CANADA BUSINESS CORPORATIONS ACT

DISCUSSION PAPER

PROPOSALS FOR TECHNICAL AMENDMENTS

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EXECUTIVE SUMMARY

PROPOSALS FOR TECHNICAL AMENDMENTS

In addition to eight more substantive topics examined in CBCA Phase II reform, over fifty proposals are considered in this paper on technical amendments to the Canada Business Corporation Act ("CBCA"). A number of suggested amendments were raised in submissions on Bill C-12, the first phase of CBCA reform. Since many of the suggestions were "outside the scope" of Bill C-12 and could not be considered at that time, Industry Canada agreed to examine them for possible inclusion in Phase II CBCA reform.

Other proposals were recommended during initial Phase II consultations or in letters to Industry Canada. Some of the proposals originate from amendments made to The Business Corporations Act of Saskatchewan in 1992 and amendments recently made to the Ontario Business Corporations Act. Other suggestions stem from proposals to amend the British Columbia Company Act and the Alberta Business Corporations Act.

In general, the proposals would clarify the CBCA, correct anomalies, codify judicial interpretations, update terminology, correct cross references and eliminate regulatory and paper burdens. For example, one of the proposals considers whether the CBCA s. 14 should be amended to clarify that the rules governing pre-incorporation contracts apply to contracts "purported to be entered into" with a corporation prior to its incorporation (even though under the common law there is no contract).

A proposal studies whether to correct an anomaly in CBCA s. 21. An affidavit is required for access to shareholder lists under subs. 21(3) but not for access to the securities register under subs. 21(1), even though more information, albeit in a less-user friendly form, is potentially available under subs. 21(1).

One proposal examines whether to codify a recent decision of the Supreme Court of Canada by amending CBCA s. 249 to provide that only final orders made by a court under the CBCA are appealable as of right. Another proposal looks at updating the English and French "securities" terminology used in the CBCA to match the language found in the Québec, Ontario and other provincial securities laws.

A number of proposals consider ways to reduce or eliminate regulatory and paper burdens. For example, proposals consider whether interim financial statements (subs. 160(4)) and prospectuses (s. 193) should continue to be filed with the CBCA Director. Other proposals explore whether less rigorous procedures could be adopted for changes to the place of the registered office (par. 173(1)(b)) and for corporations proposing their liquidation or dissolution (par. 211(7)(b)).

Some of the proposals assess very complex issues such as whether subsidiaries should be permitted to purchase shares in the parent corporation (s. 30), whether new rules are needed for directorless corporations (s. 102), whether the auditors' right to information should be strengthened (s. 170) and whether a new detailed set of rules should be adopted for revivals of dissolved corporations (s. 209).

This discussion paper should be seen as a living document. Other technical amendments may eventually be considered for CBCA Phase II reform.

Certain preferred positions or recommendations are made simply to help focus discussion. No final determination of the most appropriate options will be made by Industry Canada until after consultation.

CANADA BUSINESS CORPORATIONS ACT

PROPOSALS FOR TECHNICAL AMENDMENTS

INTRODUCTION

[1] The following proposals cover over 50 technical changes to the Canada Business Corporation Act ("CBCA"). A number of amendments were raised in submissions on Bill C-12,[1] the first phase of CBCA reform. Since many of the suggestions were "outside the scope" of Bill C-12 and could not be considered at that time, Industry Canada agreed to examine them for possible inclusion in Phase II CBCA reform. Many proposals were recommended during initial Phase II consultations or in letters to Industry Canada. Some of the proposals originate from amendments made to The Business Corporations Act of Saskatchewan ("Saskatchewan BCA")[2] in 1992 and amendments recently made to the Ontario Business Corporations Act ("Ontario BCA")[3]. Other suggestions stem from proposals to amend the British Columbia Company Act ("B.C. Company Act")[4] and the Alberta Business Corporations Act ("Alberta BCA").[5]

[2] In general, the proposals would clarify the CBCA, remove anomalies, codify judicial interpretations, update terminology and correct cross references. Some of the potential technical amendments respond to concerns about regulatory and paper burdens. Other proposals concern pre-incorporation contracts, conditions for access to corporate records, purchase of shares by a subsidiary (currently prohibited), directorless corporations, provisions on auditors, appeal of court orders made under the CBCA and rectification of errors in documents, to list only a few of the issues. This discussion paper should be seen as a living document. Other technical amendments may eventually be considered for CBCA Phase II reform beyond those presented in the paper.[6]

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[1] An Act to amend the Canada Business Corporations Act and to make consequential amendments to other Acts, S.C. 1994, c. 24, assented to June 23, 1994.

[2] Saskatchewan The Business Corporations Act, R.S.S. 1978, c. B-10. The amendments were made by An Act to amend The Business Corporations Act, S.S. 1992, c. 44.

[3] R.S.O. 1990, c. B.16. The amendments are contained in s. 72 of the Ontario Statute Law Amendment Act, 1994 (Bill 175) which received royal assent on December 8, 1994 and entered into force on March 1, 1995.

[4] R.S.B.C. 1979, c. 59. The proposals are found in Ministry of Finance and Corporate Relations, Company Act [:] Discussion Paper (Province of British Columbia, January 1991).

[5] S.A. 1981, c. B-15.

[6] Consultations on other technical amendments will be carried out in accordance with the time and opportunity available.

[3] Certain preferred positions or recommendations are made simply to help focus discussion. No final determination of the most appropriate options will be made by Industry Canada until after consultation.

[4] This paper deals with the proposed amendments by chronological section reference as they would appear in the CBCA.

PROPOSALS

1. Gender-Neutrality

Issue:

[5] Whether gender-neutral terminology should be adopted in the CBCA.

Background:

[6] There are over 100 references in the statute to "he", "him" and "his", particularly in relation to the CBCA Director. For example, subs. 2(8) reads in part "... the Director may determine that a security of the corporation is not or was not part of a distribution to the public if he is satisfied that ..." Similarly, s. 41 reads "The directors may authorize the corporation to pay a reasonable commission to any person in consideration of his purchasing or agreeing to purchase shares of the corporation." [Emphasis added]

Recommendation:

[7] Introduce gender-neutral references in the statute.

2. **Definition of Auditor** (subs. 2(1))

Issue:

[8] Whether to broaden the definition of "auditor" in subs. 2(1) to expressly include incorporated auditors.

Background:

[9] The current definition of auditor in subs. 2(1) reads: "'auditor' incudes a partnership of auditors". No reference is made to an incorporated auditor.

[10] The Canadian Institute of Chartered Accountants (CICA) has recommended that the definition be amended. The CICA notes that the Bank Act[7] and other federal financial institutions legislation provide that the auditor of a financial institution shall be a "firm of accountants" and that this term is defined as follows:

> "firm of accountants" means a partnership, the members of which are accountants engaged in the practice of accounting, or a body corporate that is incorporated by or under an Act of the legislature of a province and engaged in the practice of accounting;[8]

[11] The CBCA does not define who shall audit the corporation,[9] what an auditor's professional qualifications shall be or what organizational structure a firm of auditors must take. These matters have traditionally been left to provincial regulation of the auditing function and of professionals, including accountants. Some provinces now permit professionals who prepare audits to incorporate.

[12] British Columbia, for instance, permits accountants to be associated with a corporation incorporated under the laws of British Columbia and engaged in the practice of public accounting. A number of conditions are imposed. The accountant must be expressly authorized by permit.[10] There are strict rules on share ownership and governance of the corporation. The corporation is obliged to "comply fully with all fiduciary, ethical, professional and other duties to which the

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[7] S.C. 1991, c. 46 ("Bank Act").

[8] See, for example, ss. 313-4 of the Bank Act.

[9] Other than that they must be independent of the corporation (CBCA s. 161).

[10] Form 6 issued by Council of the Institute of Chartered Accountants of British Columbia (ICABC), as per ICABC Rules of Conduct 408.1 and following.

Chartered Accountant is subject in relation to the practice of accounting".[11] The corporation is obligated to maintain in force a professional liability insurance policy with the coverage and amounts set by the professional institute.[12] The rules of conduct also provide that:

> A member to whom a permit has been issued ... shall be personally responsible for any failure of the corporation in respect of which the permit was issued, to abide by the Bylaws and Rules of Professional Conduct of the Institute as if such corporation were a member engaged in the practice of public accounting and as if the failure of the corporation were the failure of the member.[13]

[13] The key issue here is auditor liability.[14] Auditors in Canada and elsewhere have faced lawsuits claiming enormous amounts of damages. This expansion in potential exposure to liability follows the trend of expanding professional liability for economic losses seen in many countries.

[14] One recommendation for dealing with what the accounting profession feels is unfair levels of auditor liability is to allow professionals providing audits to incorporate.[15]

[15] Traditionally, accountants like lawyers, doctors and other professionals, have only been permitted to associate through partnership which provides flow-through liability to all members of the partnership.

[16] Auditor liability, like that of directors, is an important corporate law issue. The audit function is vital to good corporate governance of all publicly-traded and many privately-held corporations. On the one hand, audits are not possible without auditors. Excessive, unfair and

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[11] Form 6, par. 12.

[12] Form 6, par. 13. Currently, the minimum amount of liability insurance for a firm, either incorporated or unincorporated, with four or more members is $1,000,000 (ICABC Bylaw Regulation 2.10).

[13] ICABC Rule of Conduct 408.5.

[14] The theory of tort law in relation to auditor liability is discussed in detail in Chapman, "Limited Auditors' Liability: Economic Analysis and the Theory of Tort Law" (1992) 20 C.B.L.J. 180.

[15] The CICA has also recommended, as the second element of a two part solution, that joint and several liability be replaced with proportionate liability in respect of claims against auditors. With the release of the "Inquiry into the Law of Joint and Several Liability [:] Report of Stage Two" in January 1995 by the Commonwealth and New South Wales Attorneys-General, Australia has signalled that it will consider replacing joint and several liability of defendants in actions for negligence causing property damage or purely economic loss with liability proportionate to each defendant's degree of fault. Joint state and federal action are required to implement this proposal in Australia.

unpredictable liability may scare off many good auditors. Also, excessive liability could drive up the cost of the audit, negatively affecting the competitiveness of CBCA corporations.

[17] On the other hand, professional liability for negligent preparation of the audit is an important aspect of ensuring professional standards are maintained. Lawyers, doctors and other professionals are subject to liability for their or their partners' negligence which ensures protection of the public in the provision of professional services and compensation for damages caused by the negligence of members of the profession. It should be noted that being incorporated would not affect the liability of the auditing firm or of the particular negligent partners who would continue to have full personal liability.

[18] We remain concerned about incorporation of auditors and its impact on compensation to persons injured by a negligently prepared audit. The corporation and its shareholders (and perhaps other investors and creditors) may rely on the fact that the audit is prepared by auditors of a certain firm. The good name of the firm, its partners and the standards that the partnership represents are important aspects of their reliance that financial statements are adequately prepared. It can be argued that those relying on the statements should be able to look to the firm, and all its partners, for compensation where the audit is negligently prepared.[16]

[19] Nevertheless, we feel that the professional organization of auditors is a matter that generally should be the domain of provincial regulation. Where provinces allow business structures other than partnership for auditors, these incorporated entities should be permitted to audit CBCA corporations. Provincial rules should ensure that there is adequate protection of the public from the availability of the incorporated business organization form.

Recommendation:

[20] Expand the definition of auditor in subs. 2(1) to expressly include incorporated auditors, as well as auditors working in partnerships and as sole proprietors.[17]

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[16] The consumer of auditing services may be protected in so far as the name of the firm would carry an indication that the firm operated as an incorporated entity.

[17] Other sections of the statute may have to be updated to reflect the incorporation of auditors (for example, "business partner" as used in subs. 161(2)).

3. **Changing "Société Mère" in French Version** (subs. 2(4))

Issue:

[21] Whether the French term used in the CBCA for "holding body corporate", "société mère", should be replaced with the more accurate term, "personne morale mère", in subs. 2(4) and elsewhere in the CBCA.

Background:

[22] The Barreau du Québec noted in its submission to the Committee on Industry which reviewed Bill C-12 that the equivalent term in the French version for "holding body corporate" lacks logic and coherence.

[23] The term "société" is the French equivalent of the English term "corporation" (defined to be a company incorporated or continued under the CBCA). The equivalent French term for "body corporate" is "personne morale" (defined to be a company wherever or however incorporated). Therefore, the logical French term for "holding body corporate" should be "personne morale mère" not "société mère".

[24] The comments of the Barreau du Québec appear to be sound. The term "société mère", as currently defined in CBCA subs. 2(4), is referred to in a number of CBCA sections, which all must be amended.

Recommendation:

[25] Amend the French version of subs. 2(4) to replace the expression "société mère" with the more accurate expression "personne morale mère" and make consequential amendments, where appropriate, to CBCA provisions which refer to "société mère".

4. **Securities Terminology** (subs. 2(7))

Issue:

[26] Whether to review and update the English and French terminology in respect of the words "security", "distributing corporation" and "distribution to the public".

Background:

[27] In its submission on Bill C-12, the Barreau du Québec commented on a change in wording for the French version of the definition of "distributing corporation" in CBCA s. 126. Bill C-12 replaced the term "émission publique" with "souscription publique" in this definition. The Barreau noted that the term "souscription" does not include a secondary distribution and does not adequately translate the English term "distribution". The Barreau noted that under Québec company and securities laws,[18] the terms "une distribution publique" and more recently "placement" are used and should be followed in the CBCA.

[28] Bill C-12 made uniform the language within the CBCA. The expression "souscription publique" is defined in subs. 2(7) and is used throughout the CBCA. It is defined to include secondary distributions and effectively captures the same transactions covered by the terms "une distribution publique" and "placement".

[29] It was not possible to adopt in Bill C-12 the terminology proposed by the Barreau without rewriting many sections of the CBCA (which were outside the scope of the Bill). However, as part of the review of those aspects of the CBCA which overlap with securities laws (insider trading, takeover bids and proxy solicitations), the CBCA terminology in this area should also be generally reviewed.

[30] Subsection 2(7) defines a "distribution to the public". "Distributing corporation" is also defined in s. 126 for the purposes of the insider trading sections. These terms are also used in several provisions.[19]

Recommendation:

[31] In conjunction with a review of insider trading, takeover bids and proxy solicitation, the English and French "securities" terminology used in the CBCA should be reviewed and updated to match the language found in the Québec, Ontario and other provincial securities laws.[20]

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[18] Québec Companies Act, R.S.Q., c. C-38, s. 123.3 uses the phrase «une distribution publique» and the Québec Securities Act, R.S.Q., c. V-1.1, s. 5 uses the term «placement».

[19] Including CBCA subss. 21(1) and (3), 26(12), 49(9), 82(2), 102(2), 130(1), 160(1), 171(1) and 174(1) and ss. 126, 127 and 193.

[20] It has also been noted that the French version of the current subs. 2(7) is narrower than the English version. The English version reads: "...a security of a body corporate ... is part of a distribution to the public where ...", whereas the definition in the French version refers to the issuance of a security ("... l'émission de valeurs mobilières par une personne morale ... a lieu par voie de subscription publique lorsque". This inconsistency should also be clarified.

Moreover, the terminology should be defined in s. 2 and made applicable, where appropriate, to the entire CBCA.

Option:

[32] If current terminology is kept, we recommend that the phrase "distributing corporation" be defined in s. 2 using the definition contained in s. 126 and that the definition be deleted from s. 126.

5. **Purpose Clause** (s. 4)

Issue:

[33] Whether to update s. 4 which sets out the "Purposes of Act".

Background:

[34] Section 4 currently reads:

> The purposes of this Act are to revise and reform the law applicable to business corporations incorporated to carry on business throughout Canada, to advance the cause of uniformity of business corporation law in Canada and to provide a means of allowing an orderly transference of certain federal companies incorporated under various Acts of Parliament to this Act.

[35] These goals, set out when the CBCA was adopted, have been substantially achieved. Federal business corporate law was successfully revised and reformed in 1975 by the CBCA. The CBCA has also helped achieve a large degree of uniformity to business law in Canada. The third goal of allowing an "orderly transference" was also reached.

[36] Today, some of these objectives may seem outdated. In addition, other purposes could be considered, such as objectives:

- to help create an economic climate conducive to sustained growth and job creation
- to equitably and efficiently balance the interests of those persons interested in federal business corporations, including shareholders, management and creditors

- to allow for a fair, efficient and comprehensive administrative system that encourages the formation and good governance of corporate enterprises and facilitates efficient and flexible business management

- to promote a fair, efficient and competitive marketplace which promotes investor confidence

- to provide effective and responsive corporate regulation

[37] While a purpose clause is not common in corporate legislation, it can be useful in setting out the overall policy or goals of the legislation and in its interpretation.

Recommendation:

[38] Update s. 4 to refer to the current goals of the CBCA. Section 4 could refer to the following purposes:

- to continue to provide a modern business framework law for corporations incorporated to carry on business throughout Canada;

- to advance the cause of uniformity of business corporations law in Canada; and

- to equitably and efficiently balance the interests of those persons interested in federal business corporations, including shareholders, management and creditors.

Option:

[39] Repeal s. 4.

6. **Particulars of Articles of Incorporation** (subs. 6(1))

Issue:

[40] Whether to amend subs. 6(1) to provide that the articles of incorporation shall set out "information" prescribed by regulation.

Background:

[41] Currently, subs. 6(1) requires certain listed particulars, such as the name of the corporation and the classes of shares, to be set out in a corporation's articles.

[42] Subsection 72(2) of the Ontario Statute Law Amendment Act, 1994, amended Ontario BCA subs. 5(1) to provide that the articles shall set out the information as required by the regulations. Previously, these requirements (name, address, directors, etc.) were established by the Ontario BCA in subs. 5(1).

[43] An advantage of specifying the requirements for the articles by regulation is flexibility. Regulatory amendments are less time consuming to prepare and promulgate than legislative amendments. As the subs. 6(1) requirements change from time to time, this consideration is relevant.

[44] On the other hand, subs. 6(1) sets the framework for the governance rules of each CBCA corporation. The statute goes on to limit the way in which these key rules can be changed (such as through special majorities and class votes) to protect shareholders. Commentators may argue that the contents of the rules constitute the substance of corporate governance and therefore deserve to be enshrined in the statute, not in the regulations. It should also be noted that the CBCA, when enacted twenty years ago, specifically reduced what information is required to be put in the articles of incorporation and therefore what is on public record. The statute only requires a very limited number of key matters to be set out in the articles.

Recommendation:

[45] Do not amend subs. 6(1). Rather, the subsection's requirements should be updated where appropriate.

7. **Forms of Corporate Names** (s. 10)

Issue:

[46] Whether to amend CBCA s. 10 to (A) clarify the use of French and English forms and "combined English and French forms" of the corporate name and (B) specify that a corporation may have in its articles a provision permitting it to set out its name in any language.

Background:

[47] A legal practitioner has indicated that:

> It appears your administrative practice is that if a corporation has an English form of its name and wishes to use a French form then that French form must be shown in the certificate of incorporation and vice versa.
>
> This results in a difficulty interpreting subsection 10(3) of the Canada Business Corporations Act, as to what constitutes the form of the name. It is not clear whether the English and the French form constitute the full name of the corporation or whether either the English form alone or the French form alone may be used. If the English form and the French form of the name have to be used then this can also be interpreted as meaning both forms must appear wherever the corporate name appears viz. business documents, advertisements, etc. The use of the English form of the name and the French form of the name in every document issued by a corporation is unwieldy and adds to the cost of business administration.

[48] There appear to be two problems. First, the letter suggests that there is a lack of clarity as to whether CBCA subs. 10(3) permits a corporation to use separately the French and English forms of a corporate name. The Corporations Directorate is also continuously questioned about what kind of name is a "combined English and French form" of name. Our view is that CBCA subs. 10(3) does permit the separate use of French and English forms, but it does not clearly define what is a combined form as opposed to separate English and French forms.

[49] The practitioner's letter refers to the following amendments made to Ontario BCA s. 10 by subs. 72 (3) of the Ontario Statute Law Amendment Act, 1994:

> (2) Subject to this Act and the regulations, a corporation may have a name that is in,
> (a) an English form only;
> (b) a French form only;
> (c) a French and English form, where the French and English are used together in a combined form;
> (d) a French form and an English form where the French and English forms are equivalent but are used separately.
>
> (2.1) A corporation that has a form of name described in clause (2)(d) may be legally designated by the French or English version of its names.

[50] While the Ontario BCA provisions attempt to clarify the question of use of the various forms of names, we feel that they do not address the real problem which is the definition of the separate and combined forms. We do not believe it would be appropriate to provide these definitions in the statute because of the detail involved. However, regulations could be used to prescribe rules, such as separate forms shall appear on separate lines in the articles of incorporation or shall be divided by a hyphen or slash. These types of rules seem more suited for regulations where they could clarify the use of corporate names yet remain flexible. It should be

noted that regulations may be difficult to draft, particularly for existing CBCA corporations which have set out their names in the articles in a variety of ways.

[51] A second problem raised by the letter is that a corporation must set out in its articles the French and English forms of names if it wishes to be legally designated by both of them. This is not merely an administrative practice but a requirement of the statute. CBCA subs. 10(3) reads:

> Subject to subsection 12(1), a corporation may set out its name in its articles in an English form, a French form, an English form and a French form or in a combined English and French form and it may use and may be legally designated by any such form.

[52] The practitioner's letter referred to subs. 10(4) of the Ontario BCA which reads:

> Subject to the provisions of this Act and the regulations, a corporation may have in its articles a special provision permitting it to set out its name in any language and the corporation may be legally designated by that name.

[53] Ontario BCA subs. 10(4) does not expressly state <u>where</u> the other language names must be set out (for example, in a directors' resolution). The practitioner's letter suggested that the other language names need not be set out in the articles:

> You will see that not only does the Ontario legislation allow the separate use of the French and English forms of the corporate name but that there is, in subsection (4), a provision which allows a corporation to have a special provision in its articles permitting it to set out its name in a French form thereby eliminating any necessity for the English form and the French form to be shown in the certificate of incorporation.

[54] By contrast, subs. 10(4) of the CBCA is much narrower:

> Subject to subsection 12(1), a corporation may, <u>for use outside Canada</u>, <u>set out its name in its articles in any language form</u> and it may use and may be legally designated by any such form outside Canada. [Emphasis added]

[55] While we can appreciate the flexibility offered by the Ontario provisions, we are concerned about resulting name confusion. If a corporation may be legally designated, for example in contracts, court pleadings and land title documents, by a name set out only in a resolution of directors, how is the public notified as to what legal entity is legally using that name. There is no public record. Legislation could require a notice, specifying the other name, to be publicly filed, but this may defeat some of the flexibility intended by the provision and may be little different than requiring an amendment to the articles.

[56] Another issue is the requirement in subs. 10(5) for a corporation to "set out its name in legible characters in all contracts, invoices, negotiable instruments and orders for goods or services issued or made by or on behalf of the corporation". The equivalent Ontario BCA provision, subs. 10(5), specifically overrides Ontario BCA subs. 10(4) ("despite subsection (4), a corporation shall ..."). This is presumably intended to limit confusion in the marketplace about who is bound by contracts, etc. These other language names are essentially treated as business names. The CBCA already permits the corporation to use a business name or names (see CBCA subs. 10(6)) and imposes no restrictions about what language the name can be in. Moreover, there is no need to reference it in the articles.

Recommendation:

[57] Amend the CBCA by adding the "as prescribed" the words to CBCA subs. 10(3), so it would read: "... a corporation may as prescribed set out its name in its articles in an English form, a French form, an English form and a French form or in a combined English and French form and it may use and may be legally designated by any such form".

Option:

[58] Amend the CBCA along the lines of Ontario BCA subss. 10(2), (2.1) and (4), to (A) clarify that a corporation may use separately the different forms of its corporate name set out in its articles and (B) specify that, where the articles so provide, the directors may, by resolution, set out the name of the corporation in any other[21] language and the corporation may use and be legally designated by any such form.[22]

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[21] The Ontario BCA permits a corporation to have a special provision in its articles permitting it to set out its name in "any language". This might be interpreted to include the language in which it is already found in the articles (English and/or French). Presumably, the purpose of the provision is to permit flexibility in using a name in another language than the language(s) of the corporate name, as set out in the articles.

[22] As with the new Ontario BCA provision, the use of the alternative name would be restricted by the obligation to use the corporate name (as set out in the articles) in contracts, etc. (subs. 10(5)).

8. **Pre-incorporation Contracts** (subs. 14(1))

Issue:

[59] Whether to clarify the wording of subs. 14(1) by adding the phrase "or who purports to enter into" a written contract.

Background:

[60] Section 14 deals with "pre-incorporation contracts". These are agreements or transactions between a person and a corporation entered into before its incorporation. The common law treatment of such agreements was unsatisfactory and Canadian corporate laws have attempted to provide greater certainty.

[61] Commentators have described several problems with CBCA s. 14 and the case law interpreting identical provincial legislation.[23] A complete review of these problems, including differing theoretical approaches adopted in other jurisdictions[24] is beyond the scope of the Phase II technical reforms.

[62] However, one possible wording problem was addressed in 1992 in amendments to the Saskatchewan BCA.[25] The summary of the proposed amendments prepared by the Saskatchewan Corporations Branch provided the following explanation:

> This amendment clarifies the intention of the section, which is to protect third parties who enter into pre-incorporation contracts with as yet unformed corporations. The person who purports to act on behalf of the corporation is personally liable under the contract.

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[23] See for example, comments in the Alberta Institute of Law and Research and Reform, Proposals for a New Alberta Business Corporations Act (Edmonton, 1980) at pages 44ff; M.A. Maloney, "Pre-Incorporation Transactions: A Statutory Solution?" (1985) 10 Can. Bus. L.J. 409; Jacob S. Ziegel, "Promoter's Liability and Preincorporation Contracts: Westcom Radio Group Ltd. v. MacIsaac" (1989-90) 16 Can. Bus. L.J. 341; and A.J. Easson and D.A. Soberman, "Pre-Incorporation Contracts: Common Law Confusion and Statutory Complexity" (1992) 17 Queen's L.J. 414.

[24] For example, see the Alberta Business Corporations Act, S.A. 1981, c. B-15, s. 14 ("Alberta BCA").

[25] An Act to amend The Business Corporations Act, S.S. 1992, c. 44, s. 7, amending subs. 14(1) of the Saskatchewan BCA.

> The amendment removes a gap which has been found in other provinces, to exist in the wording of the Act, by adding the wording "purports to enter into a written contract".

[63] The changes to the Saskatchewan BCA were made as a result of the decision in Westcom Radio Group Ltd. v. MacIsaac.[26] Upholding the decision of the trial court, the Ontario Divisional Court held that the pre-incorporation contract was a nullity because the plaintiff intended to contract with a non-existent company, not its agent (the defendant in the case). The pre-incorporation contract provision in the Ontario BCA (subs. 21(1)), which is similar to CBCA s. 14, did not apply since no contract came into existence.[27]

[64] The Westcom decision has been criticized by commentators as narrowly interpreting the legislation, defeating its clear purpose and leading to uncertainty in the law. However, the Westcom decision has been followed by at least one other case interpreting the Ontario BCA and presumably could be applied to interpret CBCA s. 14.[28]

Recommendation:

[65] Amend CBCA subs. 14(1) by adding the words "or purports to enter into a written contract", following amendments made to the Saskatchewan BCA. The amended provision would clarify that the section applies to contracts "purported to be entered into" with a corporation prior to its incorporation (even though at common law there is no contract).

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[26] [1988] O.J. No. 950 (Ont. Dist. Ct.), affirmed by 70 O.R. (2d) 591 (Ont. Div. Ct.).

[27] The Divisional Court held:

> In coming to any conclusion about the case at bar, the starting point must be to determine whether the plaintiff intended to contract with the non-existent company exclusively. If so, then the purported "contract" is a nullity. Whether the defendant will be personally liable under the O.B.C.A. will depend upon the interpretation of the word "contract" in s. 21(1). It is probable that the intention of the legislators was to remedy the perceived unfairness of [principles developed at common law], but it is questionable whether the current wording of the Act clearly includes purported agreements which are in law nullities. ...
>
> In the present case, application of the common law leads to the conclusion that no contract ever existed. That being the situation, there is nothing to which s. 21(1) of the O.B.C.A. can apply.

[28] See Vacation Brokers Inc. v. Joseph [1993] O.J. No. 3036 (Ont C.J., Gen. Div.).

9. **Regulatory Authority and Retention of Documents** (subss. 20(2.1), 225(1) and 267(3))

Issue:

[66] Whether the retention periods for documents required by the CBCA to be maintained by CBCA corporations and the CBCA Director shall be "prescribed by regulation".

Background:

[67] CBCA corporations and the CBCA Director are required to keep many kinds of documents on file. The CBCA only provides rules on retention with respect to certain documents. Subsection 20(2.1), enacted recently by Bill C-12, provides a six year retention period for accounting records. Subsection 225(1) provides document retention rules for dissolved corporations. Finally, with respect to the CBCA Director's records, subs. 267(3) states: "The Director is not required to produce any document, other than a certificate and attached articles or statement filed under section 262, after six years from the date he receives it."

[68] The Alberta BCA authorizes regulations respecting the retention period for securities records[29] and for records of the Registrar. Concerning records of the Registrar, subs. 260(1.1) simply provides: "The records referred to in subsection (1) [records prepared and maintained by the Registrar] shall be kept in accordance with the regulations."

Recommendation:

[69] Amend the CBCA to provide that the retention periods for any documents required by the legislation to be maintained by CBCA corporations and the CBCA Director shall be "prescribed by regulation".

Option:

[70] Amend the CBCA to provide that retention periods for documents maintained by the CBCA Director be determined by regulation but continue to set out in the CBCA itself retention periods for documents required to be maintained by CBCA corporations. If this option is adopted, there remains the issue of whether a statutory retention period should be adopted for other documents specified in subss. 20(1) and (2) or in other sections of the statute (for example,

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[29] Subsection 46(1.1).

for documents such as articles, by-laws, unanimous shareholder agreements, minutes of meetings and resolutions of both directors and shareholders and the securities register).

10. **Access to Corporate Records** (subs. 21(1))

Issue:

[71] Whether to place under subs. 21(1) the same conditions for access to information available to shareholders as are currently imposed with respect to subs. 21(3).

Background:

[72] A stock transfer professional has advised Industry Canada that:

> Under subs. 21(1), a shareholder may examine the records of a corporation during normal business hours and may take extracts therefrom, free of charge. Subsection 21(1) does not limit the application of information acquired by a shareholder in this manner.
>
> Subsection 21(3) allows a shareholder to obtain a shareholders' list upon payment of a reasonable fee and upon filing an affidavit -- as per subs. 21(7) and 21(9) -- which, effectively, limits the use of the information obtained.
>
> [My company] is concerned that a shareholder is not restricted in the use of information obtained under Section 21(1). While we agree with the basic premise of shareholder access, we would like to suggest that the use of the information obtained under Section 21(1) must be restricted as per 21(7) and 21(9).

[73] Subsection 21(1) grants shareholders (and others) the right to obtain access to records referred to in subs. 20(1). The records referred to in subs. 20(1) are: (a) articles and bylaws and any unanimous shareholders agreement; (b) minutes of meetings and resolutions of shareholders; (c) copies of notices of directors or change of directors; and (d) the securities register. Section 50 specifies that the securities register shall show, with respect to each class of securities, the names, alphabetically arranged, and addresses of each person who is or has been a security holder, the number of securities and the particulars of the issue and transfer of securities.

[74] A shareholder or creditor may examine and take extracts from these records, free of charge. In the case of distributing corporation, any other person may do so on payment of a reasonable fee.

[75] Subsection 21(3) authorizes shareholders (and others) to request and receive from the corporation a list of shareholders, their addresses and the number of shares owned. Before the corporation is required to prepare and deliver a list of shareholders, the applicant must send to the corporation a fee and an affidavit stating that the list of shareholders will not be used except in connection with:

(a) an effort to influence the voting of shareholders of the corporation;
(b) an offer to acquire shares of the corporation; or
(c) any other matter relating to the affairs of the corporation.

[76] It difficult to understand why an affidavit is required for a shareholders list under subs. 21(3) but not for the securities register under subs. 21(1), particularly where the same information, although in a less-user friendly form, is potentially available under subs. 21(1). In fact the securities register contains more information -- all securities, not just shares, and past owners as well as present. It also includes the particulars of securities transfers including dates and the consideration.

[77] We have not been advised of any incident where the right to access has been abused. We are reluctant to recommend any restrictions on access by shareholders to corporate information in the absence of any evidence of abuse. Nevertheless, the subsections appear to be inconsistent and one of the purposes of the technical amendments is to reconcile such discrepancies.

[78] Finally, it should be noted that subss. 21(3) to (10) are designed to enable shareholders and third persons to gain access to shareholder lists for the purposes of proxy solicitation or take-over bids, largely in the publicly-traded corporation setting (where security registers would be extremely complicated to use). We presume that the affidavit requirement is there to prevent abuse of shareholder lists of publicly-corporations. It may not be justified therefore to restrict the access of shareholders and creditors of privately-held corporations to the securities register.

Recommendation:

[79] Require an affidavit under subs. 21(7) before access to the securities register of a distributing corporation is authorized and allow a reasonable fee to be charged for extracts.

11. **Shareholder Lists** (subs. 21(3))

Issue:

[80] Whether subs. 21(3) should be amended to clarify the wording.

Background:

[81] Subsection 21(3) grants shareholders, creditors and others access to shareholder lists on payment of a fee and delivery of an affidavit.

[82] One of the 1992 amendments to the Saskatchewan BCA changed the identical Saskatchewan provision. That amendment clarified that the fee for the shareholder list must be filed at the same time as the affidavit. The summary of the proposed amendments prepared by the Saskatchewan Corporations Branch provided the following explanation:

> This amendment clarifies that the affidavit and the fee are to be filed at the same time. Thus, the corporation has 10 days after receiving the affidavit plus the fee to deliver the list of shareholders.

[83] This amendment appears to be a sensible clarification of the subsection.

[84] Some concerns might be raised about a target corporation using the "reasonable" fee requirement as a delaying tactic to a take-over bid. The offeror may be able and willing to pay a "reasonable" fee but the fees are not yet determined or are the subject of discussion. The question of what constitutes a "reasonable" fee may be used as a delaying tactic to the take-over bid.

Recommendation:

[85] Amend CBCA subs. 21(3) by adding the words "the fee and" between the words "receipt of" and "the affidavit" (in both places they are found in the subsection).

Option:

[86] Amend CBCA s. 21 to require that the person wishing access to the shareholder lists demonstrate an ability to pay the fee.

12. **Corporate Seal** (s. 23)

Issue:

[87] Whether to clarify that corporations are not required to have a corporate seal.

Background:

[88] Under common law, the "rule was that a corporation was not bound by a contract unless it was under the corporate seal but there were and are certain exceptions to this rule ...".[30] Corporate laws have generally provided that the use of a corporate seal is permissible but not required. CBCA s. 23 provides:

> An instrument or agreement executed on behalf of a corporation by a director, an officer or an agent of the corporation is not invalid merely because a corporate seal is not affixed thereto.

[89] Most provincial corporate laws similarly end the need for a corporate seal.[31] Several statutes provide, like the CBCA, that instruments or agreements do not need to be under seal. The Ontario BCA simply provides: "A corporation may, but need not, have a corporate seal."[32] However, despite these legislative pronouncements, use of the corporate seal continues today, adding to the costs of CBCA and other Canadian corporations.

[90] The Dickerson Report[33] provided:

> At one point we considered abolishing the whole idea of the corporate seal, an anachronism carried over from a less literate age. The amount of money spent every year in buying and storing this redundant ironmongery must be substantial. In the end, however, we concluded that we would probably create more trouble than we would save by abolishing the seal. Many people, bank managers in particular, are devoted to the seal

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[30] H. Sutherland, Fraser & Stewart Company Law of Canada, 6th ed. (Toronto: Carswell, 1993), p. 104.

[31] New Brunswick Business Corporations Act, S.N.B. 1981, c. B-9.1, s. 21, Saskatchewan The Business Corporations Act, R.S.S. 1978, c. B-10, s. 23, Manitoba Corporations Act, L.R.M. 1987, c. C225, s. 23 have identical language to that of the CBCA. The Alberta Business Corporations Act, S.A. 1981, c. B-15, subs. 23(2) uses language similar to CBCA s. 23 but goes on to provide for the adoption, change, use and facsimile of a corporate seal (s. 23). The Québec Companies Act, R.S.Q., c. C-38, s. 36 provides: "... in no case shall it be necessary to have the seal of the company affixed to any ... contract, agreement, engagement, bargain, bill of exchange, promissory note or cheque [made on behalf of the company] ...". Section 115 also eliminates the need for a seal on any summons, notice, order or proceeding requiring authentication by the company. The British Columbia Company Act, R.S.B.C. 1979, c. 59, ss. 35 and 130 and the Nova Scotia Companies Act, R.S.N.S. 1989, c. 81, ss. 103-4 do not purport to eliminate the need for seals but provide for both common and official seals.

[32] Section 13.

[33] Robert W.V. Dickerson, John L. Howard, Leon Getz, Proposals for a New Business Corporations Law for Canada, 2 vols (Ottawa: Information Canada, 1971) referred to hereafter as the Dickerson Report.

> and would be very upset if its use was prohibited. The law need not deprive people of such simple and harmless pleasures.[34]

[91] Similarly, the 1980 Report Proposals for a new Alberta Business Corporations Act by the Institute of Law Research and Reform concluded:

> We do not think that company law should require a company to have a seal. General literacy has made the seal as a form of signature unnecessary. ...
>
> On the other hand, we see no reason why a corporation should not have a seal if it wishes, and many corporations will come up against practical problems if they do not, including difficulties arising under statutes such as the Land Titles Act which provide for authentication of corporate acts by seal.[35]

[92] The CBCA itself does not require corporate seals to be affixed to any documents. However, the requirement for corporate seals are presumably found in other federal, provincial and foreign laws.[36]

Recommendations:

[93] Amend CBCA s. 23 to provide (A) that a corporation may, but need not, have a corporate seal (the Ontario BCA approach) and (B) that an instrument or agreement executed on behalf of a corporation by a director, an officer or an agent of the corporation need not have a corporate seal affixed thereto, unless a corporate seal is otherwise required by law.[37]

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[34] Dickerson Report Vol. I, p. 33.

[35] Institute of Law Research and Reform, Proposals for a new Alberta Business Corporations Act (Edmonton: 1980), p. 45.

[36] For example, land registry laws. We have not attempted to undertake what would obviously be a huge survey of the requirements found in other laws.

[37] By law, we mean a federal or provincial statutory requirement or a legal requirement (statutory or otherwise) of a foreign jurisdiction where the instrument will be used.

13. **Rights of Classes of Shares** (subs. 24(4))

Issue:

[94] Whether subs. 24(4) should be clarified where the rights of classes of shares have not been fully specified or where no shares have been issued from a class of shares.

Background:

[95] In its submission on Bill C-12, the Barreau du Québec recommended that CBCA subs. 24(4) be amended in light of s. 123.41, second paragraph, of the Québec Companies Act.

[96] CBCA subs. 24(4) currently provides:

> The articles may provide for more than one class of shares and, if they so provide,
>
> > (a) the rights, privileges, restrictions and conditions attaching to the shares of each class shall be set out therein; and
> >
> > (b) the rights set out in subsection (3) shall be attached to at least one class of shares but all such rights are not required to be attached to one class.

[97] CBCA subs. 24(3) sets out three rights: the right to vote, the right to receive any dividend declared by the corporation and the right to receive the remaining property of the corporation on dissolution.

[98] The Québec Companies Act provides in s. 123.41, first and second paragraphs:

> Except where provided to the contrary in the articles, the rights mentioned in section 123.40 attach to every share.
>
> If a right under this section is attached to no issued share, every restriction to that right has no effect until a share is issued to which the right affected by that restriction is attached.

[99] Section 123.40 mentions the three rights, to vote, to receive dividends and to receiving the remaining property, also referred to in CBCA subs. 24(3).

[100] With respect to the first paragraph of s. 123.41, we have been advised that:

> The overall effect of sections 123.40 and 123.41 is that if one of the three basic rights is not expressly excluded in the articles in relation to shares of a class, this right automatically is attached to that class. Section 123.41 has a suppletive role: if a right is not mentioned in the articles, it is attached to the shares. ...
>
> Under 24(3) of the CBCA, if there is only one class of shares, all three "basic rights" automatically attach themselves to these shares. Under section 24(4)(a) of the CBCA, when there are more than one class of shares, the rights attached to each class must be set out in the articles.
>
> This can be construed as meaning that unless a "basic right" is expressly set out in the articles, that right does not attach itself to a share when there are more than one class of shares. The CBCA does not correct the drafters' omissions. It does not fill the blanks, as the Q.C.A. does.

[101] With respect to the second paragraph of s. 123.41, the wording is difficult to follow. However, it appears to mean that where one of the fundamental share rights (vote, dividend, remaining property) is attached to a class of shares which have not yet been issued, any restriction placed on the other classes of shares with respect to this fundamental right has no effect. As far as we have determined, no other provincial legislation expressly deals with the non-issuance of shares of the class and we have not found any case law considering this issue.

[102] We have concerns that difficulties may arise in practice in trying to determine the rights of shareholders under such a rule and any legislation without a detailed set of rules may lead to confusion and possible abuse. It has also been suggested that adverse tax consequences may result if the statute effectively alters share attributes.

[103] A narrower interpretation of the second paragraph of s. 123.41 has also been suggested. If one class of shares is subject to a restriction (for example, cannot receive a dividend until another class is paid), that restriction is lifted for as long as no shares of that second class are issued. This appears to be a sensible rule that probably reflects what occurs in practice.

Recommendation:

[104] We recommend that CBCA s. 24 be amended to clarify that, except where provided to the contrary in the articles, the rights mentioned in subs. 24(3) attach to every share, following the first paragraph of s. 123.41 of Québec Companies Act.

Option:

[105] Amend CBCA s. 24 to clarify that where one class of shares is subject to a restriction subordinating one of its rights to the rights of another class of shares, the restriction is lifted for as long as no shares of that second class are issued and outstanding.

14. **Stated Capital Account** (subs. 26(3))

Issue:

[106] Whether certain technical changes should be made to this provision.

Background:

[107] The Barreau du Québec has raised three concerns in connection with subs. 26(3), a very complex provision dealing with the stated capital account.[38] The concerns of the Barreau are:

A. The translation of the words "immediately before" by "au moment de" is inadequate and should be replaced by "immédiatement avant". The Barreau also noted that the French version contains an element that does not exist in the English text: the words "immédiatement après l'échange et" should be deleted.

B. The word "or" after the words "paragraph 192(1)(b) or (c)" is missing from paragraph (b) of the English version. The French version needs to be amended accordingly. The Barreau notes that the equivalent Ontario BCA provision, subs. 24(3), includes the "or" preposition. This change would add flexibility to the provision in that it could apply in respect of ordinary amalgamations and not simply three cornered amalgamations.

C. The Barreau du Québec recommends deleting or clarifying the reference to subs. 25(3) in subs. 26(3).[39]

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[38] This term and the purpose of s. 26 is described below.

[39] Two other stated capital matters have also been raised with us. Firstly, when shares are issued as a stock dividend, does CBCA subs. 43(2) permit the addition of an amount to the stated capital account that is less than the value of those shares? Subsection 43(2) provides that the "declared amount" of a stock dividend shall be added to the stated capital account. Taxpayers often wish to add a nominal amount to stated capital on the payment of a stock dividend so that the amount of the dividend for tax purposes is a nominal amount. The Income Tax Act appears to contemplate that this may

[108] Stated capital[40] is an important corporate law concept designed to protect the capital of a corporation. The stated capital represents the capital contributions of shareholders. The management (directors and officers) are limited in the way it may use this capital.[41] Broader powers are given to management to use the corporation's profit.

[109] Section 26 provides that the corporation shall maintain stated capital account(s) for the corporation and the section provides the rules for adding amounts to them. Subsection 26(2) requires corporations to add to the stated capital account(s) the full amount of consideration it receives for any shares it issues. Subsection 26(3) provides certain exceptions. In general, these exceptions appear to be tax driven.

[110] The first issue raised by the Barreau du Québec is a question of clarification. Currently, the English and French versions do not appear to be consistent. The phrase "au moment de" (at the moment of) in the French version appears to be different than the phrase "immediately before" in the English version. In at least two places, the Income Tax Act translates "immediately before" with "immédiatement avant" (subs. 219(5.3) and s. 89.1, now repealed). With respect to the words "immédiatement après l'échange et", they do not appear in the English version and appear unnecessary.

[111] The second issue is more complicated. It appears to be a question of the balance between shareholder protection and commercial and tax practice. Shareholders are better protected if all the consideration paid for shares is paid into the stated capital account. This was

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be done. It has been suggested that CBCA subs. 43(2) should be amended to clarify the matter. Secondly, what is the stated capital of shares where the amount added to the stated capital account contravenes CBCA s. 26? For example, a corporation may add to the stated capital account an amount that is less than the consideration received, in the mistaken belief that subs. 26(3) applies to the transaction. Partly on the basis of CBCA subs. 16(3), Revenue Canada has taken the position that the stated capital is the amount that was actually added to the stated capital account (and not the amount that s. 26 required to be added to the account). It may be preferable if the CBCA explicitly set out the consequences of additions to the stated capital that contravene the Act. No full analysis of these issues has been made, nor any determination of appropriate options, but any comments are welcome.

[40] The term "stated capital" was introduced by the CBCA in 1975. Under the Income Tax Act, R.S.C. 1986 (5th Supp.), c. 1, the parallel concept is paid-up capital.

[41] Subsection 26(10) prohibits the corporation from reducing its stated capital except in the manner provided for in the CBCA. Sections 34 and following permit certain reductions in the stated capital where the realizable value of the corporation's assets exceed its liabilities to creditors and its stated capital. Commissions, dividends, financial assistance and certain other types of transactions are prohibited where the corporation does not have enough realizable assets to cover its liabilities and stated capital. In other words, management can pay, for example, dividends or financial assistance, out of the corporation's profit but not its capital.

the view of the Dickerson Report[42] and was reflected in the CBCA as adopted in 1975.[43] However, amendments to the CBCA in 1978,[44] through the adoption of the current subs. 26(3), recognized that commercial practice requires some flexibility.

[112] Most provinces appear to give corporations more flexibility than the CBCA. The equivalent Ontario BCA provision[45] includes the word "or" in par. 26(3)(b) which adds flexibility by applying in respect of ordinary amalgamations and not simply three cornered amalgamations.[46] This flexibility was referred to by the Barreau du Quebec, as noted above. Other provincial laws vary on their treatment of these issues.[47] The Alberta BCA[48] permits a corporation to add to the

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[42] Dickerson report, Vol. I, pages 38-9, paras. 105-6. The Dickerson report noted that, under the pre-existing federal business corporate law, companies had a great deal of flexibility in determining whether consideration received from the sale of shares was allocated to the capital account or to a "distributable surplus" account. The "distributable surplus" could be paid out in dividends. The Dickerson report strongly recommended that the law be changed:

> In our view (supported by the Canadian Institute of Chartered Accountants) it is wrong to use the term "surplus" in this way. It is also wrong, we think, to allow the distribution as dividends of moneys received by a corporation upon an issue of shares. There have been cases where shareholders have been misled by such payments into thinking that the corporation was more profitable than it in fact was. We believe that all moneys paid for shares should be treated as capital by the issuing corporation and, if any part of such money is later returned to the shareholders, it should be only by way of a redemption or reduction of capital.

[43] S.C. 1974-75-76, c. 33, s. 26.

[44] An Act to Amend the Canada Business Corporations Act, S.C. 1978-79, c. 9, s. 11.

[45] Subsection 24(3).

[46] A "three cornered amalgamation" occurs for example when A and B corporation merge to form AB corporation. As part of the amalgamation, at least some of the shareholders of A and/or B corporation receive shares of a third corporation, C corporation, in consideration for the shares they held in A and/or B corporation. In an "ordinary amalgamation", the shareholders of the amalgamating corporations receive cash and/or shares of the new corporation.

[47] We understand that jurisdictions which have par and nominal value shares, British Columbia and Nova Scotia, have very flexible rules on what need not be added to the stated capital account (although we have not reviewed the British Columbia Company Act, R.S.B.C. 1979, c. 59 and the Nova Scotia Companies Act, R.S.N.S. 1989, c. 81 on this point). New Brunswick business corporate law also offers the same flexibility as Ontario but, in addition, allows par value shares and provides separate flexible rules for these shares: New Brunswick Business Corporations Act, S.N.B. 1981, c. B-9.1, s. 25. Manitoba and Saskatchewan business corporate laws have adopted similar rules to the CBCA but only with respect to assets freezes and non-statutory continuances. No exceptions are provided for any amalgamations: Manitoba Corporations Act, L.R.M. 1987, c. C225, subs. 26(3) and Saskatchewan The Business Corporations Act, R.S.S. 1978, c. B-10, subs.

stated capital account the whole or any part of the consideration received for shares issued in exchange for property, other than a promissory note, or issued shares of the corporation of a different class. There is no requirement for a non-arms length transaction.

[113] The third issue is also complicated. As indicated above, the principle found in subs. 25(3) that the shares should be fully paid for is fundamental to shareholder protection. Even if commercial and tax practice favours that the full consideration not be added to the stated capital account, we do not feel that this should take away from the obligation to ensure that full consideration is received for the shares.

Recommendations:

A. Replace the phrase "au moment de" in the French version with the phrase "immédiatement avant" and remove the words "immédiatement après l'échange et", as recommended by the Barreau du Québec.

B. Amend par. 26(3)(b) by inserting the preposition "or" between the reference to "paragraph 192(1)(b) or (c)" and the words "to shareholders of an amalgamating body corporate...", as recommended by the Barreau du Québec.

C. Delete the reference to subs. 25(3) in subs. 26(3), as recommended by the Barreau du Québec. The principle that there must be full consideration for issued shares should not be affected by the question of what can be added to the stated capital account.

Options:

[114] Adopt the Alberta BCA provision, described above, which provides the corporation with flexibility in adding amounts to the stated capital account even where there is an arms length transaction. This option could be adopted as an alternative to, or as an addition to, recommendation B above.

[115] Alternative to recommendation C: Maintain the reference to subs. 25(3) in subs. 26(3).

26(1.2).

[48] Subsection 26(3).

15. **Subsidiary Acquisition of Parent's Shares** (s. 30)

Issue:

[116] Whether s. 30 should be amended to permit a subsidiary corporation to acquire shares in the parent.

Background:

[117] A legal practitioner has advised Industry Canada that, although s. 30 essentially prevents a subsidiary from holding shares in its holding body corporate, it would be useful for various reasons if a subsidiary could purchase shares in its parent, grandparent or other entities in the corporate chain. In some cases this is merely a good investment. In other cases, it is useful for fiscal reasons, particularly as regards withholding tax of a foreign country on dividends paid into Canada by a foreign subsidiary. If a dividend from a foreign subsidiary is paid to a Canadian parent, the parent obtains the funds subject to any applicable foreign withholding tax. However, if the subsidiary could purchase the shares of its parent, the parent would obtain such funds without foreign withholding tax.

[118] Should the CBCA be amended, it would presumably maintain the provision which prohibits a subsidiary from voting any shares which it holds in its parent company and other entities in the corporate chain (CBCA s. 33).

[119] Most Canadian corporate laws prohibit share purchases by subsidiaries. One of the few exceptions is the British Columbia Company Act. The January 1991 B.C. Ministry of Finance and Corporate Relations Discussion Paper on reforming the B.C. business corporate law stated:

> Most jurisdictions prevent a subsidiary from purchasing the shares of its parent. British Columbia is unique in Canada in that the act does not expressly deal with this issue. This has been interpreted as providing an unrestricted ability for a subsidiary to purchase the shares of its parent.
>
> The policy reason for preventing a subsidiary from purchasing its parent's shares seems to be to prevent the restrictions on redemptions and purchases of the parent's own shares from being effectively circumvented. However, there are legitimate circumstances where a purchase of the parent's shares by a subsidiary is in the best interests of both the parent and the subsidiary and not detrimental to the interests of shareholders or creditors. It

> seems unnecessarily restrictive to eliminate this option altogether in order to protect the integrity of the redemption and repurchase provisions.[49]

[120] The Draft Act accompanying the Dickerson Report expressly provided that a corporation could purchase shares in itself or its holding body corporate, as long as the corporation was solvent.[50] However, the 1974 Bill C-29, which became the CBCA, only permitted the corporation to purchase shares in itself. While there was no express prohibition on a subsidiary purchasing shares in the parent, this was implied by a prohibition imposed on a corporations from holding shares in itself or its holding body corporate. The 1975 Senate Briefing Book explained:

> The provision barring a subsidiary is necessary to ensure that a corporation is not acquiring shares through a subsidiary when it can not fulfil the solvency standards in order to acquire the shares itself.

[121] In 1978, s. 30 was amended to include the current prohibition imposed on a corporation from allowing a subsidiary to buy shares in it. The 1978 Briefing Book for the Senate provided:

> To the proposed subs. 30(1) there is added a new paragraph (b) which is designed to preclude a subsidiary from acquiring shares of the corporation, which is the logical corollary to paragraph (a), the provision that precludes a federal corporation that is a subsidiary of any body corporate from holding shares in itself or in its holding body corporate.

[122] Concerns could be raised about abuse of this provision in the take-over bid setting. However, CBCA s. 33 prohibits a subsidiary from voting those shares. Moreover, the corporation may purchase shares in itself and therefore the potential for abuse, if any, is already present and may not be substantially increased. Self-dealing is another concern, particularly for minority shareholders and creditors of the subsidiary. One option might be to only permit wholly-owned subsidiaries to purchase shares of the parent.

[123] Revenue Canada officials have also raised concerns about any changes to the provision from a tax viewpoint. They believe that the potential for abuse in the income tax field outweigh any commercial benefits that might arise from the this change. Disguising dividends as shares purchases could permit avoidance of Canadian income tax. They also "would question the propriety of amending Canada's corporate statutes to facilitate the disguising of dividends as share investments for the purpose of allowing a corporation to avoid another country's taxes,

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[49] Ministry of Finance and Corporate Relations, Company Act [:] Discussion Paper (Province of British Columbia, January 1991), page 51.

[50] Volume II, pp. 24-25, clause 5.08. See also Volume I, pp. 42-43.

particularly where Canada and the other country have entered into a tax convention one of the purposes of which is the prevention of fiscal evasion."[51]

[124] In light of Revenue Canada's concerns, and other potential problems arising out of the removal of the prohibition, we are reluctant to recommend a change to permit subsidiaries to acquire shares in the parent, without evidence of substantial commercial benefit to CBCA corporations from a corporate law policy perspective.

Recommendation:

[125] Maintain the prohibition in s. 30 on subsidiaries from acquiring shares of parent.[52]

Option:

[126] Amend s. 30 to allow subsidiaries to purchase shares of their parents and other entities in the corporate chain. Subsidiaries, like their parents, could not vote the shares and such purchases

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[51] See, for example, the Canada-United States Income Tax Convention (1980) (signed at Washington on September 26, 1980) which provides in its preamble: "Canada and the United States of America, desiring to conclude a convention for the avoidance of double taxation and the prevention of fiscal evasion with respect to taxes on income and on capital, have agreed as follows ...". [Emphasis added] The Convention deals with a number of issues, including the exchange of information (article XXVII), which forms the basis for cooperation to deal with avoidance or evasion of taxes. Reprinted in Canadian Tax Reports, pars. 30,226 and 30,227i.

[52] Revenue Canada officials have also suggested that s. 30 should be clarified. They understand that subsidiaries of CBCA corporations sometimes acquire shares in their parents on the basis that the five-year transition period provided in subs. 30(2) overrides the prohibition in subs. 30(1). The purpose of subs. 30(2) was to provide relief only in the case where a corporation owning shares in another corporation subsequently becomes a subsidiary of that other corporation. We feel that this policy is provided for in s. 30 because subs. 30(1) clearly prohibits acquisitions and subs. 30(2) only speaks of holding and selling shares, not acquiring. Nevertheless, the section could be made clearer by moving the opening words of subs. 30(1) "subject to subsection (2)" to par. 30(1)(a). A revised subs. 30(1) could read:

> Subject to sections 31 to 36, a corporation
>
> (a) shall not hold shares in itself or, subject to subsection (2), in its holding body corporate; and
>
> (b) shall not permit any of its subsidiary bodies corporate to acquire shares of the corporation.

would only be allowed in circumstances where the parent[53] and subsidiary are solvent. The CBCA s. 128 requirement for notice to be given to the CBCA Director imposed on corporations when they purchase their shares could also be imposed on purchase of shares by subsidiaries.

16. **Changing the Word "Acheter" in French Version** (subss. 34(2), 35(3) and 36(2))

Issue:

[127] Whether these provisions should be clarified by replacing the term "acheter".

Background:

[128] The Barreau du Québec in its submission on Bill C-12 recommended:

> [TRANSLATION] In the French version of these three provisions, the expression "make any payment to purchase ..." is incorrectly translated by "acheter". The notion of payment is not rendered at all, whereas it is very important to distinguish it from the notion of purchase, buy back or acquisition, as the English version does.

[129] The purpose of these provisions is to ensure that the corporation is solvent when the corporation redeems or otherwise acquires shares. This protection is meant to prevent any payment in respect of such redemption or acquisition, and not simply the purchase of the shares.

Recommendation:

[130] Amend and clarify the French versions of subss. 34(2), 35(3) and 36(2) by replacing word "acheter" with terminology better reflecting the words used in the English version "make any payment to purchase ...", such as "effectuer un paiement en vue du rachat".

17. **Repeal Clause Preserving Remedy** (subs. 38(6))

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[53] The requirement that the parent meet the solvency tests would be intended to prevent abuse of creditors of the subsidiary in the sense that shares of an insolvent corporation are presumably a bad investment. Some might however question the need for this requirement as creditors are presumably protected as long as the subsidiary is solvent.

Issue:

[131] Whether subs. 38(6) should be repealed.

Background:

[132] Section 38 provides for reductions in the stated capital account, through (a) reducing any liability in respect of an amount unpaid on any share, (b) distributing funds back to shareholders or (c) reducing the stated capital to reflect the worth of the corporation (subs. 38(1)). The reduction must be authorized by special resolution of shareholders. Under subs. 38(3), a corporation shall not reduce its stated capital if the corporation is insolvent or would be made insolvent (subs. 38(3)). Where a reduction to stated capital is made contrary to the section (i.e., the corporation is or becomes insolvent), a shareholder is liable to repay to the corporation any amounts received by the shareholder, etc. (subs. 38(4)).

[133] Subsection 38(6) provides: "This section does not affect any liability that arises under section 118." Section 118 imposes liability on directors when they approve certain payments by the corporation (e.g., dividends, redemptions of shares and financial assistance) where the corporation is insolvent or would be made insolvent by the payment. No liability is expressly imposed on directors under s. 118 for payments made under s. 38.

[134] In its submission on Bill C-12, the members of the Corporate Law Subcommittee of the Canadian Bar Association - Ontario, Business Law Section ("CBA - Ontario") recommended that the subsection be repealed because "section 118 does not impose any liability for a breach of s. 38 so the reference in subs. 38(6) is a non sequitur." The submission of the Barreau du Québec on Bill C-12 also made this comment.

[135] Section 38, not considered in the Dickerson Report, appears to have originated from the Canada Corporations Act and the United Kingdom companies law. The only reference we can find explaining subs. 38(6) is a comment in a letter from Robert Dickerson in 1975: "I think this provision was included to make it clear that, notwithstanding the corporation's right to recover directly from a shareholder or other person under section [38(4)], the director would still be personally liable."

[136] One option would be to amend s. 118 to impose liability on directors for reductions of capital made under s. 38. Directors are liable for other payments made by the corporation when it is in financial difficulties. Perhaps directors should therefore be liable for payments made (or reductions in shareholder liability) under s. 38.

[137] However, the payments for which directors are liable under s. 118 are payments that they approve. Under s. 38, it is the shareholders who by special resolution approve the reduction in

capital (although the directors presumably also approve the reduction). By analogy, under s. 211, it is the shareholders who by special resolution authorize the dissolution of the corporation and receive the remaining property (par. 211(7)(d)). The shareholders, not the directors, remain liable for amounts paid to shareholders on dissolution (subs. 226(4)).

Recommendation:

[138] Repeal subs. 38(6).

18. **Enforceability of Contract** (subs. 40(3) and par. 190(25)(b))

Issue:

[139] Whether the order of priority on liquidation should be changed to subordinate the rights of a shareholder who has a contract with the corporation for the purchase of shares or has exercised the right to dissent to those of a shareholder of a preferred class.

Background:

[140] In its submission on Bill C-12, the Barreau du Québec recommended that subs. 40(3) and par. 190(25)(b) "be amended to protect preferred shareholders. For a model, see s. 123.57, second paragraph, of the Québec Companies Act."

[141] CBCA subs. 40(3) provides:

> Until the corporation has fully performed a contract referred to in subsection (1), the other party retains the status of a claimant entitled to be paid as soon as the corporation is lawfully able to do so or, in a liquidation, to be ranked subordinate to the rights of creditors but in priority to the shareholders. [Emphasis added]

[142] CBCA par. 190(25)(b) provides:

> If subsection (26) applies, a dissenting shareholder, by written notice delivered to the corporation within thirty days after receiving a notice under subsection (24), may
>
> (a) withdraw his notice of dissent, in which case the corporation is deemed to consent to the withdrawal and the shareholder is reinstated to his full rights as a shareholder; or

> (b) retain a status as a claimant against the corporation, to be paid as soon as the corporation is lawfully able to do so or, in a liquidation, to be ranked subordinate to the rights of creditors of the corporation but in priority to its shareholders. [Emphasis added]

[143] Subsection 190(26) prohibits a corporation from purchasing shares where, basically, the purchase would make the corporation insolvent.

[144] Therefore, in a liquidation, the rights of the shareholder who has contracted with the corporation and the rights of a dissentee under s. 190 are subject only to the rights of creditors. The (ex-)shareholders under subs. 40(3) and par. 190(25)(b) rank ahead of other shareholders, even shareholders of a class of shares which would normally have priority on liquidation. It can be argued that this is fair because the (ex-)shareholders are no longer entitled to exercise their rights as shareholders.

[145] Québec Companies Act, s. 123.57 provides:

> In no case may a company be required to pay for a share of its share capital that it has acquired if it shows that by paying for the share at its book value it would contravene sections 123.54 to 123.56. [solvency provisions]
>
> The person who held the share then becomes a creditor of the company and is entitled to be paid as soon as the company may legally do so or, in the case of a winding-up, to be collocated by preference to the shareholders of the class of the shares he held, but after the creditors. [Emphasis added]

[146] Several other provincial laws have similar provisions to the CBCA.[54] Alberta and New Brunswick, however, have provided that, in the case of a contract for the purchase of shares, the purchaser only takes priority over shareholders of that class or a class of lower priority. For example, the Alberta provision reads:

> Until the corporation has fully performed a contract referred to in subsection (1), the other party to that contract retains the status of a claimant and is entitled to be paid as soon as the corporation is lawfully able to do so or, in a liquidation, to be ranked subordinate to the rights of creditors and to the rights of any class of shareholders whose rights were in priority to the rights given to the class of shares which he contracted to

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[54] Saskatchewan The Business Corporations Act, R.S.S. 1978, c. B-10, subs. 38(3) and subs. 184(25); Ontario BCA, subs. 36(3) and subs. 185(29); Manitoba Corporations Act, L.R.M. 1987, c. C225, subs. 38(3) and subs. 184(25).

> sell to the corporation, but in priority to the rights of the other shareholders.[55] [Emphasis added]

[147] In the case of a dissenting shareholder, the Alberta and New Brunswick provisions are the same as the CBCA and other provincial legislation (priority is given over all other shareholders).

[148] The Alberta and New Brunswick provisions appear more detailed than the Québec rule because they more clearly deal with the question of priority between classes of shares.

[149] The distinction between contractual and dissent rights seems appropriate in many cases. A rule subjecting contractually obtained rights could be seen as trying to prevent insiders from jumping the queue on priority when the corporation is in difficulty. It is unlikely that the dissent rights could be similarly misused. On the other hand, some dissenters with a corporation's direction may reach an agreement with the corporation to be bought out, instead of opting for the more formal dissent procedure. Why should they receive less priority?

Recommendation:

[150] We recommend that CBCA subs. 40(3) be amended along the lines of the Alberta and New Brunswick provisions referred to above. However, we do not recommend any change to the priority for dissentees under par. 190(25)(b) because the potential for abuse of the right of priority by a dissenting shareholder is minimal.

Option:

[151] Adopt the above recommendation but allow the articles of incorporation to override subs. 40(3) and establish different priorities.

19. **Correcting Cross-reference** (subs. 45(1))

Issue:

[152] Whether the cross reference in subs. 45(1) to subs. 226(5) should be corrected.

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[55] Alberta BCA , subs. 38(3). Subsection 39(3) the New Brunswick Business Corporations Act, S.N.B. 1981, c. B-9.1 is identical to the Alberta provision.

Background:

[153] In its submission on Bill C-12, the members of the CBA - Ontario recommended that we:

> Correct the cross reference [in subs. 45(1)] from subs. 226(5) to 226(4). Subsection 226(4) is the provision which imposes liability on a shareholder to whom a distribution has been made. Subsection 226(5) authorizes a form of class action.

[154] Subsection 45(1) limits the liability of shareholders. Certain exceptions to limited liability are specified. Under s. 226, creditors of a dissolved corporation may recover amounts distributed to shareholders on the dissolution.

[155] The CBA - Ontario points out that substantive liability is imposed under subs. 226(4) and therefore subs. 45(1) should refer to it. However, subs. 226(5) also is a basis of liability for shareholders in the class action setting. Therefore, subs. 45(1) should be amended to add a reference to subs. 226(4) in addition to the current reference to subs. 226(5).

Recommendation:

[156] Change the cross reference in subs. 45(1) by adding a reference to subs. 226(4) in addition to the reference to subs. 226(5).

20. **Prescribing Amount of Fee for Certificate** (subs. 49(2))

Issue:

[157] Whether subs. 49(2) should be amended to provide that the maximum fee a corporation may charge for a security certificate shall be set by regulation.

Background:

[158] Section 49 provides for the rights of shareholders to, and the form and content of, a security certificate. Subsection 49(2) currently provides: "A corporation may charge a fee of not more than three dollars for a security certificate issued in respect of a transfer."

[159] The Alberta BCA provides that the maximum fee for a security certificate be established by regulation.[56] Similarly, one of the 1992 amendments to the Saskatchewan BCA[57] amended the Saskatchewan provision that was equivalent to CBCA subs. 49(2) to provide that the maximum fee would be established by regulation. The summary of the proposed amendments prepared by the Saskatchewan Corporations Branch provided the following explanation:

> The $3 fee charged by corporations to their shareholders is inadequate to cover the cost of compensation for the actual cost of processing a share transfer.
>
> An appropriate fee that more nearly reflects the actual cost incurred will be prescribed in the regulations.

[160] We understand that some corporations are refusing to issue certificates for share holdings smaller than a certain amount (e.g., 5 or 100 shares). One reason for this may be the cost of issuing share certificates. The Saskatchewan amendment may address some of this concern. Another concern is the cost of shareholder communications (annual proxy solicitation). The proposed amendment does not address this and other concerns which raise fundamental policy considerations (such as shareholder democracy, liquidity of capital markets, right of shareholder to receive a certificate, etc.) and which are beyond the scope of Phase II technical reforms.

Recommendation:

[161] Amend CBCA subs. 49(2), following the 1992 Saskatchewan BCA amendments. Provide for the setting by regulation of the maximum fee for issuance of a security certificate.

21. **Promissory Note** (subs. 49(5))

Issue:

[162] Whether the expression "promissory note" should be deleted and replaced with the expression "debt obligation".

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[56] Subs. 45(2). The regulations set this fee at $5 (s. 2(1.1)).

[57] Saskatchewan BCA s. 45(2) amended by S.S. 1992, c. 44, s. 15. The regulations provide that the maximum fee shall be $10 (s. 41.1).

Background:

[163] Subsection 49(4) requires manual signatures on security certificates by at least one director, officer, transfer agent or trustee. Subsection 49(5) provides that, notwithstanding subs. 49(4), a manual signature is not required on a security certificate representing a promissory note, a fractional share, an option or a scrip certificate.

[164] A legal practitioner has recommended that the phrase "promissory note" be deleted and substituted with "debt obligation". It was noted that it seems to be a matter of interpretation whether or not a particular instrument is a "promissory note" and the broader phrase "debt obligation" would achieve the intended purpose without the necessity of the company seeking legal advice as to whether or not the particular instrument is a classical "promissory note". It has also been noted to us that:

> There are circumstances ... where a corporation wishes to issue debt obligations otherwise than under a trust indenture in circumstances where the issue is to members of the public and to manually execute each debt obligation would be burdensome and expensive for the issuer. For example, it is not uncommon for corporations to issue bearer debt obligations in the European debt markets under the provisions of a "fiscal agency agreement" rather than a trust indenture. Because the debt obligations are in bearer form there is no registrar, transfer agent or branch transfer agent. It has always been difficult to do this under the CBCA and avoid a manual signature by an officer unless counsel can conclude that the debt obligation constitutes a "promissory note" which is often difficult.
>
> For the forgoing reasons I believe that the section should be amended to provide for a security certificate to be manually signed by at least one director or officer of the corporation or by or on behalf of a registrar, transfer agent, branch transfer agent or trustee (who certifies in accordance with the trust indenture) or other person who certifies or authenticates the securities certificate in accordance with an authorization granted by the corporation.

[165] As promissory notes are less formal than bonds and debentures and are issued into the money markets in great numbers, there appears to be less need for the solemnity and protection that manual signatures give. Some provincial laws are similar to the CBCA.[58]

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[58] Manitoba Corporations Act, L.R.M. 1987, c. C225, subs. 45(5), Ontario Business Corporations Act, R.S.O. 1990, c. B.16, subs. 55(3) and Saskatchewan The Business Corporations Act, R.S.S. 1978, c. B-10, subs. 45(5) are very similar to the CBCA. The New Brunswick Business Corporations Act, S.N.B. 1981, c. B-9.1, subs. 47(5) permits manual signatures for certain certificates, but not for promissory notes.

[166] A corporate secretary has recommended removing any requirement in the CBCA for a manual signature on share certificates. The Alberta BCA permits all certificates, not just those evidencing debt obligations, to be signed mechanically: "Any signatures required on a security certificate may be printed or otherwise mechanically reproduced on it."[59]

Recommendation:

[167] No change is recommended.

Options:

(A) Adopt approach of Alberta BCA to permit mechanical signatures on all security certificates; or

(B) Amend subs. 49(4) to permit signature of security certificates by a person who certifies or authenticates the security certificate in accordance with an authorization granted by the corporation (in addition to the other persons already specified in the subsection).

22. **Restriction on Issue of Shares** (subs. 49(9))

Issue:

[168] Whether subs. 49(9) should be amended to delete the reference to a restriction on the "issue" of shares.

Background:

[169] A legal practitioner has raised concerns that this subsection could negatively impact the "issue" of shares by a public corporation.

> Subsection [49(9)] prohibits a public corporation from [imposing] any restrictions on the issue, transfer or ownership of its shares. In connection with "issue", this section could be read to prohibit a class of preferred or other shares, to be issued in series, containing an "issue test" whereby additional series of the class could not be issued unless such issue

[59] Subsection 45(5).

> test were met. I do not believe this is the intent of the section. There are numerous examples of issue tests in share provisions but perhaps the matter could be clarified.

[170] The 1978 Briefing Book gave the following background to the enactment of the provision:

> The proposed addition of [subs. 49(9)] effects a significant substantive change. At present the CBCA permits any corporation to place any restriction it wants on the transfer of its shares. It was assumed that express restrictions would only be placed on shares issued by closely held corporations, particularly corporations governed by a unanimous shareholder agreement.
>
> A number of persons have stated to the Department that this provision is unnecessarily broad. Subsection [49(9)] is therefore proposed to be added to preclude any restriction on the transfer of shares distributed to the public other than a restriction by means of a constraint imposed under s. 168. This makes clear that a CBCA corporation, even if it has the unanimous approval of its shareholders at the time, cannot restrict the transfer of any shares it distributes to the public.

[171] The above explanation focuses on restrictions on the "transfer" of shares after they are issued. The purpose of limiting restrictions on transfers is straightforward -- shares of public companies are negotiable instruments and a liquid market for the shares is vital. However, the purpose for the reference in the subsection to "issue" of shares is not as clear.

[172] It may simply be that the drafters wanted to use the same language, "issue, transfer or ownership", found in ss. 46 and 174 (dealing with constrained shares). The purpose of these sections is enabling in that it permits corporations to constrain the "issue, transfer or ownership" of its shares in certain cases. The use of the same language in subs. 49(9), which is prohibitive, appears to make less sense. However, we remain concerned that a change to the language in subs. 49(9) could distort ss. 46 and 174.

[173] It should be noted that the Ontario BCA was recently amended[60] to remove the word "issue" in subs. 42(2), the equivalent of CBCA subs. 49(9).

[174] There appears to be a number of problems with the constrained share provisions. However, a general review and updating of the provisions is beyond the scope of the Phase II technical amendments.

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[60] Ontario Statute Law Amendment Act, 1994, s. 71(6).

Recommendation:

[175] Amend subs. 49(9) by deleting the word "issue".

23. **Directorless Corporations** (s. 102)

Issue:

[176] Whether s. 102 should be amended to deal with directorless corporations.

Background:

[177] Subsections 72 (11) to (14) of the Ontario Statute Law Amendment Act, 1994 make a number of changes to the Ontario BCA to deal with corporations that have no directors. These changes are in response to a decision of the Ontario Provincial Court in R. v. Bain[61]. The Ontario government prosecuted a director for resigning without having a successor director being appointed. The court held:

> It is my view that if the legislators intended to create an offence with severe penalty sanctions they must make their intention clear and unequivocal. A citizen must be able to read a statute and say: I can't do that forbidden act because the statute says so.
>
> The citizen in this case, Virginia Bain, would know that if she was a first director as described in subs. 119(2), that she would not be allowed to resign as a director until such time that she had a successor to take her place.
>
> S. 121(1) allows any director to resign at any time subject to s. 119(2) which is the first director. When you read s. 121(1) the only exception to resigning as a director is that contained in s. 119(1).
>
> In short, I do agree with the defence contention that it is not an offence known to law and I have no jurisdiction in this matter.

[178] In response, the Ontario Companies Branch first considered an amendment to prohibit a director from resigning where the corporation would be directorless. Strongly opposed by the legal and business communities, this idea was dropped and instead the Ontario government proposed and adopted subss. 72(11) to (14). Essentially, these amendments do not prohibit

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[61] [1989] O.J. No. 2612 (unreported).

directors from resigning. Instead, the Ontario BCA deems any person who manages or supervises the management of a directorless corporation to be a director for the purposes of the Ontario BCA. The Ontario amendments also provide that the election or appointment of a director shall not be effective unless the individual consents in writing within ten days.

[179] The CBCA has provisions similar to those of the Ontario BCA (prior to the amendments). A corporation must have directors (subs. 102(2)), but directors are entitled to resign. Breach of the requirement to have directors is presumably an offence (for the corporation) under CBCA s. 251 and also compliance orders could be issued under ss. 247 and 252. However, action under these provisions may not be very effective.

[180] With respect to the Ontario BCA proposal deeming certain persons to be directors, the CBCA currently defines the word "director" to mean "a person occupying the position of director by whatever name called ..." (s. 2). This definition is also currently used in the Ontario BCA but the Ontario government feels that it is not clear or broad enough to encompass managers running a directorless corporation.

[181] A more effective remedy could be administrative or court-ordered dissolution of a non-compliant corporation (s. 212 and 214). Recent proposals to amend the Alberta BCA recommend a different approach of amending that statute to permit the Registrar to dissolve a corporation that does not have any director.[62] The proposals comment:

> Section 97(2) makes it mandatory for a corporation to have at least one director. Situations have arisen where all the directors of a corporation have resigned but the business continues to operate. Currently the Registrar has no authority to intervene. The duties and responsibilities of the directors form a large part of the law of business corporations. We believe that corporations that choose to continue to operate with no directors should lose the benefits of incorporation.

Recommendations:

[182] Following the Ontario Statute Law Amendment Act, 1994, we recommend that, where all of the directors have resigned or have been removed by shareholders without replacement, any person who manages or supervises the management of the business and affairs of the corporation shall be deemed to be a director. As with the Ontario BCA, this deeming provision would not apply to:

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[62] Alberta Registries, A Discussion on the [Alberta] Law of Business Corporations (Department of Municipal Affairs, Government of Alberta, March 1995) pages 18-9 (referred to hereafter as the "1995 Alberta Discussion Paper").

A. an officer who manages the business of the corporation under the direction or control of a shareholder or other person;

B. a lawyer, accountant or other professional who participates in the management of the corporation solely for the purposes of providing professional services; or

C. a trustee in bankruptcy, receiver, receiver-manager or secured creditor who participates in the management of the corporation or exercises control over its property solely for the purposes of enforcement of a security agreement or administration of a bankrupt's estate, in the case of a trustee in bankruptcy.

[183] We also recommend that CBCA s. 2 be amended to define "officer" applicable to the whole statute.[63]

Options:

(A) In addition to the above recommendation, amend CBCA subs. 212(1) to permit the CBCA Director to dissolve a corporation where it has no directors.

(B) Instead of the above recommendation, amend CBCA subs. 212(1) to permit the CBCA Director to dissolve a corporation where it has no directors.

24. **Appointing Additional Directors Between Shareholder Meetings** (subs. 106(8))

Issue:

[184] Whether subs. 106(8), which was added by Bill C-12 and provides that the articles of a corporation may allow directors to appoint a limited number of additional directors between meetings, should be amended.

Background:

[185] The purpose of subs. 106(8), which was added to the CBCA by Bill C-12, is to permit flexible corporate management while adopting certain safeguards for shareholders.

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[63] Currently, the only definition of officer is found in s. 126, the provision on insider trading. This definition could be moved to s. 2 and made applicable to the whole statute.

[186] In its submission on Bill C-12, the members of the CBA - Ontario recommended:

A. that the proposed subsection be moved to the end of s. 111 (subs. 111(6)) which the CBA - Ontario feels is a more "logical" place for it;

B. that the exceptions in subs. 111(1) be expanded to refer to the new subs. 111(6); and

C. that the new subsection permit the appointment of additional directors "if the articles of the corporation provide for a minimum and maximum number of directors".

[187] The CBA - Ontario was concerned that amending the corporation's articles is a cumbersome procedure and submitted that: "... where the articles provide for a variable number of directors, the shareholders can be taken to have authorized an increase within the range ... There should be no need for a second authorization to be stipulated in the articles."

[188] The submission of the Institute of Corporate Directors' on Bill C-12 agreed with the CBA - Ontario proposal. Another submission suggested that this change actually inhibits flexibility within corporations which use a by-law to grant this power. It was recommended that the new subsection allow the directors to appoint additional directors if "the articles or by-laws so provide".[64]

[189] In its submission on Bill C-12, the Barreau du Québec expressed the opposite concerns. The Barreau is concerned that the new provision could lead to abuse in certain circumstances and these concerns outweigh any advantages. The Barreau submission notes that there are other ways to obtain the flexibility desired, notably by the appointment of board observers. Barreau advisors noted that it is a fundamental principle of shareholder democracy that shareholders elect directors. They recommended against proceeding with the amendment.

[190] Since its enactment, the federal government has received many complaints in respect of the subs. 106(8) from legal practitioners. They have indicated that the new provision is ambiguous and creates difficulties because the flexibility that had been relied on is now being lost. The costs of articles of amendment is also now imposed.

[191] Some of the concerns expressed about subs. 106(8) reflect differing legal interpretations about the existing rights under the CBCA, as well as competing goals of flexible corporate

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[64] Under s. 103, the by-laws are effective when the directors make them. They must be confirmed, by means of an ordinary resolution (50% approval), by the shareholders at the next meeting. This contrasts with amendments to the articles which require prior shareholder approval. Moreover, shareholder approval for amendments to the articles is by means of a special resolution (two thirds approval).

management and shareholder democracy. Some lawyers had given a broad interpretation to the CBCA provisions on vacancies of directors, finding that directors who have the power (in the by-laws) to set the number of directors within a minimum/maximum range could vote to increase the number of directors and then proceed to fill the vacancy. Other lawyers adopted a narrower interpretation.

[192] Provisions of the Ontario BCA,[65] expressly provide for how the number within the minimum/maximum range is established and how the directors can appoint additional directors within this range. The Canadian Bar Association - National Business Law Subsection, which reviewed this issue in 1990, recommended against adopting these Ontario rules because of their complexity. Instead, it proposed that the CBCA follow the B.C. Company Act provision. Subsection 106(8) is closely modelled on the B.C. provision (subs. 134(3)). No problems have been reported with the B.C. legislation.[66]

[193] The Alberta BCA[67] also adopted this B.C. provision in the early 1980s, although the Alberta BCA refers to a power to appoint one or more "additional" directors. As the balance of the Alberta BCA[68] rules on election and appointment of directors are similar to the CBCA, the two statutes now have virtually the same rules.

Recommendations:

[194] It is proposed that:

(A) subsection 106(8) be moved to the end of s. 111 to become new section 111.1;

(B) subsection 111 (1) be amended to clarify that it does not apply to a "vacancy" resulting from an increase in the number of directors; and

(C) following the Alberta BCA, the word "additional" be added in new section 111.1 [106(8)].

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[65] Subsections 124(2) and 125(3).

[66] It should be noted that the British Columbia Company Act does not provide for a minimum and maximum number range of directors.

[67] Subsection 101(4).

[68] Sections 101 and 106.

Options:

(A) Permit directors to appoint additional directors between meetings where the articles or the by-laws so provide; or

(B) Adopt the Ontario BCA approach.

25. **Clarification of English Version Re: Cumulative Voting** (pars. 107(g) and (h))

Issue:

[195] Whether the English version of paragraphs 107(g) and (h), dealing with cumulative voting, should be clarified.

Background:

[196] Section 107 details the rules relating to cumulative voting. Cumulative voting, where the articles of a corporation provide for it, grants a shareholder a total number of votes equal to the votes associated with the shares held times the number of directors being elected. For example, if the shareholder has 100 shares each carrying one vote and there are five director positions, then the cumulative votes held by that shareholder is 500.

[197] Under cumulative voting, the shareholder is allowed to cast all of his or her votes (e.g., 500 in the above example) for one or more directors. This contrasts with the normal voting process where this shareholder would only be able to cast 100 votes for each director. Cumulative voting thus provides minority shareholders with more influence in the voting process by allowing them to concentrate their votes. This allows them to more easily elect at least some directors to the board.

[198] Paragraph 107(h) provides the rules relating to the decrease in the number of directors where there is cumulative voting. A practitioner has advised that the French and English versions of paragraph 107(h) are different and that:

> [The English version] is vague in that different numbers of votes would be sufficient to elect a number of directors in different circumstances. One solution would be to add 'in all circumstances' at the end of the portion of the subsection just quoted.
>
> The French version applies a numerical test which is much simpler to apply. However, as between the French and the English versions, there could be a one vote difference in

> the number of votes which could defeat the proposal to decrease the number of directors. While the difference between the English and French is likely to be of only theoretical significance, we are mindful of it at [our company] as our English proxy material mirrors the English version of the Act and our French material mirrors the French language version of the Act. I would suggest that the English version be changed to mirror the French version in this case.

[199] Under the English version, the number of directors cannot be decreased if the votes against the motion to decrease the number of directors would be sufficient to elect a director if cumulative voting were used. However, the number of votes required to elect a director, and therefore prohibit a decrease in the number of directors, depends on the number of candidates and the distribution of votes. If there are a lot of candidates or a large number of votes are cast for one director, then fewer votes are needed to elect a director and to prohibit a decrease in the number of directors.

[200] Assume, for example, that a corporation has 600 shares and the articles set the number of directors at 5. Under the cumulative voting scheme each share would carry 5 votes. In total, 3000 votes could be cast. If there are six candidates, and a fairly even distribution of votes among them, then it would take 101 shares (505 votes) to ensure the election of a director. In this situation, it would take 101 shares voting against the par. 107(h) motion to defeat it.

[201] However, if we vary the number of candidates, the numbers change. In an extreme example, assume there are 595 candidates. If 590 candidates each got five votes each (one share), and five got 10 votes each (two shares), then the five with 10 votes are elected. While this example is very improbable, it does show the problem with the English formula. In this scenario, it would take only two shares (ten votes) to defeat a motion to reduce the number of directors.

[202] Another hypothetical situation involving six candidates could envisage a large number of votes (say 2000 (400 shares)) being cast for one director. It would only take 255 votes (51 shares) to ensure the election of a specific candidate. In this case, you only need 51 shares to defeat the motion to reduce the number of directors.

[203] Many hypothetical situations can be envisaged. As the election of directors is hypothetical (there is actually no election at the time of the motion to reduce the number of directors), one does not know the number of candidates or the distribution of votes that should be used.

[204] Presumably, as was suggested by the practitioner, paragraph 107(h) only prohibits reductions where the votes against the motion would be sufficient to elect a director "in all circumstances" (i.e., no matter how many candidates there are). In the above scenario, a shareholder or a group of shareholders with at least 101 shares (or 505 votes, more than one-sixth of the total number of votes) could "in all circumstances" have enough votes to elect a director

and therefore oppose any reduction in number of directors. (The remaining shareholders could only equal or surpass the 505 vote count for four other directors.)

[205] The formula in French version of par. 107(h) is different. A reduction in the number of directors is permitted only if the number of shares voted in favour of the reduction is greater than the number of shares voted against multiplied by the number of directors. In the above scenario, there would have to be shareholders with at least 501 shares voting in favour of the proposal (501 being greater than 495 which is the number of the 99 remaining shares x 5 (the number of directors)).

[206] In summary, the English version is ambiguous and the two versions are different. The French version appears simpler and more straight forward and could be used as the basis to redraft the English version. The different tests are also found in the English and French versions of par. 107(g) of the CBCA, respecting removal of directors from office. If par. 107(h) is changed, a parallel change should be made to par. 107(g).

Recommendation:

[207] Amend pars. 107(g) and (h) to clarify the English version, using the French version as a guide.

26. **Notice of Change of Address of Directors (Form 6)** (subs. 113(1))

Issue:

[208] Whether to amend CBCA s. 113 to clarify that a notice of change of directors must be filed with the CBCA Director when there is a change in the address of a director.

Background:

[209] Subsection 113(1) now reads:

> Within fifteen days after a change is made among its directors, a corporation shall send to the Director a notice in prescribed form setting out the change and the Director shall file the notice.

[210] The words "a change is made among its directors" could be read to limit the obligation of giving notice to the CBCA Director (and the public) to only where there is a change in the directors and not when there is a change of address of such directors.

[211] The purpose of this notice of change of directors provision is to ensure that timely notice of proceedings and legal actions can be given to the directors. For example, under s. 212, notice must be given to directors of an administrative dissolution of the corporation. Inherent in this objective is the need to send documents to the correct address. It is also presumably important for the directors themselves to receive timely notice of proceedings.

[212] Recent proposals to amend the Alberta BCA recommend a similar change to the equivalent Alberta BCA provision.[69]

[213] We do not believe that an amendment to this provision to require notice of a change in a director's address would impose any new obligations on CBCA corporations. Such a change would simply clarify the intent of the current provision.

Recommendation:

[214] Amend CBCA subs. 113(1) to require notice of any change in the address of the directors.

27. **Limits on Delegated Authority** (subs. 115(3))

Issues:

[215] Whether pars. 115(3)(c) and (f) should be deleted so as to provide the ability of directors to delegate these matters to a managing director or committee.

[216] Whether a new paragraph should be added to subs. 115(3) to prohibit delegation by the board of directors of its power to approve short form amalgamations, change the corporate designation from a number to a verbal name and alter the division of unissued classes of shares.

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[69] 1995 Alberta Discussion Paper, page 18.

Background:

[217] A legal practitioner has advised that we:

> Delete Sections 115(3)(c) and 115(3)(f) and expand the ability of the directors to delegate these matters in the same manner as Section 189(2).
>
> COMMENT: In the course of modern day financing, companies have their board of directors set out the broad parameters for particular equity issues and delegate to a committee the authority to issue shares within those parameters, taking into account the market conditions at the time of issue. Lawyers are often called upon to make judgments as to whether or not the board of directors has properly set the "terms" of the issue in accordance with par. 115(3)(c). The formal ability to delegate the power to set the terms in a manner similar to subs. 189(2) would alleviate many interpretation problems and facilitate a company's ability to respond quickly to changing market conditions at the time they are contemplating fixing the terms of the equity issue.

[218] Subsection 115(1) permits directors to delegate to a managing director or a committee of directors any of the powers of the directors. An exception is provided in subs. 115(3) with respect to certain listed powers which may not be delegated. Paragraph 115(3)(c) prohibits delegation of the power to "issue securities except in a manner and on the terms authorized by the directors". Paragraph 115(3)(f) prohibits delegation of the power to "pay a commission referred to in section 41". Section 41 authorizes the directors to pay a reasonable commission to any person in consideration of that person purchasing shares or procuring purchasers for the shares.

[219] Issuing securities has traditionally been regarded as a matter for the board of directors to review and approve. The limits on delegation set out in subs. 115(3) generally reflect what is fundamental to the job of a director and those areas that directors face explicit statutory liability (in subss. 118(1) and (2)). In particular, directors may be liable for issuing securities in contravention of the statute (for less than fair value).

[220] Similarly, with respect to commissions, directors can be liable under subs. 118(2) for paying a commission contrary to s. 41. However, an anomaly has been pointed out in that par. 115(3)(f) does not permit the same limited delegation permitted under par. 115(3)(c), namely "except in the manner and on the terms authorized by the directors". While a corporation may delegate to a committee or a managing director the authority to issue shares within the parameters (manner and terms) set by directors, any commission paid in connection with the issue cannot be delegated.

[221] On a different element of the issue of delegation of board powers, subs. 72(16) of the Ontario Statute Law Amendment Act, 1994 amended Ontario BCA subs. 127(3), the equivalent of CBCA subs 115(3), to add a new paragraph that prohibits delegation of the directors' powers

to: 1) approve a short form amalgamation; 2) divide a class of shares, etc. (Ontario BCA subs. 168(2)); and 3) change a number name to a verbal name (Ontario BCA subs. 168(4)). The reason for this amendment seems to be that these matters were seen to be fundamental changes to the corporate structure that should not be delegated. To date, there has been no evidence of any problems in these areas under the CBCA.

[222] Finally, subs. 115(3)(b) prohibits the delegation of the power to fill a vacancy among the directors. Subsection 106(8), which was added by Bill C-12, provides that the articles of a corporation may allow directors to appoint a limited number of additional directors between meetings. As drafted, subs. 115(3) may be interpreted to not prohibit the delegation of this appointment power, even though this power is analogous to the power to fill vacancies.

Recommendations:

[223] It is proposed that:

(A) pars. 115(3)(c) and (f) not be deleted;

(B) no prohibition on the delegation of board powers to approve short form amalgamations, change a number name to a verbal name or divide a class of shares be added to subs. 115(3);

(C) par. 115(3)(f) be amended by adding words "except in the manner and on the terms authorized by the directors"; and

(D) par. 115(3)(b) be amended to prohibit delegation of the power to appoint additional directors.

28. **Meetings of Shareholders by Electronic Means (Including Tele- or Video-Conferencing and Computer Link)** (s. 132)

Issue:

[224] Whether to amend the CBCA to permit meetings of shareholders to be held by electronic means (including tele- or video-conferencing and computer link).

Background:

[225] Currently, the CBCA envisages meetings in person except where there is a resolution in lieu of meeting signed by all the shareholders (s. 142). A resolution in lieu of meeting is presumably available only where there are a very few shareholders and where no shareholder wants to hold a formal meeting.

[226] Advances are being made in video-conferencing and of course the "information highway" is being developed. We envisage that shareholder democracy could be advanced in many situations by the use of modern technologies. A CBCA corporation with a widely-dispersed shareholder base may indeed see more shareholder participation, if for example, video-conferencing was available in major centres across the country. Similarly, corporate competitiveness could eventually be improved if meetings could be held "on-line" without the expense of a meeting involving shareholders travelling from many destinations.

[227] Currently, directors of CBCA corporations may participate in meetings of directors or committees "by means of telephone or other communications facilities as permit all persons participating in the meeting to hear each other".[70] As directors cannot vote by proxy, it could be argued that an electronic means of communications is needed for directors' meetings but not for meetings of shareholders (who may vote by proxy).

[228] It may be harder to reconcile the new technology with meetings of shareholders (as compared to directors' meetings) and the much more detailed statutory rules respecting the holding of such meetings. Concerns have been raised that:

- There may not be equal access to new technologies by shareholders -- institutional and other larger shareholders versus retail investors.

- The large number of shares held through depositories and intermediaries have already led to a large gap between issuers and many shareholders. The annual meeting may be one bridge in that gap which could be lost if new technologies are used. On the other hand, new technologies may be a better way to help bridge the current gap. The large beneficial holdings may also mean that it would be difficult for corporations holding meetings using new technologies to adequately ensure everyone who wants to be is, in fact, "on-line".

- The mechanics of holding a meeting (votes by a show of hands, polls, secret voting) may not be easily altered to suit the new technologies. Would scrutineers be present at every location?

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[70] CBCA subs. 114(9).

- The location of meetings held by electronic means.[71]

[229] Another issue is what type of shareholder approval. There could be a requirement for unanimous consent or for approval of an amendment to the articles or a by-law amendment.

[230] The Rules of the Law Society of British Columbia[72] were recently amended to require the Law Society to conduct its annual meeting at a number of "remote locations" "by telephone or by any other means of communication that permits all persons participating in and entitled to vote at the meeting to hear each other". The Secretary of the Law Society may appoint a member to act as a local chair of a remote location meeting. If 7 days before the meeting less than 15 members have indicated an intention to attend the meeting at the remote location, the Law Society can cancel the meeting at that remote location.

Recommendation:

[231] We recommend that, where the articles or by-laws of the corporation allow, a corporation be permitted to hold meetings of shareholders by electronic means (including tele- or video-conferencing and computer link) in accordance with the CBCA regulations. The regulations could specify rules on location of meetings and protections for shareholders where, for example, secret voting is used or where there is a shareholder proposal.

29. **Extension of Time to Hold Annual Meeting** (s. 133)

Issue:

[232] Whether the CBCA should be amended so as to allow a corporation to seek from the court authorization to postpone the holding of the annual meeting.

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[71] Currently, the meeting of a CBCA corporation must be held in Canada unless all the shareholders agree otherwise (CBCA s. 132). The location requirement is interrelated to the use of new technologies. Where, for example, is a telephone meeting held? Another common issue is the type of consent required. The discussion paper on residency issues discusses whether the current requirement for unanimous consent should be reduced.

[72] Rules 86 and 92.

Background:

[233] Section 133 of the CBCA provides that a corporation shall call an annual meeting of shareholders of the corporation to be held no later than fifteen months after holding the last preceding annual meeting.

[234] Presently, there is no provision allowing a corporation unable to hold the annual shareholders' meeting within that fifteen month period for reasons beyond its control (i.e., not having received from the auditor the corporation's financial statements) to postpone the holding of the annual meeting.

[235] On the other hand, subs. 127(2) of the Alberta BCA allows a corporation to apply to the court for an order extending the time in which the first or the next annual meeting of the shareholders of the corporation may be held.[73] Such a provision would seem to contribute to making the legislation flexible.

Recommendation:

[236] Adopt a provision similar to subs. 127(2) of the Alberta BCA.

30. **Clarification, Timing of Shareholders' Meeting and Filing of Financial Statements** (ss. 133, 155 and par. 160(1)(b))

Issue:

[237] Whether to clarify the CBCA by providing that an annual meeting must be held within six months of the financial year end and that financial statements must be sent to the CBCA Director not later than fifteen months after holding the last preceding annual meeting.

Background:

[238] Shareholders have complained that there is too long a delay between annual meetings. Concern has also been expressed about how up-to-date the financial information is that they receive. The relevant CBCA provisions in these areas are not very clear.

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[73] Subsection 127(2) of the Alberta BCA reads: "Notwithstanding subsection (1), the corporation may apply to the Court for an order extending the time in which the first or the next annual meeting of the corporation shall be held." Alberta BCA subs. 127(1), like CBCA s. 133, sets out timing restrictions for the holding of meetings.

[239] Section 133 provides that an annual meeting must be held[74] within 15 months of the last annual meeting. Item 155(1)(a)(i) provides that a corporation shall place before the shareholders at every annual meeting financial statements which are not older than six months. This requirement has been interpreted to mean that the annual shareholders meeting has to be held within six months of the end of the financial year. However, some corporations have interpreted the provision to permit the corporation to hold the meeting after six months from the end of the financial year, but to require the corporation to present interim financial statements (current to a period ending within six months) at the meeting.

[240] The lack of clarity in ss. 133 and 155 was raised in 1992 consultations with provincial regulators, most of whose corporate legislation is similar to the CBCA in this regard. Two provinces questioned the need for an amendment and objected to it. In their experience, no problem had arisen with similarly-worded provisions.

[241] Nevertheless, there remains considerable concern that the provisions are ambiguous and unclear. Some feel that with the current wording regular meetings of shareholders could be delayed so as to prevent timely reporting of current financial information. In fact, if meetings are held at the end of each 15 month period, a corporation can skip one annual meeting every four to five years.

[242] A clarification to hold an annual meeting within six months of the financial year end is unlikely to cause problems to many corporations. Most corporations now hold their annual meetings within six months of the financial year end in any event.

[243] From an enforcement perspective, there is also ambiguity in par. 160(1)(b). This provision requires filing documents "in any event not later than fifteen months after the last date when the last preceding annual meeting should have been held". As noted under s. 133, an annual meeting must be held within 15 months of the last meeting. Some corporations have argued that the reading of these provisions together seems to permit the filing of annual financial statements up to 30 months after the last annual meeting.

[244] Most problems from an enforcement perspective had arisen with respect to the filing of financial statements by privately-held corporations under par. 160(1)(b). However, Bill C-12 has eliminated filings for privately-held corporations.

[245] Publicly-traded corporations have stricter filing requirements under securities legislations (e.g., under Ontario Securities Act R.S.O. 1990, c. S.5, s. 78 publicly-traded corporations must

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[74] The statute obligates the directors to "call an annual meeting of shareholders not later than eighteen months after the corporation comes into existence and subsequently not later than fifteen months ...". It has been suggested that this wording does not clearly obligate the corporation to "hold" the meeting, only "call" it, within the time frames set out.

file their annual financial statements within 140 days of their financial year end). Stock exchange by-laws require the holding of an annual meeting within six months of the financial year end. Although there are therefore few problems with public company filings, this issue has arisen in a few recent cases involving CBCA corporations.

Recommendations:

[246] Amend s. 133 to clarify that an annual shareholders meeting has to be held within six months of the end of the financial year by adding in paragraph (a) the words, "which must be held", after the word "shareholders" and also the phrase "and in any event not later than six months after the end of the last completed financial year" at the end of the paragraph.

[247] Amend par. 160(1)(b) by replacing the phrase "after the last date when the last preceding annual meeting should have been held" with the wording found in s. 133, that is "after holding the last preceding annual meeting."[75]

31. **Right of Beneficial Share Owner to Submit a Shareholder Proposal** (s. 137)

Issue:

[248] Whether the CBCA should be amended to expressly permit a beneficial owner of shares of a corporation to submit a shareholder proposal, even though the person is not the registered shareholder.

Background:

[249] CBCA section 137 provides that "a shareholder entitled to vote at an annual meeting of shareholders" may submit to the corporation notice of any matter that the shareholder proposes to raise at the meeting (a shareholder proposal). The Ontario courts have held that s. 137 only entitles registered shareholders to submit shareholder proposals.[76]

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[75] This change would eliminate any possible interpretation that together sections 133 and 160 permit the filing of annual financial statements with the CBCA Director up to 30 months after the last annual meeting.

[76] See Re Greenpeace Foundation of Canada & Inco Ltd. (1984) 24 A.C.W.S. (2d) 176 (Ont. H.C.), affd (1984) 25 A.C.W.S. (2d) 149 (Ont. C.A.). Under CBCA subs. 51(1), the corporation is entitled to treat the registered owner of a security as the person "exclusively entitled to vote ... and otherwise to exercise all rights and powers of an owner of the security". This subsection is expressly made subject to CBCA ss. 134, 135

[250] Until relatively recently, shareholders were generally individuals who had in their possession actual share certificates and were registered shareholders. Over the past few decades, however, shareholder ownership practices have evolved such that few shareholders of publicly traded corporations now actually hold registered shares. Rather, most share holdings are held by nominees, typically brokers, financial institutions, and other intermediaries, for beneficial owners.

[251] The depository system has been well received by the North American securities industry as a practical solution to the difficulties of share transfers. However, it has had the effect of adding a second layer between the corporation and the beneficial owners of securities. This has increased the potential for alienation of the true owner from the governance of the corporation.

[252] Corporate laws, including the CBCA, have tended to focus on registered owners. Canadian Securities Administrators National Policy 41 addresses the issue of communication with and proxy solicitation of beneficial shareholders. One of the CBCA Phase II Reform discussion papers, on Shareholder Communications, examines options for addressing concerns of both corporations and beneficial shareholders and for improving shareholder communications under the CBCA. An amendment to permit beneficial shareholders to submit shareholder proposals under s. 137 would both reflect the current market reality of share holdings and fit into a broader effort to improve communication among the corporation and the owners of its shares.

[253] Arguments could be made that such an amendment might lead to a flood of proposals and that a shareholder who wants to participate in the corporation should be expected to take the step of registering as a shareholder. Beneficial shareholders are certainly entitled to become registered shareholders (with certain costs). It can be argued that compelling registration as a requirement to submit a shareholder proposal only adds a "technicality" to the exercise of an important shareholder right and reduces market (cost) benefits associated with the depository system.

Recommendation:

[254] Amend CBCA s. 137 to expressly permit a beneficial owner of shares of the corporation to submit shareholder proposals.

32. **Evidence of Adoption of Resolution** (s. 141)

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and 138 which deal with the record date for the meeting, notice of meeting and shareholder lists. Under s. 138, a transferee of shares owned by a registered shareholder is entitled to vote at the meeting if the transferee establishes ownership to the shares ten days before the meeting.

Issue:

[255] Whether a new provision should be added to specify that an entry into the minutes of the meeting that a motion is carried or defeated is evidence of that fact.

Background:

[256] Section 141 provides that, unless the by-laws otherwise provide, voting at shareholder meetings shall be by show of hands except where a ballot is demanded.

[257] One of the 1992 amendments to the Saskatchewan BCA changed the equivalent Saskatchewan provision by adding a new subsection:

> Unless a ballot is demanded, an entry in the minutes of a meeting of shareholders to the effect that the chairperson of the meeting declared a motion to be carried or defeated is admissible in evidence as prima facie proof of the fact without proof of the number or proportion of the votes recorded in favour or against the motion.[77]

[258] The summary of the proposed amendments prepared by the Saskatchewan Corporations Branch provided the following explanation:

> This amendment provides that a vote is carried by a show of hands and an entry in the minutes to that effect is proof that it was carried, unless a ballot was demanded.

Recommendation:

[259] Amend CBCA s. 141 by adopting a new subsection (3) similar to the Saskatchewan BCA provision.

33. **Requisition of Meeting** (subs. 143(3))

Issue:

[260] Whether to restrict the rights of shareholders to requisition a meeting to matters within the powers of the shareholders.

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[77] Saskatchewan BCA, subs. 135(3), added by An Act to amend The Business Corporations Act, S.S. 1992, c. 44, s. 23.

Background:

[261] Subsection 143(1) permits the holders of not less than five percent of the issued voting shares to requisition the directors to call a meeting of shareholders for the purposes stated in the requisition, unless a meeting has already been called or unless the business of the meeting includes matters described in paragraphs 137(5)(b) to (e). Section 137 deals with shareholder proposals and paras. 137(5)(b) to (e) set out exemptions from the obligation imposed on the corporation to send the proposal to shareholders with the proxy materials. The directors can refuse to distribute the proposal if it relates to a personal claim against the corporation, it is to secure publicity, it has recently been defeated or the shareholder recently failed to present the proposal. The directors may refuse to requisition a meeting on these same grounds.

[262] In its submission on Bill C-12, the Barreau du Québec recommended that subs. 143(3) should be amended by adding, by way of restriction, "les questions à l'ordre du jour énoncées dans la requête ne relèvent pas des pouvoirs des actionnaires" (the agenda items stated in the requisition are not subject to the powers of the shareholders).

[263] When rules on shareholder proposals were adopted into federal business corporate law in 1970, they included an additional limitation to those now found in subs. 137(5), namely that "the proposal as submitted is not a proper subject for action by shareholders".[78] In other words, directors could refuse to circulate a shareholder proposal when it was not a proper subject for action by shareholders.[79] However, the CBCA as adopted in 1975 dropped the limitation concerning proper subject for action by shareholders "because experience, especially in the U.S., has shown that it is not a useful standard for rejecting 'nuisance' proposals".[80]

[264] In corporate governance theory, the shareholders elect the directors to run the corporation on behalf of the shareholders. Under s. 146, shareholders can adopt unanimous

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[78] An act to amend the Canada Corporations Act, R.S.C. 1970, 1st Supp., c. 10, s. 9, adding s. 108.8 (see par. 108.8(6)(b)).

[79] There was, however, no limit on the right to requisition a meeting of shareholders: Canada Corporations Act, R.S.C. 1970, c. C-32, s. 103.

[80] Quoted from the 1975 Senate Briefing Book. The Dickerson Report recommended adopting and expanding the 1970 shareholder proposal limitations to permit the corporation to refuse to circulate proposals if "the proposal is not the proper subject for action by shareholders or is a recommendation or request that the directors act in respect of a matter relating to the conduct of the ordinary business operations of the corporation" Vol. 2, page 85, par. 11.05(5)(b). The Dickerson Report commentary reasoned: "Subsection (5)(b) is designed to make it clear that the machinery of this section cannot be used to authorize the taking of decisions by the general meeting which the shareholders are not otherwise competent to make ... . Whether a proposal is a subject matter for action by shareholders must be determined by the Act, the articles, by-laws and any shareholder agreement." Vol. 1, page 95, par. 277.

shareholder agreements (U.S.A.) restricting the powers of directors. At first glance, any decision of the directors should also be a matter for the shareholders.

[265] However, certain decisions are within the directors' powers and not subject to shareholder control, in absence of a U.S.A. For example, the right to declare a dividend is within the power of the directors and "it would appear to be improper for the shareholders to attempt to declare a dividend as constituting an attempt to usurp the directors' powers of financial direction ...".[81] Moreover, corporate law clearly indicates that the directors owe their duties to the corporation[82] not the individual shareholders. Directors are liable for certain actions (e.g., payment of dividends when the corporation is insolvent)[83] and to subject their decision to shareholder control seems inappropriate. It does not appear reasonable for shareholders to be able to requisition a meeting, with all its attendant expenses, for a matter that lies outside their powers. It also may not make sense for a shareholder to be able to submit a proposal on such a matter.

[266] On the other hand, while shareholders may not be entitled to take decisions with respect to certain matters, it can be argued that they should be entitled to have such matters discussed at the annual meeting of shareholders, if only from the perspective of permitting full discussion. We are also concerned about the impact of any change on the right of shareholders to submit a proposal or requisition a meeting when they feel the general well-being of the corporation is at issue.

Recommendation:

[267] Amend the CBCA to include an additional limit on the right to requisition a meeting where the business stated in the requisition relates to a matter outside the powers of the shareholders.[84]

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[81] H. Sutherland, Fraser & Stewart Company Law of Canada, 6th ed. (Toronto: Carswell, 1993), p. 217. See also B. Welling, Corporate Law in Canada, 2nd ed. (Toronto: Butterworths, 1991), p. 644.

[82] CBCA subs. 122(1).

[83] See CBCA sections 118 and following.

[84] The powers of the shareholders include any power that has been transferred to them by a U.S.A. Therefore, the right to requisition a meeting would still encompass any power (matter) transferred to the shareholders by a U.S.A.

The most uniform amendment would be to insert the additional limit as par. 137(5)(f) (applying also to proposals) and refer to this additional paragraph in subs. 143(3). However, there are less strong arguments for restricting shareholder proposals on this basis. It can be argued that the power to require a special meeting, with all its costs, is inappropriate in respect of a matter outside the powers of the

34. **Clarification of the French Version** (subs. 144(1))

Issue:

[268] Whether the French version of this subsection should be clarified.

Background:

[269] The purpose of CBCA subs. 144(1) is to give the court the discretion to call a meeting of shareholders in cases where it is not practicable to call a meeting in accordance with the rules of the corporation.

[270] The Barreau du Québec recommended in its submission to the Committee on Industry respecting Bill C-12 that:

> [TRANSLATION] The word "impracticable" has been incorrectly translated as "impossibilité" (i.e. "impossibility"), the meaning of which is quite different and no doubt exceeds Parliament's intention.
>
> It should be replaced by a more accurate expression such as "s'il n'est pas pratiquement réalisable", "en cas de difficulté pratique" or words to that effect.

[271] It has also been recommended that the same terminology be adopted for the French versions of subss. 187(11) and 192(3) which translate the English term "not practicable" in two further different ways.

Recommendation:

[272] Amend subs. 144(1) by replacing, in the French version, the word "impossibilité" with a more accurate expression such as "s'il n'est pas pratiquement réalisable", "en cas de difficulté pratique" or words to that effect. Adopt the same terminology in subss. 187(11) and 192(3).

35. **Signature on Financial Statements** (subs. 158(1))

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shareholders. Yet, shareholders should be entitled to raise and discuss at the annual meeting matters outside their powers but nevertheless relating to the affairs of the corporation (for example, dividends).

Issue:

[273] Whether to eliminate the requirement to have financial statements evidenced by a signature.

Background:

[274] A legal practitioner has recommended:

> Section 158(1) requires approval of financial statements to be evidenced by signature of the statements which, in practice, is rarely done. Optional approval by resolution of the board should be permitted. I would suggest the addition of the words "... or by adoption of a resolution approving same." to Section 158(1).

[275] The question is what evidence of the approval should be required. Signatures not only provide evidence of proper approval but serve a cautionary function. The letter indicates, however, that the signature requirement is not usually carried out in practice.

[276] One problem is that modern technologies (such as electronic filing) may not be compatible with written signatures. Bill C-12 permits regulations respecting the sending of documents, including "their signature in electronic or other form or their execution, adoption or authorization in a manner that pursuant to the regulations is to have the same effect for the purposes of this Act as their signature". Therefore, a regulatory amendment (even for filing of paper copies) could also be used to provide alternative forms of authorization of financial statements.

[277] The equivalent provision of the Ontario BCA (subs. 159(1)) requires the signatures of not one but two directors as evidence of their approval.

[278] The American Bar Association Model Business Corporations Act provides, at par. 16.20(b), that the annual financial statements are to be reported upon by a public accountant and accompanied by the latter's report.[85] If not, such financial statements are to be accompanied by a statement from the president or the person responsible for the corporation's accounting records. A formal endorsement by signature is therefore not required.

[279] We are not convinced that the signature requirement should be eliminated. While audited financial statements will be accompanied by the report of an auditor, most CBCA

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[85] Committee on Corporate Laws of the Section of Business Law of the American Bar Association, Model Business Corporations Act, Official Text, Revised through 1994 (Prentice Hall Law & Business, 1994), referred to hereafter as the "Model BCA".

corporations do not have an auditor. Directors' liability appears to be expanding at common law, including potential liability to third parties for incorrect information in financial statements. Given this potential liability, a director's signature requirement may serve to both caution and protect the directors. Moreover, one signature annually does not appear overly burdensome.

Recommendation:

[280] No amendment to subs. 158(1) is proposed.

Options:

(A) Repeal the subs. 158(1) requirement for a director's signature on financial statements; or

(B) Permit printed or mechanically reproduced signatures.

36. **Filing of Interim Financial Statements** (subs. 160(4))

Issue:

[281] Whether to eliminate the requirement to file interim financial statements with the CBCA Director.

Background:

[282] Subsection 160(4) provides that:

> (4) If a corporation referred to in subsection (1)
>
> (a) sends to its shareholders, or
>
> (b) is required to file with or send to a public authority or a stock exchange
>
> interim financial statements or related documents, the corporation shall forthwith send copies thereof to the Director.

[283] Some provincial securities laws require distributing corporations to file their interim financial statements.[86]

[284] The interim statements are of some value to the CBCA Director in terms of investigations of corporations. These statements, however, could likely be available from co-regulators in the event that interim financial information were relevant to an investigation. Additionally, there does not seem to be wide-spread use of interim financial statements by the public, at least as obtained from the office of the CBCA Director.

[285] This requirement appears to create a paperburden for CBCA distributing corporations having to file identical documentation with multiple regulators.

Recommendation:

[286] Maintain statutory requirement, while relieving paper and regulatory burdens through blanket filing exemption orders issued under CBCA s. 258.2 where appropriate.

Option:

[287] Repeal subs. 160(4).

37. **Notice of Change of Auditors** (subss. 168(5) to (9))

Issue:

[288] Whether the CBCA provisions on notice of change of auditors should be amended.

Background:

[289] The Canadian Institute of Chartered Accountants has requested a review of the CBCA provisions dealing with notice of change of auditors. The CICA believes that the onus should be on management to provide an explanation for the change of auditors as well as an opportunity for both the successor and the former auditor to comment.

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[86] For example, s. 77 of the Ontario Securities Act, R.S.O. 1990, c. S.5.

[290] The CICA argues that any changes should reflect the ideas brought out in National Policy No. 31, issued by the Canadian Securities Administrators in 1991. This policy statement imposes detailed obligations on reporting issuers to explain the resignation or termination of auditors. There are also obligations imposed on the former and successor auditors to comment on the reasons given by the issuer. These detailed rules are presumably appropriate in the context of distributing corporations. However, as the CBCA rules also apply to privately-held corporations, it must be determined what rules are appropriate in the context of both privately-held and distributing CBCA corporations.

[291] Currently, incumbent auditors have the right under the CBCA to prepare and have the corporation circulate a statement informing the shareholders that they are being removed as auditors (subs. 168(5)). The new auditors cannot take office until they have requested and received from the incumbent auditor "a written statement of the circumstances and the reasons why, in the auditor's opinion, he is to be replaced" (subs. 168(7)). There is, however, no right given to the new auditor to communicate with shareholders and there is no obligation on management to explain the reason for a change in auditors.[87]

[292] Requiring management to provide the shareholders with an explanation as to the reasons for the replacement of the auditor and giving both the successor and the former auditor the opportunity to comment would seem to be an effective way to help protect shareholders. Differences with management over the audit could lead to the dismissal of the auditor. These differences should be made known to the shareholders.

[293] Another issue that should be considered is the question of timing of notices. Subsection 168(6) now reads:

> The corporation shall forthwith send a copy of the statement [of the resigning or fired auditor] to every shareholder entitled to receive notice of any meeting referred to in subsection (1) and to the Director unless the statement is included in or attached to a management proxy circular required by section 150. [Emphasis added]

[294] The current provisions entitles the former auditor to submit a statement. There is no requirement to do so. However, the imposition of a requirement on management to explain a change in auditors would mean that every change in auditors will result in at least one piece of paper being created. When should this document be made available? Is it an unreasonable paper burden to require that this document be sent to shareholders "forthwith"? Should the management explanation be only sent forthwith when there is also a statement from a former or

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[87] Pursuant to CBCA regulation 35(p), a management proxy circular shall contain information on the name of any new auditor proposed to be appointed, the name of each auditor appointed within the preceding 5 years and the date on which each auditor was first appointed.

new auditor, otherwise the document can be sent with proxy materials (s. 150) or presented at the annual meeting with the financial statements (s. 155)?

[295] National Policy No. 31 requires immediate disclosure to the appropriate securities administrators, and in some cases, to the public through a press release. Disclosure to shareholders is through the information circular accompanying the notice of any meeting of shareholders at which action is to be taken concerning a change of auditor.

Recommendations:

[296] Amend subs. 168(5) of the CBCA to provide the new auditor with the right to comment on the reason for changing auditors.

[297] Amend the CBCA to require management to prepare a statement as prescribed by regulation on the reason for changing auditors and to circulate that statement. The timing for circulating the management and auditor statements should be changed from "forthwith" to "with the notice of the (next) meeting of shareholders" (CBCA s. 135).

38. **Auditor's Right to Information** (s. 170)

Issue:

[298] Whether section 170 should be amended to strengthen the auditor's right to information.

Background:

[299] Representatives of the Canadian Institute of Chartered Accountants have put forward three changes to improve the power of the auditor to obtain information. The recommendations are that:

A. There should be a provision saving individuals (third parties) from civil liability where they provided information to the auditor in good faith. Section 324 of the Bank Act is modelled on s. 170 of the CBCA. Both provisions provide that the auditors have the right to obtain information about the financial state of the corporation. The Bank Act provision, however, goes on to provide in subsection (3): "A person who in good faith makes an oral or written communication under subsection (1) or (2) shall not be liable in any civil action arising from having made the communication."

B. The CBCA should be amended to make it clear that the solicitor-client privilege will not be broken where information in the possession of the client's lawyers is given to the auditor for the purposes of allowing the auditor to carry on his/her duties. Corporate lawyers have sometimes expressed reluctance to provide auditors with information that the lawyers have obtained because they are concerned that releasing the information will result in a loss of privilege. Maintaining the information confidential may be a requirement for claiming privilege.

C. Section 393 of the U.K. Companies Act, 1985 should be adopted. This section makes it an offence for an officer to convey misleading, false or deceptive statements to the auditor. It is clearer than the relevant CBCA sections.

[300] With respect to issue B on privilege, the common law traditionally attached privilege only in respect of communications with lawyers. In the last twenty years, the courts have recognized an alternative case-by-case approach to privileged communications. Privilege may, in special cases, also attach to non-traditional classes of confidential communications. Legislation, notably in Quebec, has also dealt with confidential communications.[88]

[301] This issue is dealt with in great detail in a recent article on auditor privilege. The article stated:

> Because financial statements are the representation of management, and because an auditor has a duty to report to shareholders whether, in his or her opinion, those financial statements are in accordance with generally accepted accounting principles, there must be open and frank communications between the auditor and management throughout the audit. The earlier discussion highlighted the potential serious consequences which may ensue when an auditor attempting to obtain sufficient audit evidence is placed in conflict with a solicitor and client intent on preserving solicitor-client privilege. In such circumstances, clients may become increasingly reluctant to provide complete access to legal correspondence files, knowing that the information contained in those files may lose its privileged status, and solicitors may well incline to something less than complete candour in fashioning the response to an audit enquiry letter. In either case, an auditor's only recourse would be to qualify or deny his or her opinion. It is a conundrum and one which may be solved only by legislative intervention.[89]

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[88] Article 9, Québec Charter of Human Rights and Freedoms, R.S.Q., c. C-12.

[89] Ivankovich, "A Question of Privilege: Confidential Communications and the Public Accountant" (1994) 23 C.B.L.J. 201, at 232. See also discussion at pages 220-2 and 233.

[302] The article noted that the New Brunswick Evidence Act[90] was amended in 1987 to deal with this issue and recommended that other jurisdictions adopt this change: "Such resolution would also be in the joint interests of lawyers, auditors and clients."[91]

[303] Section 43.2 of the New Brunswick Evidence Act provides that:

> (1) Any privilege that exists in relation to any communication between a solicitor and client is not lost or waived because all or part of the communication is
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> (a) furnished or disclosed to the client's auditor for the purpose of assisting the auditor in the performance of an audit, or
>
> (b) referred to in the client's financial statements and the notes with respect to those statements.
>
> (2) The fact that any communication between a solicitor and client is prepared or made with the intention that it will be furnished or disclosed to the client's auditor for the purpose of assisting the auditor in the performance of an audit does not prevent the creation of, or give rise to the waiver of, a privilege in relation to that communication.

Recommendations:

[304] With respect to the above recommendations, we propose to:

A. Amend the CBCA to exonerate from civil liability a person who in good faith makes an oral or written communication to the auditor (following s. 324 of the Bank Act).

B. Provide in s. 170 that solicitor-client privilege will not be breached as a result of privileged information being provided to the auditor.[92] Such information should be

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[90] R.S.N.B. 1973, c. E-11, s. 43.2, as amended by S.N.B. 1987, c. 19, s.1.

[91] Ivankovich, page 233. The article recommends that other common law provinces should adopt a similar legislative solution (Québec, as noted above, affords protection to all confidential communication of auditors and other professionals). Presumably, the best solution is an amendment to Evidence Acts at both the provincial and federal levels. However, in absence of legislation in every jurisdiction, another option to protect the confidentiality of solicitor-client communications disclosed to auditors of CBCA corporations could be an amendment to the CBCA.

[92] There are a number of further issues for consideration. For example, what use of the information can the auditor make without the corporation losing its privilege? Who claims the privilege when access is sought to information in the hands of the

seen as remaining within the corporation, such as providing information to the chief financial officer. Section 43.2 of the New Brunswick Evidence Act could be adopted as a model.

C. We do not recommend the adoption of a further offence provision. It is felt that the existing CBCA provisions are adequate.[93]

39. **Clarification of Terminology** (subs. 171(1))

Issue:

[305] Whether the reference in subs. 171(1) to "a corporation described in subsection 102(2)" should be clarified.

Background:

[306] Subsection 171(1) requires a distributing (publicly-traded) corporation to have an audit committee composed of at least three directors, the majority of which are not officers or employees of the corporation. Instead of expressly referring to a distributing corporation, the subsection imposes an audit committee requirement on "a corporation described in subsection 102(2)". This reference is confusing.

[307] Subsection 102(2) in fact refers to both public and private corporations:

> A corporation shall have one or more directors but a corporation, any of the issued securities of which are or were part of a distribution to the public and remain outstanding and are held by more than one person, shall have not fewer than three directors ...

[308] More clarity would be achieved if subs. 171(1) referred to a defined term or repeated the reference "a corporation, any of the issued securities of which are or were part of a distribution to the public and remain outstanding and are held by more than one person".

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auditor? Should the solicitor have to obtain authorization from the management prior to releasing the information?

[93] Section 250 of the CBCA makes it an offence to make an untrue statement if it relates to "a report, return, notice or other document required by this Act or the regulations to be sent to the Director or to any other person". CBCA subss. 171(6) to (9) also create an offence where an officer or director knowingly fails to notify the audit committee and the auditor of any error or misstatement of which he or she becomes aware in the financial statements.

Recommendation:

[309] Amend subs. 171(1) by replacing the phrase "a corporation described in subsection 102(2)" with a defined term for a distributing or publicly-traded corporation.[94]

40. **Notice of Change of Registered Address** (par. 173(1)(b))

Issue:

[310] Whether to repeal par. 173(1)(b).

Background:

[311] A legal practitioner has advised that:

> You may wish to give some consideration to deleting or amending this provision [par. 173(1)(b)]. Interpreted literally, this could mean that any change to the registered office would require a shareholders vote and an amendment to the articles ... I am not sure what is achieved by requiring a corporation to hold a shareholders meeting and file articles of amendment if it wishes to change the street or city where its registered office is located. In my view, the "Notice of Registered Office or Notice of Change of Registered Address" form (Form 3) accomplishes what is required in a more cost effective manner. A change of registered office should be dealt with at a directors' meeting without the need of a shareholders' resolution and an amendment to the articles. This amendment would also require corresponding amendments to subsection 6(1) and to the Form 1 contained in the regulations. An alternative approach would be to clarify the paragraph to at least make it clear that it is only a change of the province in which the registered office is located that will require articles of amendment.

[312] Under par. 6(1)(b) of the CBCA, the "place" (a city, town etc.) where the registered office is to be situated must be set out in the articles. The directors can change the office (that is, the address/the building) within the city (place) set out in the articles of the corporation (subs. 19(3)), but an amendment to the articles is required if the "place" is changed. A special resolution must be passed by shareholders to authorize the amendment to the articles (par. 173(1)(b)).

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[94] Proposal 3, above, recommends adopting updated securities terminology and providing definitions in s. 2 applicable to the entire CBCA.

[313] The Ontario BCA par. 168(1)(b) required an amendment to the articles to "change the municipality or geographic township in which its registered office is located." Amendments to the Ontario BCA repealed this paragraph.[95] The amendments provide under s. 14 that a corporation may change its registered address within a municipality or geographic township by directors' resolution. Where the registered office moves from a particular municipality or geographic township, a special resolution is required.[96] An amendment to the articles of the corporation will remain a valid, although unnecessary, way to change the registered office.

[314] The Québec Companies Act requires the articles to specify the "judicial district" in which the head office is located.[97] This is a larger area than a municipality. The Alberta BCA does not require the articles to specify the location of the registered office and permits directors to change the registered office's location.[98]

Recommendation:

[315] Repeal pars. 173(1)(b) and 6(1)(b) and adopt a provision similar to the new Ontario BCA s. 14 permitting the directors to change the location of the registered office and the shareholders, by special resolution, to change the municipality or township in which the registered office is located.

41. **Clarification of the French Version** (pars. 173(1)(c) and 190(1)(b))

Issue:

[316] Whether the French version of these paragraphs should be clarified.

Background:

[317] Paragraph 173(1)(c) provides that the articles of a corporation may by special resolution be amended to add, change or remove any restriction on the business or businesses that the

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[95] Subsection 72(20) of the Ontario Statute Law Amendment Act, 1994 repeals para. 168(1)(b).

[96] Subsections 72(4) and (5) of the Ontario Statute Law Amendment Act, 1994 amending Ontario BCA subss. 14(1), (3) and (4).

[97] Section 123.34.

[98] Subsection 119(4).

corporation may carry on. The same wording is found in par. 190(1)(b). The words "apporter" and "étendre" have been incorrectly used in both paragraphs of the French version. Their meanings are different than the English version "add".

[318] Also, in paragraph 190(1)(b), the words "certaines restrictions" have been incorrectly used; their meanings are narrower that the English version "any restriction". In par. 173(1)(c), the words "toute restriction" have been used and are more accurate.

Recommendations:

[319] Amend pars. 173(1)(c) and 190(1)(b) by replacing, in the French version, the word "apporter" and "étendre" by "ajouter".

[320] Also, amend par. 190(1)(b) by replacing, in the French version, the words "certaines restrictions" by the more accurate words "toute restriction".

42. **Changing Number of Shares** (par. 173(1)(h))

Issue:

[321] Whether this paragraph should be amended to exclude share splits and consolidations, which could be provided for separately.

Background:

[322] Paragraph 173(1)(h) provides that the articles of the corporation may by special resolution be amended to "change the shares of any class or series, whether issued or unissued, into a different number of shares of the same class or series or into the same or a different number of shares of other classes or series" [Emphasis added].

[323] One of the 1992 amendments to Saskatchewan BCA removed the underlined words in the identical Saskatchewan provision. The new provision stipulates that the articles of the corporation may by special resolution be amended to "change the shares of any class or series, whether issued or unissued, into the same or a different number of shares of other classes or series".

[324] In addition, the 1992 amendments added a new section 25.1 to the Saskatchewan BCA which provides:

> (1) A corporation may, by special resolution, change the shares of any class or series, whether issued or unissued, into a different number of shares of the same class or series.

[325] Subsection 25.1(2) provides that the rules respecting class voting apply to any special resolution under subsection (1).[99]

[326] The summary of the proposed amendments prepared by the Saskatchewan Corporations Branch provided the following explanation:

> Stock splits or consolidations do not result in an amendment to the articles but, instead, simply increase or decrease the number of shares issued. [The amendment] confirms this situation and resolves a long-standing ambiguity. The authority to pass a stock split or consolidation is moved to new section 25.1.

[327] Recent proposals to amend the Alberta BCA recommend a different approach, namely amending that statute to expressly "allow the directors to do a share split for no apparent consideration".[100] The proposals comment:

> There are two schools of thought respecting share splits. One is that the directors may, by special [sic] resolution, do a share split. The problem is, there is no actual consideration given for the split shares, only the implied consideration of transferring the original share back to the corporation for cancellation. The other school of thought is to do an amendment to the Articles of Incorporation pursuant to Section 167(1)(f) [CBCA par. 173(1)(h)]. This process is more time consuming and does not permit the corporation to "paper" a transaction that took place earlier.

[328] We question whether there is a problem with consideration but we agree that the appropriate approval is an issue. As share consolidations may potentially be used as a going-private transaction, shareholder approval by special resolution appears a reasonable requirement.[101] However, stock splits which do not result in going-private transactions do not seem to raise the same concerns. Shareholder approval seems less necessary. On the other hand, it has been commented that a stock split is a fundamental adjustment in the outstanding share

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[99] The Saskatchewan BCA, s. 25.1(2) reads:

> Section 170 applies, with any necessary modification, to a special resolution mentioned in subsection (1) as if the special resolution were a proposal to amend the articles.

[100] 1995 Alberta Discussion Paper, page 7.

[101] This issue is also studied in the discussion paper on Going-private Transactions.

capital of a corporation and may therefore be construed as a matter properly allocated to the shareholders.

Recommendations:

[329] Amend CBCA par. 173(1)(h) to remove the phrase "into a different number of shares of the same class or series or". Add a new subs. 25.1(1) providing that a special resolution of shareholders is required for a share consolidation or share split along, the lines of the Saskatchewan BCA subs. 25.1(1). Add a new subs. 25.2(2) applying class voting under CBCA s. 176 to any special resolution passed under subs. 25.1(1).

43. **Continued References to Par Value Shares Where it is "Not Practicable" to Change the Reference** (subs. 187(11))

Issue:

[330] Whether to change the words "not practicable" in subs. 187(11) to match the terminology used in the French version.

Background:

[331] Section 187 deals with the import continuances into the CBCA of body corporates from other jurisdictions. While the corporate laws of some other jurisdictions permit corporations to have nominal and par value shares, these types of shares are prohibited under the CBCA (subs. 24(1)). Subsection 187(11) provides that the CBCA Director may permit a body corporate, which has nominal or par value shares and which is continued as a CBCA corporation, to continue to have such shares where it is "not practicable" to change the reference in the corporation's articles.

[332] It is not clear that the words "not practicable" are appropriate in this context. We have not found any interpretation of these words as used in subs. 187(11) although the words "not practicable" have been judicially considered in the context of s. 192 arrangement provisions.[102]

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[102] According to Justice Moore in Imperial Trust Co. v. Canbra Foods Ltd. [1987] A.J. No. 156 (unreported), the word "impracticable" simply means difficult to put into practice. Recently, Justice Farley, in Deprenyl Research Ltd (Re) [1994] O.J. No. 1430 (unreported), applied the Shorter Oxford English Dictionary definition of "practicable" -- "capable of being carried out in action; feasible" in interpreting subs. 192(3) of the CBCA.

[333] The words "n'y a pas lieu de" are used in the French version of subs. 187(11). According to the Petit Robert, this means "il n'est pas opportun; il ne convient pas". This is weaker than the words "not practicable".

[334] We do not have any evidence that there are any problems under the currently worded subs. 187(11). Moreover, we remain concerned about amending the definition in subs. 187(11) when the same or similar words are used in other sections. The words "not practicable", "impracticable", "as far as is practicable" and "as closely as practicable" are used in the English versions of several CBCA provisions.[103]

Recommendation:

[335] Do not amend subs. 187(11).

44. **Correction** (subs. 189(1))

Issue:

[336] Whether to delete from subs. 189(1) the words "the articles of a corporation are deemed to state that".

Background:

[337] The Barreau du Québec recommended in its submission to the Committee on Industry respecting Bill C-12 that:

> [TRANSLATION] The words "les statuts sont réputés prévoir que" ["the articles of a corporation are deemed to state that"] were included for the sole purpose of trying to exclude the corporation from the application of s. 27 of the Special Corporate Powers Act (R.S.Q., c. P-16) which required companies incorporated outside Québec wishing to constitute certain securities in Quebec to record their borrowing and guarantee powers in their articles.

[103] CBCA par. 77(1)(d), par. 101(f) and subss. 144(1) and 192(3) in addition to subs. 187(11).

> Now that s. 27 of the Special Corporate Powers Act has been amended (S.Q. 1992, c. 48, s. 643), the aforementioned words are no longer required. They should therefore be deleted from both the English and French versions.

[338] The Barreau du Québec's recommendation appears sound. Subsection 189(1) (at that time subs. 183(1)) was amended in 1978. The 1978 Briefing Book indicates that the reasons for the change in wording (adding the words "the articles of a corporation are deemed to state" and, in the French version, "les statuts sont réputés prévoir que") was to deal with s. 27 of the Special Corporate Powers Act. The amendment of the relevant Québec provision means that these words are no longer necessary.

Recommendation:

[339] Amend subs. 189(1) by deleting the words "the articles of a corporation are deemed to state".

45. **Right to Dissent** (subss. 190(1) and (2))

Issue:

[340] Whether to amend the CBCA to clarify what rights to dissent are available under s. 190 where a corporation has only one class of shares.[104]

Background:

[341] Subsection 190(1) gives the general dissent right in case of major corporate changes, such as amalgamation, export continuance and sale, lease or exchange of substantially all the property of the corporation. This dissent right is available to shareholders of all corporations, regardless of the number of classes of shares.

[342] Section 173 sets out the basic rules on fundamental changes to the corporation (names, businesses, shares, numbers of directors, etc.). When a corporation resolves to amend its articles to make one of these changes, the section requires that there be approval by a special resolution of shareholders (that is, approval by two-thirds majority). Among the fundamental changes set

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[104] This issue, in a narrower context, is also considered in the Industry Canada discussion paper concerning going private transactions.

out in subs. 173(1) are the creation of a new class of shares (par. 173(1)(e)) and share consolidations (par. 173(1)(h)).

[343] Subsection 190(1) gives the right to dissent with respect to two types of fundamental changes set out in subs. 173(1) (changing any restrictions on the business of the corporation and any constraints on the transfer of shares). No reference is made to the creation of a new class of shares or share consolidations.

[344] Section 176 provides a further rule that on certain fundamental changes, shareholders of a class[105] of shares must approve the change by special resolution. A class vote, for example, is required when there is a proposal to create a class of shares equal or superior to the shares of such class (par. 176(1)(e)). While the CBCA does not deal expressly with this issue, class votes under s. 176 may not be available to shareholders of a corporation with only one class of shares.

[345] Subsection 190(2) provides that:

> A holder of shares of any class or series of shares entitled to vote under section 176 may dissent if the corporation resolves to amend its articles in a manner described in that section. [Emphasis added]

[346] The "manners" of amending the articles described in section 176 are very broad, including share consolidations and as noted above the creation of a new class of shares with equal or superior rights. Thus shareholders entitled to vote under s. 176 have a broad right to dissent. If shareholders of a corporation with one class of shares cannot vote under s. 176, they have a much more limited right to dissent.

[347] In McConnell et al. v. Newco Financial Corporation[106], the Supreme Court of British Columbia held that CBCA s. 176 and subs. 190(2) apply "only where there is more than one class ... of shares". In McConnell, minority shareholders brought an oppression remedy application under the CBCA alleging oppressive conduct by the majority shareholder who approved a share consolidation that squeezed out the minority shareholders. The respondent argued that the applicants had no right to proceed with the oppression remedy because they had claimed a dissent right earlier. The CBCA provides that once a shareholder dissents, he or she ceases to have any rights as a shareholder except the right to be paid for the shares. The applicants argued that they could proceed with their oppression application because the earlier claim under the dissent remedy was invalid. The court agreed on the grounds that the corporation had only one class of shares and s. 176 did not apply.

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[105] Section 176 also applies to a series of a class of shares, but for the sake of simplicity, we refer only to classes of shares.

[106] (1979) 8 B.L.R. 180.

[348] The dissent right has been criticized for providing little protection for shareholders.[107] Majority shareholders and corporate managers naturally do not like disruptions in corporate affairs. Therefore, changes to this section may be censured as either not addressing the real issue (making it more user-friendly for shareholders, which is beyond the scope of these technical changes) or seeking to broaden a remedy which is already too intrusive in corporate affairs. Nevertheless, we feel that there is a "technical" anomaly under the CBCA because the statute might be read to permit the shareholders of a corporation with two classes to dissent in certain circumstances but not shareholders of a corporation with one class of shares.

Recommendation:

[349] Amend s. 190 to confirm the availability of the right to dissent to shareholders of a corporation with one class of shares where there is a share consolidation or creation of an equal or superior class of shares. It appears that the most logical and consistent means to do this would be to amend s. 190 to provide that the right to dissent is available under subs. 190(2) even where (a) there is only one class of shares and (b) the shareholders would have had the right to a class vote under s. 176 if there had been two classes of shares.

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

Option:

[350] Amend subs. 190(1) to include a right to dissent where the corporation resolves to amend its articles under section 173[108] to effect a share consolidation or to create a new class of shares.[109]

46. **Filing of Prospectus Document with Director** (s. 193)

Issue:

[351] Whether to repeal s. 193.

Background:

[352] Section 193 requires a CBCA corporation that files or distributes in any jurisdiction a prospectus or similar document relating to the distribution to the public of securities of the corporation to file a copy of the document with the CBCA Director. The need for this filing has been questioned internally in the context of regulatory and paper burdens and overlap and duplication. These documents are already filed with and publicly available from securities regulators.

[353] The Dickerson Report recommended in 1971 that federal corporate law include detailed rules on the preparation, circulation and filing of prospectus documents. However, the CBCA,

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[108] One of the issues discussed in this discussion paper is whether par. 173(1)(h) should be amended to remove the requirement for an amendment to the articles of incorporation for share consolidations and splits. In place of this requirement, it is recommended that a new section 25.1 be adopted to require share consolidations and splits to be approved by special resolution of shareholders. If this change is adopted, reference in an amended s. 190 would have to include a reference to a new s. 25.1.

[109] While this recommendation is more specific and precise than the broader recommendation set out above, it may have three problems. First, there may be other fundamental changes referred to in s. 176 that result in a right to dissent and that should be available even where there is only one class of shareholders. Second, subs. 176(1) was amended in 1978 to permit the corporation's articles to remove the class vote (and therefore dissent right) with respect to paras. 176(1)(a), (b) and (e). Paragraph 176(1)(e) concerns the creation of new class of shares. One option to deal with this problem would be to add the same limitation found in subs. 176(1) ("where the articles otherwise provide") into s. 190 with respect to a right to dissent for the creation of a new class of shares. Thirdly, not all share consolidations may be used to squeeze out shareholders or otherwise be oppressive. Share consolidations may be undertaken to bring share numbers down to rational and workable numbers.

when enacted in 1975, did not contain any substantive provisions on prospectus documents. Instead, s. 193 was the only rule enacted.

Recommendation:

[354] Maintain statutory requirement, while relieving paper and regulatory burdens through blanket filing exemption orders issued under CBCA s. 258.2 where appropriate.

Option:

[355] Repeal s. 193.

47. **Application of Part XVIII** (s. 208)[110]

Issue:

[356] Whether the provisions on dissolution and revival in Part XVIII should apply to insolvent corporations.

Background:

[357] Subsection 208(1) currently provides that: "This Part does not apply to a corporation that is insolvent within the meaning of the Bankruptcy and Insolvency Act or that is bankrupt within the meaning of that Act." Part XVIII provides the rules for voluntary liquidations and dissolutions of corporations by directors or shareholders, dissolutions by the CBCA Director and the courts, and revivals of corporations.

[358] With respect to voluntary liquidations and dissolutions of insolvent or bankrupt corporations, there are strong policy grounds for leaving them to the Bankruptcy and Insolvency Act (BIA) to ensure proper protection of creditors of the corporation (through trustees, class voting, etc.).

[359] However, Part XVIII also allows for dissolutions of the corporation by the CBCA Director (s. 212, administrative dissolution) or the courts (ss. 213 and 214) where the corporation

[110] The proposals for changes to the revival provisions of the CBCA are based on analysis and summary prepared by Wayne Gray of Miller Thomson.

has not commenced business, is inactive, has failed to keep its public filings up to date, has failed to hold annual meetings, has procured any certificate issued under the CBCA by misrepresentation or has carried on business in an oppressive manner. In many cases, these corporations are insolvent but there are insufficient assets to warrant a BIA proceeding. It may be very impractical to determine if such dormant companies are solvent or insolvent before an administrative or judicial dissolution.

[360] Moreover, even where there is an orderly liquidation of the property of a bankrupt corporation under the BIA, the BIA does not provide for the dissolution or other termination of the corporations existence. In effect, there is a gap in the law whereby some defunct corporations are in limbo -- bankrupt, insolvent or possibly insolvent and not dissolved.

[361] It is important to note that legal proceedings may be continued or brought against a dissolved corporation as if it had not been dissolved and assets of the corporation remain available to satisfy any judgment or order made against the corporation (subs. 226(2)). Any property of the corporation vests in the Crown on dissolution and can be returned to the corporation on revival of the corporation. Creditors can apply for revival of the corporation. Creditors of an insolvent corporation are therefore not likely to be prejudiced by administrative or judicial dissolution.

[362] Part XVIII also provides for revival of dissolved corporations. Again, the revived corporation remains "liable for all the obligations that it would have had if it had not been dissolved" (subs. 209(4)). Creditors of an insolvent corporation would not be prejudiced by its revival.

Recommendation:

[363] Amend subs. 208(1) to provide that "The provisions dealing with voluntary liquidations and dissolutions under this Part do not apply to a corporation that is insolvent ...".

48. **Revival - Definition of "Interested Person"** (subs. 209(1))

Issue:

[364] Whether to define "interested person" for the purposes of subs. 209(1).

Background:

[365] Section 209 authorizes "any interested person" to apply to the CBCA Director for revival of a CBCA corporation which has been dissolved. The expression "interested person" is not defined, leaving it to the courts to develop the law. An amendment to this section could add certainty to the law by specifying who are the interested persons.

[366] An amendment could also clarify that an "interested person" includes persons who become creditors after the dissolution. This would ensure that the interpretation given to the Ontario BCA in Re Mancini[111] is not extended to the CBCA.[112] However, this raises the question of what activities the corporation can undertake after dissolution that bind the corporation. In other words, can a person become a voluntary (by a contract) or involuntary (by a tort) creditor of a dissolved corporation? Below under the review of subs. 209(4), we consider what actions of the corporation are retroactively validated by the revival. However, the revival which may retroactively validate activities of the corporation is subsequent to the application for revival.

Recommendation:

[367] Define the term "interested person" for the purposes of s. 209 to include persons who are shareholders, directors, officers, employees, creditors or any other person who has a contractual relationship with or a tort claim against the dissolved corporation. Further define "interested person" to include a person who, although not a shareholder, director, officer, employee or creditor at the time of the dissolution, will become so upon the revival of the corporation.

49. **Issuance of a Certificate of Revival** (subs. 209(3))

Issue:

[368] Whether the issuance of a certificate of revival is discretionary or mandatory.

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[111] (1984) 27 B.L.R. 1 (Ont. S.C.).

[112] In Mancini, the bankruptcy court was reviewing a series of transactions involving a transfer of a parcel of land to a corporation that had been or was later dissolved. One of the issues was whether the purported subsequent purchaser of the land could have applied to have the corporation revived. The court concluded that the subsequent purchaser could not apply for a revival. However, the equivalent provision of the Ontario BCA, subs. 242(4), refers to an application by "any interested person immediately before the dissolution". CBCA subs. 209(1) only refers to "interested person" -- the words "immediately before the dissolution" are not found in the CBCA.

Background:

[369] In Computerized Meetings & Hotel Systems Ltd. v. Moore[113], the Ontario Divisional Court found that the CBCA Director has no discretion to deny the revival of a corporation under subs. 209(3).[114] One effect of the decision in Computerized Meetings & Hotel Systems Ltd., if correctly decided, is arguably to limit the power of the CBCA Director such that she may impose reasonable terms on a revival but not prevent the revival itself. Under subs. 209(4), the CBCA Director can impose "reasonable terms", but presumably the Director could not impose terms as a condition to revival that are so onerous as to reasonably prevent the revival.

[370] The underlying question is whether the CBCA Director should have the discretion to refuse a revival application. The circumstances surrounding revival are often fact-oriented and, therefore, a case-by-case review on the part of the CBCA Director may be the most appropriate means to minimize any prejudice. The CBCA Director does have discretion in other fact-oriented corporate transactions and she can and does publish policy guidelines to foster certainty.

[371] Another point is that if the CBCA Director has no power to refuse a revival[115] and the revival is retroactive (as discussed in detail below, subs. 209(4)), then there is no possible meaningful sanction for dissolution. Finally, the CBCA Director's decision is appealable to a court under par. 246(f)[116] which gives any interested person the opportunity to challenge the decision of the CBCA Director.

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[113] (1982) 141 D.L.R. (3d) 306.

[114] The Divisional Court had to determine whether a court action commence by corporation which had been dissolved (and subsequently revived) could proceed. The court held that the language of subs. 209(4), discussed in detail below, did not permit a corporation to commence proceedings during a period which a corporation is dissolved. "The converse inference would tender the sanction of dissolution meaningless." (p. 314) As part of the reasoning that there would be no other sanction for dissolution, the court held that the CBCA Director "has no discretion to deny revival itself" (p. 314).

However, another CBCA provision, par. 246(f), suggests that Computerized Meetings & Hotel Systems Ltd. may be wrongly decided. Under par. 246(f), a person who feels aggrieved by the decision of the CBCA Director "to refuse to revive a corporation under section 209 ... may apply to a court for an order requiring the Director to change his decision, and on such application the court may so order and make any further order it thinks fit." [Emphasis added] Paragraph 246(f) implies that the CBCA Director has a discretion whether or not to grant a revival, because the court is not obligated to force the Director to change her decision. Moreover, other paragraphs in s. 246 refer to what are clearly discretional decisions of the Director (for example, decisions relating to exemption applications, par. 246(c)).

[115] As was held in Computerized Meetings & Hotel Systems Ltd.

[116] See discussion below on par. 246(f).

Recommendation:

[372] Revise subs. 209(3) to clarify that the CBCA Director has a discretion whether to issue a certificate of revival.

50. **Retroactivity of Revival** (subs. 209(4))

Issue:

[373] Whether subs. 209(4) should be amended to provide that revival of the corporation has a retroactive effect and, if so, in accordance with what rules.

Background:

- Should revival be retroactive?

[374] The issue of retroactivity is a very complex one. Subsection 209(4) currently provides:

> A body corporate is revived as a corporation under this Act on the date shown on the certificate of revival, and thereafter the corporation, subject to such reasonable terms as may be imposed by the Director and to the rights acquired by any person after its dissolution, has all the rights and privileges and is liable for the obligations that it would have had if it had not been dissolved. [Emphasis added]

[375] This wording is ambiguous as to whether revival is intended to have retroactive effect. However, the courts have interpreted the subsection as not retroactively validating acts, such as the commencement of legal proceedings, performed between the time of the dissolution and the subsequent revival: Computerized Meetings & Hotel Systems Ltd. v. Moore,[117] Profit Sharing Investors of Canada Ltd. v. Coffee Vending Services (Ottawa) Ltd.,[118] and Wolf Offshore Transport Ltd. v. Sulzer Canada Inc..[119]

[376] The wording used in the French version is also ambiguous. The Barreau du Québec noted in its submission to the Committee on Industry respecting Bill C-12 that

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[117] (1982) 141 D.L.R. (3d) 306.

[118] (1983) 146 D.L.R. (3d) 320 (Ont. H.C.).

[119] (1992) 100 Nfld. & P.E.I.R. 178 (Nfld T.D.).

"[TRANSLATION] The words 'that it would have had if it had not been dissolved' have been translated by 'antérieurs', which does not fully render Parliament's idea regarding the partially retroactive nature of revival."

[377] The lack of retroactivity creates several difficulties. A plaintiff which is a dissolved corporation must recommence any legal proceedings after the revival, resulting in additional costs. If a limitation period has in the meantime expired, the revived plaintiff corporation cannot recommence the proceedings and hardship results.

[378] Corporations can be dissolved both voluntarily by the shareholders or involuntarily by administrative or judicial order. Sometimes an involuntary dissolution results from only minor infringements of the CBCA (for example, default for one year in sending to the CBCA Director any fee, notice or document). Other parties may unreasonably seek to take advantage of what otherwise might be seen as a mere technicality (the dissolution) to avoid obligations to which they have willing agreed.[120]

[379] With respect to equivalent provisions in provincial corporate legislation, several statutes are similarly worded to the CBCA subs. 209(4).[121] With respect to one of these provisions, the Manitoba Courts have issued conflicting judgments as to whether the equivalent Manitoba provision should be interpreted to be retroactive.[122]

[380] Other statutes expressly provide for retroactivity of the revival, either by "deeming" that the company continued in existence[123] or by "revoking" the dissolution retroactively.[124] The

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[120] This was the opinion of the courts in Re Zangelo Investments Ltd. (1988) 49 D.L.R. (4th) 320 (Ont. C.A.) at page 320, affirming (1987) 38 D.L.R. (4th) 395, a case which consider the revival provisions of the Ontario BCA.

[121] See, for example, New Brunswick Business Corporations Act, S.N.B. 1981, c. B-9.1, subs. 136(5) and Saskatchewan Business Corporations Act, R.S.S. 1978, c. B-10, s. 202(4).

[122] Steven Kubla Enterprises Ltd. v. Viking Investments Ltd. (1978) 87 D.L.R. 541 (Man. Q.B.) interpreting Manitoba Corporations Act, S.M. 1976, c. 40, subs. 202(2), now R.S.M. 1987, c. C225, subs. 202(2), to not be retroactive. Compare Helcor Enterprises Ltd v. Moore & James Food Services Ltd. [1990] 5 W.W.R. 596 (Man. Q.B.).

[123] British Columbia Company Act, R.S.B.C. 1979, c. 59, subs. 286(2), Northwest Territories, Companies Act, R.S.N.W.T. 1988, c. C-12, s. 178 and Alberta Business Corporations Act, S.A. 1981, c. B-15, subs. 201(4).

[124] Québec Companies Act, R.S.Q., c. C-38, s. 27, second paragraph. Under the United States Model Business Corporations Act ("Model BCA"), a revival "relates back to and takes affect as of the effective date of the dissolution and the corporation resumes carrying on its business as if dissolution had never occurred" (Committee on Corporate Laws of the Section of Business Law of the American Bar Association, Model Business Corporations Act [:] Revised through 1994 (Prentice Hall Law & Business, 1994) section

Ontario BCA provides that the corporation "is restored to its legal position, including all its property, rights and privileges and franchises, and is subject to all its liabilities, contracts, disabilities and debts, as of the date of its dissolution, in the same manner and to the same extent if it had not been dissolved".[125] The Ontario courts have held that, under this provision, a corporation "is revived as of the date of dissolution so as to update all action taken by the company during its time of dissolution".[126] The cases decided under the CBCA were distinguished because the wording of two provisions are "quite distinct".

[381] Therefore, at least five Canadian jurisdictions provide for retroactivity of revival. There do not appear to be any clear examples of abuse of these provisions in the five provincial statutes. Indeed, the restoration is expressly made subject to any rights acquired by any person after the dissolution of the corporation and terms and conditions can be imposed by the regulators. Finally, as recommended above, the statute could be amended to expressly give the CBCA Director the power to refuse a revival in cases of abuse.

- Scope of the retrospective effect

[382] Currently, subs. 209(4) only refers to the restoration of all rights, privileges and obligations of the corporation. The Ontario BCA refers to "property, rights and privileges and franchises, and ... liabilities, contracts, disabilities and debts". It is not clear whether this wording is intended to cover internal matters such as changes of directors, amendments to articles or changes of registered office. Retroactive legitimacy of such internal matters is critical to ensure corporate actions, such as contracts, have received proper corporate authorization. The statutes referred to above which either deem that the company continued in existence or revoke the dissolution retroactively would seem to retroactively validate internal matters, but again there may be some uncertainty.

Recommendation:

[383] Amend subs. 209(4) to make a revival retroactive, by expressly providing that the corporation can benefit from and is bound and liable for all acts of the corporation (e.g., contracts, proceedings, torts\faults, etc.) taken while the corporation was dissolved and by validating any changes to the internal affairs of the corporation.

14.04(e) for revocation of voluntary dissolution and section 14.22(c) for reinstatement following administrative dissolution).

[125] Ontario Business Corporations Act, R.S.O. 1990, c. B.16, subs. 241(5).

[126] Re Zangelo Investments Ltd. (1988) 49 D.L.R. (4th) 320 (Ont. C.A.) at page 320, affirming (1987) 38 D.L.R. (4th) 395.

Option:

[384] Revise subs. 209(4) to make a revival retroactive, by "deeming" that the corporation continued in existence.

51. **Pre-revival Contracts and Torts/Faults** (subs. 209(4))[127]

Issue:

[385] Whether the CBCA should provide rules governing the liability of directors, officers, employees and agents of a dissolved corporation for its contracts and torts/faults.

Background:

[386] The CBCA currently does not expressly provide for the rights and obligations of persons purporting to act as or on behalf of the corporation which has been dissolved. Nor do provincial statutes. CBCA s. 14 does provide for liability of persons who enter into written contracts in the name of or on behalf of a corporation "before it comes into existence". However, this section presumably does not apply to corporations that have been dissolved. Also, the CBCA does not purport to deal with pre-incorporation torts\faults.

[387] The above proposal to make the revival retroactive would make the revived corporation liable for the contracts and torts\faults occurring between dissolution and revival. However, a dissolved corporation may not necessarily be revived. Moreover, even where a corporation is revived, it may be appropriate that other persons be liable in addition to or instead of the corporation. Indeed, at common law, it is presumably the person who purports to act on behalf of the dissolved corporation that is responsible. A number of factors may be relevant: the knowledge of the parties as to whether the corporation has been dissolved; the expectations of the parties; if it is a contract, what does the contract provide; and the benefits received by the corporation and other parties.

[388] Under the United States Model BCA, the key factor in the pre-incorporation contract setting, is the knowledge of the person purporting to act on behalf of the corporation:

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[127] The reference to torts/faults refers to the non-contractual liability that can arise under the common law of the common law provinces and territories (torts) or the civil law of Québec (faults). References in this section to tort or fault should be read to include a reference to such liabilities under either system.

> All persons purporting to act as or on behalf of a corporation, knowing there was no incorporation under this Act, are jointly and severally liable for all liabilities created while so acting.[128]

[389] One practical concern is that it may difficult to prove knowledge of the dissolution by persons acting on behalf of the corporation.

[390] In 1985, the CBA - Ontario recommended that the Ontario BCA be amended to add a new section 243a dealing with contractual and tortious liability of persons acting on behalf of a dissolved corporation as well as the liability of the revived corporation.[129] The CBA - Ontario proposals are quite complicated. In general they propose a number of specific rules for contractual liability, which depend on whether the corporation has been revived or not, and whether the contract contemplated the revival of the corporation. Tortious liability would be fixed by the courts.[130]

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[128] Model BCA, section 2.04.

[129] See Minutes of the OBCA Advisory Committee, June 10, 1985.

[130] Subsection 243a(1) would provide that a revived corporation is bound by and entitled to the benefits of all contracts entered into on its behalf during the period between dissolution and revival, "except where a contract is expressly entered into in contemplation of the corporation's revival in which case section 21 applies to it". Ontario BCA s. 21 is the pre-incorporation contract provision, very similar to CBCA s. 14. Subsection 243a(2) would provide that the person purporting to enter into a contract on behalf of the dissolved corporation that is not revived may be obligated under it, "on an application under subsection (5)". Subsection 243a(3) would apply Ontario BCA s. 21 to a contract entered into on behalf of a corporation between its voluntary dissolution and its revival. It is not clear whether or not this is meant to be an exception to subs. 243a(1). Subsection 243a(4) would provide that a revived corporation is subject to all liability in tort incurred between dissolution and revival. Subsections 243a(5) and (6) would provide:

> (5) A party to a contact specified in subsection (1) or (2), a person who suffers harm as a result of a tort specified in subsection (4) and a corporation subject to an action under subsection (4) may apply to a court for an order that the corporation, the person acting in the name or on behalf of the corporation, or any director, officer or shareholder of the corporation at the time of its dissolution or a person acting in an equivalent capacity thereafter is obligated under the contract or is liable for its breach or for the tort, and upon such application the court may make any order it thinks fit, including
>
> (a) an order fixing the obligations or liability as joint or joint and several and apportioning liability between the corporation and any of the specified persons or between any of the specified persons, and
>
> (b) an order directing that any liability so found shall be satisfied to the extent possible out of any property that would have been available for that purpose if the corporation had not been dissolved, including any property that has escheated to the Crown.

[391] The advantage of these detailed CBA - Ontario proposals is that they may help create certainty for contractual relations. However, the proposals go well beyond the rather simple provisions in the CBCA and the Ontario BCA dealing with pre-incorporation contracts. For example, the proposals would permit the court in its discretion to impose liability on "any director, officer or shareholder of the corporation". This may be appropriate where such persons knowingly allowed the corporation to continue in business while dissolved and therefore the protection of limited liability normally afforded should not be available. On the other hand, this could impose the potential of rather expansive liability with few limits, other than the courts discretion. One of the CBCA Phase II reform substantive papers deals with the issue of directors' liability and the imposition of unfair and\or unpredictable liability on directors.

[392] The CBA - Ontario proposals also deal with liability of the revived corporation. It has already been recommended (see issue above) that revival be retroactive and the revived corporation be bound and liable for all acts of the corporation (e.g. contracts, proceedings, torts\faults, etc.) taken while the corporation was dissolved. We believe this should be the basic rule. Therefore, an additional provision is only required to deal with liability of persons acting on behalf of the dissolved corporation and apportionment of liability among these persons and the corporation.

Recommendations:

[393] In addition to the above proposal for retroactive revival,

(A) provide a detailed rule for liability for pre-revival contracts, differentiating the following three situations:

(a) in the case of a contract where neither side knows of the dissolution, there should be no personal liability. The liability, if any, should be that of the dissolved corporation, which any interested person could revive;

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(6) On an application under subsection (5), the court shall consider
(a) the expectations of a party to a contract specified in subsection (1) or (2),
(b) the knowledge of the dissolution of the person acting in the name or on behalf of the corporation, and
(c) the knowledge of any other party to the application of the conduct in question and any benefit received by him as a result of it.

Finally, the CBA - Ontario proposals would add a subs. 243a(7) that would provide for tort liability where the corporation is not revived, including the availability of corporate assets to satisfy any judgment and the apportionment of liability.

(b) where the person acting on behalf of the dissolved corporation is aware of the dissolution but the other party is not, the person acting on behalf of the dissolved corporation should be made personally liable; and

(c) where both parties are aware of the dissolution and enter into an arrangement in contemplation of the corporation's revival, then:

(i) in the absence of a provision in a written contract to the contrary, the person who enters into the written contract on behalf of a dissolved corporation should be personally liable and be entitled to the benefits thereof; and

(ii) where expressly so provided in a written contract, the person who purports to act in the name of and on behalf of the dissolved corporation before its revival should not, in any event, be bound by the contract or entitled to the benefits thereof.

(B) permit any "interested person"[131] to apply to the court for an order fixing any contractual and/or tort/fault obligations or liabilities arising while a corporation is dissolved as joint or joint and several or apportioning liability between the corporation and any person acting in the name of or on behalf of a dissolved corporation, whether or not the corporation has been subsequently revived. Permit the court to consider the knowledge, expectations and benefits received by the corporation and any other person and the terms of any contract;

(C) authorize the court to make an order reviving the corporation and\or directing that any liability so found shall be satisfied to the extent possible out of any property that would have been available for that purpose if the corporation had not been dissolved, including any property that has escheated to the Crown; and

(D) impose a burden of proof on persons acting on behalf of a dissolved corporation to show that they were not aware of the dissolution.

[131] See above proposal concerning subs. 209(1).

52. **Publication of Liquidation or Dissolution Notice** (par. 211(7)(b))

Issue:

[394] Whether the requirement to publish a notice in local newspapers imposed on corporations proposing liquidation or dissolution should be eliminated.

Background:

[395] Under CBCA par. 211(7)(b), dissolution of corporations **that have commenced business** must publish notice of their intent to dissolve once a week for four consecutive weeks in a newspaper published or distributed in the place where the corporation has its registered office and take reasonable steps to give notice in each province in which it carried on business. There is no requirement to publish notice in the Canada Gazette.

[396] The requirements under par. 238(1)(f) of the Ontario BCA on notice of voluntary dissolution are different from those of the CBCA. The Ontario BCA required notice to be given in the Ontario Gazette and once in a newspaper having general circulation in the corporation's principal place of business, if in Ontario. Subsection 72(25) of the Ontario Statute Law Amendment Act, 1994 removed these requirements.

[397] An elimination of the requirement (under par. 211(7)(b) of the CBCA) to publish a notice in local newspapers would remove an obligation that the CBCA imposes. The purpose of notification is to protect trade and involuntary creditors by providing them with notice of an intention to dissolve and therefore give them more than just the comfort of a revival under s. 209.

[398] Under par. 211(7)(a), the corporation must send to each known creditor a notice of its intention to dissolve. The notification under par. 211(7)(b) constitutes an additional protection for creditors who should have, but did not, receive notification under par. 211(7)(a). However, it is improbable that creditors consult regularly and systematically the notifications published in newspapers. Banks and other lending institutions can obtain the required information in the course of their operation. Paragraph 211(7)(b) provides more of a theoretical than practical protection for creditors and its elimination would not likely seriously affect the rights of creditors.

[399] The notification requirement under par. 211(7)(a) will be maintained in order to permit to the creditors to be informed of the imminent dissolution of the corporation. This way, they can apply to the court for an order that the liquidation be continued under the supervision of the court (subs. 211(8)). In the event of a dissolution, there is no loss of rights by a potential claimant, since legal action can still be taken against corporations within two years of dissolution (CBCA par. 226(2)(b)) and the corporation can be revived (CBCA s. 209).

Recommendation:

[400] Eliminate the requirement that corporations must publish notice of their intention to liquidate or dissolve in a local newspaper.

Option:

[401] Amend par. 211(7)(b) to require a corporation to publish a notice of intent to dissolve in a local newspaper once, instead of the four times currently required.

53. **Publication of an Administrative Dissolution Notice** (par. 212(2)(b))

Issue:

[402] Whether to eliminate the requirement to publish notice of an administrative dissolution in the Canada Gazette.

Background:

[403] Bill C-12 repealed the requirement imposed in par. 212(2)(b) for the CBCA Director to publish notice in a local newspaper of an intention to dissolve a delinquent corporation. This provision was not a common requirement of companies legislation in Canada. The publishing costs were very high and, due to budget constraints, a backlog of defaulting corporations which should have been dissolved had arisen.

[404] Currently, par. 212(2)(b) still requires notice to be published in both the Canada Gazette and the Canada Corporations Bulletin, as well as direct notice to the corporation in default and each director personally. The usefulness of publication of official notices in two publications, which few stakeholders actually read, has been questioned. Publication in the Canada Gazette in addition to the Canada Corporations Bulletin is an extra expense imposed on the administrators of the Act and its usefulness to creditors and other stakeholders of the corporation is doubtful.

[405] In the event of a dissolution, there is no loss of rights by a potential claimant, since legal action can still be taken against corporations within two years of dissolution and the corporation can be revived in any case.

Recommendation:

[406] Amend par. 212(2)(b) by eliminating the requirement to publish notice of an administrative dissolution in the Canada Gazette.

54. **Clarification of the French Version** (ss. 214 and 241)

Issue:

[407] Whether the French version of these sections should be amended to add a concept of the notion of "unfairly"(that is to say of injustice) which is found in the English version.

Background:

[408] The Barreau du Québec recommended in its submission to the Committee on Industry respecting Bill C-12 that:

> [TRANSLATION] The words "unfairly prejudicial" and "unfairly disregards" have been translated by "porte atteinte à" and "n'en tient pas compte", leaving aside the fundamental notion of "unfairly", that is to say of injustice. Remedy is very frequently sought under the authority of these provisions. It is high time the translation was reviewed and this notion of injustice introduced.

[409] We have not completed a complete review of the caselaw and differences between interpretations of the French and English versions of the section. A complete review of the oppression remedy and the jurisprudence decided under it is beyond the scope of Phase II technical proposals.

[410] A cursory review of the caselaw did not reveal any major differences in resulting decisions. However, our first impression is that the absence in the French version of an express reference to unfairness is problematic.

Recommendation:

[411] Include in the French version the concept of "unfairly", found in the English versions. The new versions could read something like "... porte injustement atteinte à leurs intérêts ou n'en tient pas compte d'une façon injuste...".

55. **Clarification of the French Version of "Affiliated Group"** (subs. 229(1))

Issue:

[412] Whether to replace the term "personne morale du même groupe" with the term "société du même groupe" in the French version of subs. 229(1).

Background:

[413] With respect to Bill C-12, the Barreau du Québec submitted to the Committee on Industry that:

> [TRANSLATION] The words "affiliated corporations" were incorrectly translated by "personne morale du même groupe". This gives the section much broader scope, probably rendering it "ultra vires". It should be noted that Parliament has taken care not to use the expression "affiliated bodies corporate", which appears in section 2(2) of the Act, in the English version. The French expression should therefore be replaced by the words "société du même groupe".

[414] While we believe that the subsection is "intra vires" the powers of the federal Parliament, the recommendation of the Barreau du Québec appears sensible and would clarify the French version.

Recommendation:

[415] Amend the French version of subs. 229(1) by replacing the expression "personne morale du même groupe" with the term "société du même groupe".

56. **Right of Appeal** (par. 246(f))

Issue:

[416] Whether to amend par. 246(f) to permit an interested person to appeal the terms of revival imposed by the CBCA Director and to appeal a decision to grant a revival.

Background:

[417] Currently, only the decision to refuse a revival is appealable. However, the CBCA Director may impose reasonable terms as a condition for the revival of the corporation, to protect interest parties. These terms may be onerous, or perhaps in the eyes of a third party who may be prejudiced, not onerous enough. A third party might even feel that the revival should not be granted on any terms.

Recommendation:

[418] Revise par. 246(f) to grant a right of appeal to a person who feels aggrieved by the terms imposed for revival by the CBCA Director or by the decision of the CBCA Director to grant a certificate of revival.

57. **Right of Appeal from Court Decisions** (s. 249)

Issue:

[419] Whether to amend s. 249 to provide that only final orders made by a court under the CBCA are appealable as of right.

Background:

[420] Section 249 provides that "An appeal lies to the court of appeal from any order made by a court under this Act." The terms "court" and "court of appeal" are defined in s. 2 (with respect to each province). Generally, under provincial rules of court, only final orders are appealable so that litigants can not tie up the court process and use procedural delays to prevent timely hearing of cases.[132] Similarly, the Bankruptcy and Insolvency Act provides detailed rules on when an appeal can be taken from an order.[133]

[421] In the recent Supreme Court of Canada case, Kelvin Energy Ltd. v. Lee[134], the Court held that an order of the trial level Court authorizing an examination for discovery was not appealable. The Supreme Court held that this particular order was not made under the CBCA but

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[132] See e.g., Québec Code of Civil Procedure, articles 26, 29 and 511.

[133] See s. 193.

[134] [1992] 3 S.C.R. 235.

in fact was made under the Québec Code of Civil Procedure which essentially only allows appeals of final decisions.

[422] In Kelvin Energy, an application under s. 241 for an oppression remedy was filed by certain shareholders but the parties settled the matter to their satisfaction. The parties sought court approval of the settlement. The CBCA Director, who intervened in the case, expressed concern to the court that the rights of certain shareholders might be neglected in the settlement and asked the court for authorization to summon two witnesses for examination on discovery. The court authorized the examination and the other parties appealed this decision.

[423] The Supreme Court held that, in conformity with the philosophy of the CBCA oppression remedy to provide a fast and effective relief, not all court orders in respect of an oppression action could be appealed. An order for examination was made in accordance with the rules of the local court (to which the CBCA directs procedure in respect of oppression actions), in this case the Québec Code of Civil Procedure. Such orders could only be appealed if the local rules so permit.

Recommendation:

[424] Amend s. 249 to provide that in general only final orders are appealable as a right. An appeal would be available where:

(1) the point at issue involves future rights;

(2) the value of the object in dispute in the appeal is $20,000 or more or a greater amount set by the regulations; or

(3) leave to appeal is granted by a judge of a court of appeal.

58. **Authority of Court to Rectify Records, Notices and Documents** (s. 265)

Issue:

[425] Whether a broad rectification power should be added to the CBCA permitting application to court to rectify errors in records, notices and documents made by a corporation or the CBCA Director.

Background:

[426] During consultations, several practitioners commented on rectification provisions. Some of the people consulted indicated support for a better rectification provision (a "quick fix"). They noted that the B.C. Company Act has rectification provisions (ss. 230 and 266). A court order is necessary but "court orders give us a lot of comfort on the tax side". They recommended against using the B.C. Act as a model. Instead, any rectification provisions for the CBCA should be made very broad.

[427] Representatives of the B.C. government have indicated that the current rectification provisions of the B.C. Company Act (ss. 230 and 266) will be simplified and amalgamated in a single provision. The courts will be given a broad discretion to correct past mistakes committed by the corporation or the Registrar.

[428] Also, a legal practitioner has advised that:

> Section [265(1)] of the Act refers to the correction of a certificate issued by [Industry Canada] containing an error. It is not clear in the said section if the only correction possible must be [an error] initiated by the Director of Corporations Branch. The revised Act should permit the shareholders and/or directors to apply for a correction of a certificate issued to their corporation containing an error or irregularity.

Recommendation:

[429] Amend s. 265 to add a broad rectification power permitting application to court to rectify errors made by a corporation or the CBCA Director. In addition, broaden the s. 265 rectification powers of CBCA Director to expressly permit the correction of simple technical errors made by the corporation or other persons.

59. **Copies of Documents** (subs. 266(2))

Issue:

[430] Whether to amend subs. 266(2) to include "extracts" of documents.

Background:

[431] Subsection 266(2) provides that the CBCA Director is required to furnish any person with a copy or a certified copy of a document required by the CBCA or the regulations to be sent to the Director, except in the case of an inspector's report.

[432] It is not possible under subs. 266(2) to obtain only an extract of a document certified to be a true copy by the CBCA Director and signed by the CBCA Director or by a Deputy Director.

Recommendation:

[433] Amend subs. 266(2) to refer to a certified copy or extract of a document.

60. **Full Citation Required for Reference to Earlier Act** (subs. 268(7))

Issue:

[434] Whether subs. 268(7) should be amended by adding the full citation of the Canada Corporations Act in the English version.

Background:

[435] The French and English versions of this statute are inconsistent. Both versions refer to the Canada Corporations Act but the French versions also gives the full citation, specifying both the chapter and the year of this statute. It is true that reference to the full citation is usually unnecessary as reference to the short title is normally sufficient. However, since the Canada Corporations Act was not included in the 1985 version, the full citation could be helpful.

Recommendation:

[436] Amend subsection 268(7) so as to add in the English version, after the word "...Act" the following citation "Chapter C-32 of the Revised Statutes of Canada, 1970".

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