the ongoing possibility of this capital expenditure could have serious financial ramifications.

OPTIONS

A. AMEND THE CBCA TO ALLOW COMPELLED ACQUISITIONS

Arguments For

[73] The concerns of minority shareholders would be addressed in circumstances where the 90% majority chooses not to offer an exit mechanism.

Arguments Against

(i) The burden of fair dealing as regards the 10% minority is shifted from the majority to the corporation. Therefore, to the extent that compelled acquisitions create hardship, it is

borne by the corporation. That burden might be more properly borne by the majority though that transference raises questions involving tax treatment.

(ii) Questions would arise in cases where a company cannot finance a compelled acquisition because of insolvency.

B. MAINTAIN THE STATUS QUO

Arguments For

[74] No advantages are apparent.

Arguments Against

(i) Without the proposed amendment, the CBCA would not be harmonized with the OBCA, which includes a modernized regime in respect of GPTs.

(ii) The status quo ignores the concerns of minority shareholders who may exist in a post take-over bid 10% minority with an illiquid market and reduced corporate accountability.

Preliminary Recommendation

[75] Adoption of Option A seems advisable.

ISSUE NO. 6

[76] **Are modifications necessary to the language of section 206 to clarify various ambiguities?**

Background

Mechanics

[77] The philosophy behind compulsory acquisitions in section 188 of the OBCA and section 206 of the CBCA are essentially similar. The mechanics vary slightly and in that regard, an analysis of the OBCA is merited.

[78] First, subsection 188(8) of the OBCA requires that a notice of compliance be circulated to all dissenting offerees by the offeror. The CBCA does not demand a similar notice. While this notice creates a paper burden for the offeror, it does provide assurance to a dissenting offeree that the consideration has been paid.

[79] Second, subsection 188(9) permits a dissenting offeree who seeks additional security for payment, essentially where the person believes the fair value of the shares exceeds the offered value, to apply to a court for additional security to be set aside pending determination of fair value. Until that step has either been taken or waived, shares are not deemed to have been transferred to the offeror. Again, the CBCA does not include this protection. The protective measure does seem logical particularly in instances where there may be a large difference between the offered price and the fair value. It is also chronologically logical to structure this as a precondition to the share transfer. The serious offeror will post the additional security on the presumption that he or she might have to pay fair value, whatever that is. Where the offeror is not serious, the shares are not transferred.

Exempt Offers

[80] The CBCA, in section 194, appears to take an odd approach to the definition of take-over bid. Bearing in mind that a take-over bid is a precondition to a section 206 compulsory acquisition, the definition of a take-over bid excludes "exempt offers". This exclusion therefore means that where an exempt offer has occurred, as opposed to a take-over bid, a compulsory acquisition may not occur. Based on the Director's 1994 Policy, however, compulsory acquisitions which occur after an exempt offer, if construed broadly as a GPT, may go unchallenged by the Director. Exempt offers include but are not limited to exchange bids and purchases effected in the over-the-counter (OTC) market. Again, an ambiguity appears. Because exchange bids and OTC purchases are exempt and therefore not included in the definition of a take-over bid, a compulsory acquisition cannot occur under the CBCA as a follow-up transaction presumably even where the exchange or OTC rules so allow.

OPTIONS - MECHANICS

A. AMEND THE CBCA TO PROVIDE THE ADDED SAFEGUARDS OF A COMPLIANCE NOTICE AND DEPOSIT OF ADDITIONAL SECURITY PRIOR TO SHARE TRANSFER

Arguments For

(i) Minority protection would be generally bolstered.

(ii) In respect of the deposit of additional security, offerors who are reluctant to wager what fair value will be are deterred from attempting a compulsory acquisition.

Arguments Against

(i) In respect of the notice, a paper burden for the offeror is created.

(ii) Because of the nature of litigation, the additional security held by the court may be isolated for the duration of the contest which in some cases is years. While that protects the minority, it is also a potentially inefficient use of what could be quite significant amounts of capital.

B. MAINTAIN THE STATUS QUO

Preliminary Recommendation

[81] Adoption of Option A seems advisable.

OPTIONS - EXEMPT OFFERS

A. EXPRESSLY REFERENCE EXCHANGE BIDS AND PRESCRIBED OTC PURCHASES IN SECTION 206

Arguments For

[82] Clarification would thus be provided. Under the current wording of the CBCA, an exchange bid or an OTC purchase are not specifically identified as "take-over bids" and therefore compulsory acquisitions may not subsequently occur. It is possible, but not sufficiently clear, however, that by virtue of the Director's 1994 Policy, GPTs including compulsory acquisitions, could occur as a follow-up transaction to an exchange bid or OTC purchase.

Arguments Against

[83] There are no apparent disadvantages.

B. MAINTAIN THE STATUS QUO

Preliminary Recommendation

[84] Adoption of option A seems advisable.

ISSUE NO. 7

[85] **Should the threshold for compulsory acquisitions be lowered to 66.7% of shareholdings?**

Background

[86] In preliminary consultations by the Corporations Directorate, several commentators recommended re-examining compulsory acquisitions and GPTs to contemplate whether compulsory acquisitions could not be recast. By allowing compulsory acquisitions to occur at a lower ownership threshold, presumably 66.7%, the need to resort to paper-laden transactions to invent a GPT may be eliminated. GPTs, as a corporate transaction, would assume one common form, namely a statutory acquisition. Fairness would of course be required, as it would be in any event.

[87] Resort to a two-thirds threshold is more in keeping with other defined and approved standards of majority conduct in corporate law. And whether or not a take-over bid had occurred in the previous 120 days would be irrelevant. The right to acquire would exist at any time in the event of one entity holding a special majority. This right would not impact on the proposed right of compelled acquisition. While this option has some inherent logic, it would also signal a marked departure from current standards. One wonders whether it would be preferable to bring the CBCA closer in line with other regulators and to make other improvements before contemplating a whole-scale structural change.

OPTIONS

A. AMEND THE CBCA TO ALLOW A STATUTORY RIGHT OF ACQUISITION WHERE A PARTY OWNS 66.7% OF OUTSTANDING SHARES

Arguments For

[88] Costly transactions designed simply to effect a result would be supplanted by a more linear and hopefully less costly achievement of that result.

Arguments Against

(i) The minority safeguards demanded by most GPTs are more comprehensive than parallel safeguards in compulsory acquisitions. If a move were made to broader compulsory acquisitions, it is likely that the more rigorous safeguards of the GPT would apply. Therefore, expelling a 10% minority under this regime could be more costly than is the case now. As a result, any cost reductions gained by simplicity could be offset by the expense of ensuring fairness.

(ii) No other Canadian regulator lumps compulsory acquisitions and GPTs together. Non-harmonization would result.

B. MAINTAIN THE STATUS QUO

Arguments For

[89] Allowing a lower threshold for compulsory acquisitions simply enlarges the scope for what is really a corporate expropriation.

Arguments Against

[90] A natural symmetry would exist as between the GPT regime and other fundamental changes which usually only require a 66.7% approval threshold.

Preliminary Recommendation

[91] Adoption of option B seems advisable.

ISSUE NO. 8

[92] **Would the language of section 206 be better placed elsewhere than in Part XVII having to do with take-over bids?**

Background

[93] Section 206 of the CBCA is part of the take-over bid section. Compulsory acquisitions either follow a take-over bid within 120 days or they do not occur. On the one hundred and twenty-first day, presumably they become a GPT generally, and under the current regime are prescribed only by section 241. The issue at hand is whether compulsory acquisitions should be viewed as a follow-up to a take-over bid as opposed to being an available transaction, like a GPT, at any time. The issue is only slightly less relevant in light of the Director's 1994 Policy.

OPTIONS

A. AMEND THE CBCA TO MOVE SECTION 206 OUT OF THE TAKE-OVER BID PART AND ALLOW COMPULSORY ACQUISITIONS AT ANY TIME

Arguments For

[94] The concept of a compulsory acquisition remains relatively intact. The key is that once a minority has been reduced to 10%, the realities of its existence, either in terms of annoyance to the majority or irrelevance of influence, may mean that a compulsory acquisition is positive, whether or not it follows a take-over bid.

<u>Arguments Against</u>

[95] By following a take-over bid, a fixed point of reference for share price is established. If compulsory acquisitions could occur in the abstract, another method of establishing share value would have to be found.

B. MAINTAIN THE STATUS QUO

<u>Arguments For</u>

[96] By situating a compulsory acquisition as a follow-up to a take-over bid, the CBCA has consciously considered the compulsory acquisition as a simple extension of the original bid. To allow the compulsory acquisition to occur beyond the bid, changes the philosophical nature of the right of acquisition and allows it to operate quite freely as share ownership thresholds vacillate.

<u>Arguments Against</u>

[97] If the CBCA is amended in any event to allow for a GPT regime, then compulsory acquisitions which occur after the 120 day period are thrust into the broader GPT regime. The arbitrariness of the 120 period is at issue. On the one hundred twentieth day, the short-cuts of section 206 are available; on the one hundred twenty-first day, they are not.

<u>Preliminary Recommendation</u>

[98] Adoption of option B seems advisable.

ISSUE NO. 9

[99] **Is the language of subsection 206(2) and (3) inconsistent in respect of the calculation of shares tendered in a take-over bid?**

<u>Background</u>

[100] Subsection 206(2) indicates that a compulsory acquisition may occur where "not less than ninety percent of the shares of any class of shares to which the take-over bid relates, ..." are tendered to the offer. Subsection 206(3) indicates that an offeror may send a notice to dissenting offerees and the (CBCA) Director advising, among other things, that ",... the offerees holding more than ninety percent of the shares, to which the bid relates, ..." The language appears to be inconsistent as subsection (2) refers to a threshold of <u>90% or more</u> whereas subsection (3) refers to a threshold of <u>more than 90%</u>.

OPTIONS

A. MAINTAIN THE STATUS QUO

B. AMEND THE CBCA TO CLARIFY THE THRESHOLD REQUIREMENT IN SECTION 206 AS "NOT LESS THAN NINETY PERCENT"

Arguments For

i) This clarification would amend what appears to be inadvertence in statutory drafting.

ii) Subsection 206(2) is the substantive subsection whereas subsection 206(3) is procedural. Deference should therefore be paid to subsection (2).

Arguments Against

[101] None are apparent.

Preliminary Recommendation

[102] Adoption of option B seems advisable.

CONCLUSION

[103] GPTs have for too long been neglected by the CBCA. Notwithstanding the recent policy statement of the Director, it is time to properly address and therefore codify the ground rules. The views of all interested parties on these issues are welcomed.

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APPENDICES

Appendix A	Section 190, OBCA
Appendix B	OSC Policy 9.1 (Not available electronically)
Appendix C	QSC Policy 27 (Not available electronically)
Appendix D	Provincial Laws Commentary
Appendix E	Commentary on American, United Kingdom and Australian Law
Appendix F	Section 206, CBCA
Appendix G	Section 188, OBCA
Appendix H	Section 189, OBCA
Appendix I	1989 CBCA Policy (Not available electronically)
Appendix J	1994 CBCA Policy (Not available electronically)
Appendix K	Section 194, CBCA

APPENDIX A

SECTION 190 - BUSINESS CORPORATIONS ACT (ONTARIO)

190. (1) **Definitions.** - In this section

"affected security" means a participating security of a corporation in which the interest of the holder would be terminated by reason of a going private transaction; ("valeur mobilière visée")

"going private transaction" means an amalgamation, arrangement, consolidation or other transaction carried out under this Act by a corporation that would cause the interest of a holder of a participating security of the corporation to be terminated without the consent of the holder and without the substitution therefor of an interest of equivalent value in a participating security that,

(a) is issued by the corporation, an affiliate of the corporation or a successor body corporate, and

(b) is not limited in the extent of its participation in earnings to any greater extent than the participating security for which it is substituted,

but does not include,

(c) an acquisition under section 188,

(d) a redemption of, or other compulsory termination of the interest of the holder in, a security if the security is redeemed or otherwise acquired in accordance with the terms and conditions attaching thereto or under a requirement of the articles relating to the class of securities or of this Act, or

(e) a proceeding under Part XVI; ("transformation en société fermée")

"participating security" means a security issued by a body corporate other than a security that is, in all circumstances, limited in the extent of its participation in earnings and includes,

(a) a security currently convertible into such a security, and

(b) currently exercisable warrants entitling the holder to acquire such a security or such a convertible security. ("valeur mobilière participante")

(2) **Going private transaction.** - A corporation that proposes to carry out a going private transaction shall have prepared by an independent, qualified valuer a written valuation indicating a per security value or range of values for each class of affected securities, and,

(a) the valuation shall be prepared or revised as of a date not more than 120 days before the announcement of the going private transaction, with appropriate adjustments for subsequent events other than the going private transaction;

(b) the valuation shall not contain a downward adjustment to reflect the fact that the affected securities do not form part of a controlling interest; and

(c) if the consideration to be received by the holders of the affected securities is wholly or partly other than cash, or a right to receive cash within ninety days after the approval by security holders of the going private transaction, the valuation shall include the valuer's opinion whether the value of each affected security to be surrendered is equal to or greater than the total value of the consideration to be received therefor.

(3) **Information circular.** - The corporation shall send a management information circular to the holders of the affected securities not less than forty days prior to the date of a meeting which shall be called by it to consider that transaction, and the information circular shall contain, in addition to any other required information and subject to any exemption granted under subsection (6),

(a) a summary of the valuation prepared in compliance with subsection (2) and a statement that a holder of an affected security may inspect a copy of the valuation at the registered office of the corporation or may obtain a copy of the valuation upon request and payment of a specified amount sufficient to cover reasonable costs of reproduction and mailing;

(b) a statement of the approval or approvals of holders of affected securities required to be obtained in accordance with this section;

(c) a certificate signed by a senior officer or a director of the corporation certifying that he or she and, to his or her knowledge, the corporation are unaware of any material fact relevant to the valuation prepared in compliance with subsection (2) that was not disclosed to the valuer, and

(d) a statement of the class or classes of affected securities and of the number of securities of each class and, if any securities of any such class are, under paragraph 3 of subsection (4), not to be taken into account in the vote required by subsection

(4), a statement of the number thereof and why they are not to be taken into account,

but if all or any portion of a class of affected securities is represented by certificates that are not in registered form, it shall be sufficient to make the information circular available to the holders of such affected securities in the manner provided for in the terms of the securities for sending notice to such holders or otherwise in such manner as may be prescribed.

(4) **Idem.** - A corporation shall not carry out a going private transaction unless, in addition to any other required security holder approval, the transaction is approved by the holders of each class of affected securities by a vote in accordance with the following provisions:

1. If the consideration to be received by a holder of an affected security of the particular class is,

   i. payable wholly or partly other than in cash or a right to receive cash within ninety days after the approval of the going private transaction, or

   ii. payable entirely in cash and is less in amount than the per security value or the mid-point of the range of per security values, arrived at by the valuation prepared in compliance with subsection (2),

   then the approval shall be given by a special resolution.

2. In cases other than those referred to in paragraph 1, the approval shall be given by an ordinary resolution.

3. In determining whether the transaction has been approved by the requisite majority, the votes of,

   i. securities held by affiliates of the corporation,

   ii. securities the beneficial owners of which will, consequent upon the going private transaction, be entitled to a per security consideration greater than that available to other holders of affected securities of the same class,

   iii. securities the beneficial owners of which, alone or in concert with others, effectively control the corporation and who, prior to distribution of the information circular, entered into an

understanding that they would support the going private transaction,

shall be disregarded both in determining the total number of votes cast and in determining the number of votes cast in favour of or against the transaction.

(5) **Effect of section.** - The rights provided by this section are in addition to any other rights of a holder of affected securities.

(6) **Powers of Commission.** - Upon an application by an interested person, the Commission may, subject to such terms and conditions as it may impose, exempt any person from any requirement of this section where in its opinion to do so would not be prejudicial to the public interest, and the Commission may publish guidelines as to the manner and circumstances in which it will exercise this discretion.

(7) **Rights of security holder.** - A holder of an affected security that is a share of any class of a corporation may dissent from a going private transaction upon compliance with the procedures set out in section 185, in which case the holder shall be entitled to the rights and remedies provided by that section. 1982, c. 4, s. 189.

ansaction give rise to a conflict of interest or lead to the belief that the valuer is not entirely independent.

30. In determining the independence of the valuer, the following factors should be considered:

(1) the potential for bias on the part of the valuer as a result of the involvement of the valuer or any of its affiliates in an evaluation or review of the financial status of the interested party, the issuer or their affiliates or associates during the 24 months preceding the date the valuer was first contacted in respect of the valuation; and

(2) the materiality of the financial interest of the valuer and its affiliates in transactions during the 24 months preceding the date the valuer was first contacted in respect of the valuation, in the completion of the subject transaction or in future business in respect of which a commitment exists involving the interested party or the issuer or their affiliates and associates.

31. A valuer will not be considered independent in the following situations:

(1) the valuer is an insider, associate or affiliate of the interested party;

(2) the valuer or any of its affiliates is an adviser of the interested party in respect of the transaction;

(3) the compensation of the valuer or any of its affiliates depends, in whole or in part, on the conclusions reached in the valuation or the outcome of the transaction;

(4) the valuer or any of its affiliates is the auditor of the issuer or an interested person;

(5) the valuer or any of its affiliates derives a substantial portion of its annual gross income from an interested person;

(6) the valuer or any of its affiliates acts as manager or co-manager of a soliciting dealer group in respect of the proposed transaction.

If the valuer is an affiliate of an institution which provides financial services to the issuer or an interested person and those services are provided in the ordinary course of business, the valuer is not necessarily to be considered as not independent. However, the materiality of the services provided is a decisive factor in determining the independence of the valuer. Accordingly, whenever an institution is the lead lender or manager of the lending syndicate for the transaction

in respect of which the formal valuation is being obtained, the valuer is not considered independent. This is also the case when the institution is a lender of significant funds the possibility for repayment of which is materially enhanced by the transaction or where the financial circumstances of the issuer or interested party are such that it could not readily replace the financial institution in question.

32. Disclosure in respect of a transaction will not remedy a lack of independence or qualification of the valuer.

Disclosure must be made of any past, present or anticipated relationship between the valuer and the interested party, even if it has been determined that the valuer is independent.

Valuation Procedures

Choice of the Method

33. The valuation method must be selected in accordance with the nature of the business, asset, liability or security being examined.

Subject Matter of the Valuation

34. In the case of an insider bid or insider exchange bid or of an issuer bid, the securities that are the subject of the offer will be valued. In the case of a going private transaction, the valuer must value the securities in which the interest of the holders will be terminated. In each case, the valuer must also value any non-cash consideration being offered or forming part of the transaction.

35. In the case of a related party transaction, the valuer must value the assets, liabilities, securities or any non-cash consideration being offered or forming part of the transaction.

Conduct of the Valuation

36. A valuation shall be as of a date that is not more than 120 days before the date of the transaction and shall contain appropriate adjustments for material intervening events. The valuer should take into account all material factors known or ascertainable as of the date the valuation is delivered. A person required to have a valuation prepared must, on request from the valuer, promptly furnish the valuer with access to its management and advisers and to all information in its possession relevant to the valuation, including all financial information it has furnished to its advisers in connection with the proposed transaction. the valuer is expected to use that access to perform a comprehensive review and analysis of information upon which the

valuation is based. The valuer must form its own independent views of the reasonableness of this information, including any forecasts or projections, and of any of the assumptions upon which it is based and adjust the information accordingly.

37. In arriving at an opinion as to the value or range of values for the subject matter of the valuation, regard should be had to the application of each valuation method which is appropriate in the circumstances, taking into account one or more of the following methods: capitalized value or present value of the profits, capitalized value or present value of cash flows, adjusted value of the assets, value of comparable transactions, prior, present and expected market value in relation with benefits and cash flows, book value, going concern value, liquidation value or any other pertinent method generally used as a benchmark for the value being examined. Whenever a capitalized or present value is used, the choice of the rate used must be justified.

38. Where applicable, the valuation should specifically identify and explain comparable transactions considered (including sales of control positions, treasury stock, assets or liabilities, as well as premiums paid in these transactions).

39. The valuation should consider any distinctive material value that might accrue to the interested party. Possible benefits to be considered would include any advantage attributable to surplus assets, borrowing power, tax losses or any other reasonably foreseeable advantage based on information available. The valuation should also consider any distinctive advantage that the interested party would derive from the transaction, such as increased revenues, higher utilization of the subject matter and reduced costs due to rationalization or foreseeable economies of scale. The exclusion or inclusion of any of the factors mentioned in this section must be justified in the valuation report and in the summary for security holders.

40. No downward adjustment should be made to the subject matter of the valuation to reflect minority interests, the liquidity of the subject matter or the possible effect of the transaction.

41. Where a material change occurs in the information contained in the valuation report or the summary delivered to security holders or where an intervening event occurs after the valuation date but before completion of the transaction which materially affects the conclusions drawn in the report:

(1) the issuer must inform the valuer of the material change or intervening event and amend, to the valuer's satisfaction, the document delivered to security holders by press release;

(2) the issuer must deliver to security holders an amendment explaining the material change or intervening event. The consent of the valuer must be included in the notice of amendment.

Where the document is not amended to the valuer's satisfaction, the valuer must publicly withdraw its consent to the continuing disclosure of information contained in the valuation report.

Valuers are reminded of their civil liability for misrepresentation contained in reports, opinions or statements attributable to them that are contained in disclosure documents delivered to security holders.

Any undue influence exercised upon the valuer by an interested party must be described in the valuation summary delivered to security holders.

Valuation Report

42. The valuation report must disclose the identity and credentials of the firm performing the formal valuation, the date the valuer was first contacted in respect of the transaction, the date on which the valuer was retained, its fees, the subject matter, the date, the scope and purpose of the valuation, the meaning of the term "value" in the circumstances, a description of the information upon which the valuer relied, the type of any relevant information the valuer requested but was denied, the valuation methods considered, the key assumptions made, the relative importance attached to assumptions made, if applicable, any other experts consulted and the conclusions of the valuation.

43. The report must specify the nature of any limitation on the scope of the valuation and the implications of the limitation on the valuer's conclusions. No scope limitations should be imposed by the issuer, the related party or the valuer; they should be restricted to those beyond the control of the issuer, the related party and the valuer which arise solely as a result of unusual circumstances.

44. The report must describe and explain the valuation method or methods used and specify the reasons why a method was relied upon, while others were rejected. Full disclosure will usually entail a comparison of the results obtained through different methods. Policy Statement Q-11 does not apply to future oriented financial information which is taken into account by the valuer and disclosed in the valuation report or the summary thereof.

45. The valuer must take into account any offer received and of any relevant or comparable valuation made during the 24 months preceding the date the valuer was retained. Where the valuation conflicts with any prior valuations disclosed, the differences should be explained.

Summary of the Valuation

46. A summary of the valuation should be included in the material provided to security holders in connection with the transaction together with the consent of the valuer to the disclosure of the valuation and summary. The summary will be in the information circular or in the proxy solicitation circular prepared in respect of the transaction. The summary must indicate that copies of the complete valuation will be sent to any security holder upon request and, if required, payment of a charge to cover printing and postage.

47. The purpose of the summary provided to security holders is to describe the valuation in sufficient detail to permit security holders to form a reasoned judgment with respect to the valuation and the transaction.

Without limiting the generality of the foregoing, the valuation summary must disclose the identity and credentials of the firm performing the valuation, the date the valuer was retained, its fees, the subject matter, the date, the scope and the purpose of the valuation, including limitations on the scope, the meaning of the term "value" in the circumstances, the type of any relevant information the valuer requested but was denied, the valuation methods considered, the key assumptions made and the conclusions of the valuation.

The summary must include quantitative disclosure of each of the valuation methods considered and the analysis under each approach, as well as a brief comparison of conclusions arrived at through the different methods and the rationale for accepting or rejecting one method over another.

The summary should also disclose the extent to which any advantage to a person continuing as a security holder after completion of the transaction has been considered in the valuation and the nature of that advantage.

48. The valuation summary must provide security holders with a sufficiently detailed review of all material factors contained in the report so that they can understand the valuer's thought processes and assumptions in arriving at its conclusions. In some circumstances, it may be necessary to reproduce for security holders the full text of the valuation report, but this would not dispense from making the summary required under section 46.

Prior Valuations

49. In respect of prior valuations, material provided to security holders should include an outline in sufficient detail of any relevant valuation prepared in the preceding 24 months, including an appropriate description as to the source and circumstances under which the prior valuation was prepared.

50. A fairness opinion is deemed to constitute a prior valuation when it is based on valuation or appraisal work.

51. A preliminary valuation prepared free of charge or in the ordinary course of business and not made available to any of the senior officers or directors of the interested party does not constitute a prior valuation for the purposes of this Policy Statement.

Similarly, market analyst's reports and other financial analysis prepared from publicly available information for the account of a person other than the issuer or any interested party do not constitute a prior valuation.

52. If a prior valuation exists, disclosure documents delivered to security holders should state that a copy of the prior valuation will be sent to any security holder upon payment, if required by the issuer, of a charge to cover printing and postage. If there are no prior valuations, a statement to that effect should be included in disclosure documents delivered to security holders.

Filing of Valuation

53. The valuation report as well as the report of any prior valuation shall be filed with the Commission concurrently with the filing of the disclosure document to which it relates.

54. In the event a valuation report other than the report prepared for the purposes of this Policy Statement has been submitted to the directors, this report must also be filed with the Commission.

55. The valuation report filed with the Commission must include the complete valuation report delivered to the directors for their consideration.

Part IV - Minority Approval

56. A related party transaction where the value of the subject matter exceeds 25% of the issuer's market capitalization and a going private transaction may not be carried on unless the issuer obtains the approval of minority shareholders of the classes of series of securities affected by the transaction.

57. In the case of a going private transaction, minority approval shall be from holders of each class or series of participating securities in which the interest of the holder would be terminated without his consent.

In the case of a related party transaction, minority approval shall be from each class or series of equity securities and of voting securities.

58. Minority approval of a related party transaction is not required in the circumstances set out in subsections 1 and 4 to 8 of section 25.

59. Minority approval of a going private transaction is not required if a person is the holder at the time of the transaction of 90% or more of each class or series of participating securities of the issuer and a statutory appraisal remedy is available to the minority security holders or a substantially equivalent right. Similarly, minority approval of a related party transaction is not required if a person is the holder of 90% or more of each class or series or equity securities and of voting securities.

Level of Minority Approval Required

60. In the case of a going private transaction, approval by a special majority of minority security holders must be obtained:

(1) where the consideration to be paid to security holders is not payable wholly in cash within 35 days after the approval of the transaction; or

(2) where the consideration to be paid to security holders is less in amount than the per security value or the simple average of the high and low ends of the range of per security values arrived at by the valuation report prepared in connection with the transaction.

61. In the case of a related party transaction, if the value of the consideration to be paid to the interested party from whom the subject matter of the transaction is acquired is more, or received from the interested party to whom the subject matter of the transaction is disposed is less, than the simple average of the high and low ends of the range of values arrived at by the valuation report prepared in connection with the transaction, approval by a special majority of minority security holders shall be obtained.

62. In any other case, approval must be obtained from an absolute majority of minority security holders.

Multi-Step Transactions

63. In the determination of minority approval in a multi-step transaction (for example, a transaction in which a takeover bid is followed by a going private transaction), those of the minority who accept the offer at the first or any subsequent stage prior to the transaction which has a requirement for minority approval may be included in the calculation of the minority approval of the subject transaction if:

(1) the intent to effect the latter transaction was clearly disclosed at the time of the prior transaction;

(2) the prior transaction was the subject, if so required, of a valuation in accordance with this Policy Statement and

(3) the consideration per security in the transaction which has a requirement for minority approval is at least equal in value to the consideration per security paid in the prior transaction.

64. Securities tender to an offer pursuant to a lock-up agreement by a person who participated in the negotiation of the prior transaction may not be counted in calculating the minority approval of the transaction having this requirement.

65. Disclosure of the intent to effect the transaction having a requirement for minority approval must identify the securities that cannot be counted in the minority vote respecting this transaction, state that the transaction cannot be completed unless approval of the absolute or special majority, as the case may be, has been obtained, and identify the classes or series of securities the holders of which have to approve the transaction.

66. If the tax consequences to the security holder differ significantly between acceptance of an offer in a prior transaction and participation in the transaction, adequate disclosure of the differences in the tax treatment should be made at the time of the prior transaction.

Filing of documents

67. When documents are filed with the Commission under section 12 or 14, an additional copy of each document required must be addressed to the Service des opérations financières of the Commission.

QUIT r the date of the notice under subsection (2).

(6) **Idem.** - If a corporation fails to send notice under subsection (2), a security holder, after giving the corporation thirty days notice of intention so to do, may apply to the court to have the fair value of his, her or its securities fixed.

(7) **Idem.** - If a corporation fails to make an application to the court as required under subsection (5), a security holder may make the application.

(8) **Parties.** - Upon an application to the court under subsection (5), (6) or (7),

(a) all security holders who have notified the corporation under clause (4)(b) may be joined as parties as the court thinks fit and, if so joined, are bound by the decision of the court; and

(b) the corporation shall notify each security holder entitled to notice under subsection (2) of the date, place and purpose of the application and of the security holder's right to appear and be heard in person or by counsel.

(9) **Idem.** - Upon an application to the court under subsection (5), (6) or (7), the court may determine whether any security holders should properly be sent or have been sent notice and whether such security holders should be joined as parties.

(10) **Appointment of appraiser.** - The court may appoint one or more appraisers to assist the court in fixing a fair value for the securities.

(11) **Final order.** - The final order of the court shall be made against the corporation in favour of each entitled security holder.

(12) **Security not required.** - A security holder requesting the court to fix the fair value of his, her or its securities is not required to give security for costs on the application.

(13) **Costs.** - The costs under this section shall be on a solicitor and client basis. 1982, c. 4, s. 188.

APPENDIX "K"

SECTION 194 - TAKE-OVER BIDS

194. Definitions. - In this Part,

"exempt offer". - "exempt offer" means an offer

(a) to fewer than fifteen shareholders to purchase shares by way of separate agreements,

(b) to purchase shares through a stock exchange or in the over-the counter market in such circumstances as may be prescribed,

(c) to purchase shares of a corporation that has fewer than fifteen shareholders, two or more joint holders being counted as one shareholder,

(d) exempted under section 204, or

(e) by a corporation to repurchase its own shares to be held under section 32;

"offer". - "offer" includes an invitation to make an offer;

"offeree". - "offeree" means a person to whom a take-over bid is made;

"offeree corporation". - "offeree corporation" means a corporation whose shares are the object of a take-over bid;

"offeror". - "offeror" means a person, other than an agent, who makes a take-over bid, and includes two or more persons who, directly or indirectly,

(a) make take-over bids jointly or in concert, or

(b) intend to exercise jointly or in concert voting rights attached to shares for which a take-over bid is made;

"share". - "share" means a share carrying voting rights under all circumstances or by reason of the occurrence of an event that has occurred and is continuing, and includes

(a) a security currently convertible into such a share, and

(b) currently exercisable options and rights to acquire such a share or such a convertible security;

"take-over bid". - "take-over bid" means an offer, other than an exempt offer, made by an offeror to shareholders at approximately the same time to acquire shares that, if combined with shares already beneficially owned or controlled, directly or indirectly, by the offeror or an affiliate or associate of the offeror on the date of the take-over bid, would exceed ten per cent of any class of issued shares of an offeree corporation and includes every offer, other than an exempt offer, by an issuer to repurchase its own shares.