



***CANADA BUSINESS CORPORATIONS ACT:***  
**DIRECTORS' RESIDENCY REQUIREMENTS**  
**AND OTHER RESIDENCY ISSUES**

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***CANADA BUSINESS CORPORATIONS ACT:  
DIRECTORS' RESIDENCY REQUIREMENTS  
AND OTHER RESIDENCY ISSUES***

The *Canada Business Corporations Act* (CBCA) contains seven residency requirements. One relates to the location of a corporation's registered office, another to the location of shareholder meetings, two apply to the location of corporate records, and three deal with the residency of corporate directors. This note discusses these residency requirements.

**DIRECTORS' RESIDENCY**

The most contentious residency requirements are those applying to corporate directors, which provide that:

- a majority of the directors must be resident Canadians<sup>(1)</sup> (section 105(3));
- the directors shall not transact business at a board meeting unless a majority of the directors present are resident Canadians (section 114(3));
- a majority of the members of each committee of the board must be resident Canadians (section 115(2)).

For holding corporations that earn less than 5% of gross revenues in Canada, the CBCA provides an exception to the requirement for the majority of directors to be resident Canadians. For these corporations, one-third of the directors must be resident Canadians (section 105(4)).

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(1) Section 2(1) of the CBCA defines a resident Canadian as an individual who is

- (a) a Canadian citizen ordinarily resident in Canada;
- (b) a Canadian citizen not ordinarily resident in Canada who is a member of a prescribed class of person; or
- (c) a permanent resident within the meaning of the *Immigration Act* and ordinarily resident in Canada, except a permanent resident who has been ordinarily resident in Canada for more than one year after the time at which he first became eligible to apply for Canadian citizenship.

Enacted in 1975, the directors' residency provisions were designed to address concerns about the amount of direct foreign investment in Canada. These concerns had been brought forward in a number of studies of foreign investment in Canada, which, among other things, had discussed the need to ensure a Canadian presence on corporate boards.<sup>(2)</sup> The 1971 Dickerson Report, which served as the foundation for the enactment of the CBCA some four years later, had, however, observed that it would be futile to impose a general requirement for directors of federally incorporated companies to be citizens or residents of Canada.<sup>(3)</sup>

Despite the Dickerson Report, the CBCA introduced requirements specifying that a majority of the directors of a CBCA corporation must be resident Canadians, as must be a majority of the members present at a board meeting and a majority of each committee of the board.

In addition to promoting Canadian interests and ensuring a Canadian presence on the board of directors of corporations incorporated under the CBCA, the directors' residency requirements aimed to ensure that there would be directors resident in Canada who would be accountable for the actions of the corporation. It has been suggested that the residency requirements help to promote compliance with the law, particularly statutes that impose liability on directors for the actions of a corporation. Furthermore, if directors must be resident in Canada, there are likely to be local assets from which judgments can be satisfied.

It is relatively easy to avoid the application of the CBCA requirements. One obvious way is by incorporating in a Canadian province that has no such requirement. Another, the use of a unanimous shareholder agreement, can be found within the CBCA itself.

A unanimous shareholder agreement allows shareholders to restrict the powers of the directors to manage and supervise the business and affairs of the corporation and to transfer the directors' powers to themselves. This is particularly important for wholly-owned subsidiaries because the parent can effectively control all board decisions from outside the

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(2) Report of the Royal Commission on Canada's Economic Prospects (1957); Report of the Task Force on the Structure of Canadian Industry (1968); *Foreign Direct Investment in Canada* (1972).

(3) Robert W.V. Dickerson, John L. Howard, Leon Getz, *Proposals for a New Business Corporations Law for Canada*, 1971.

country, even though the subsidiary will still be required to have a majority of resident Canadian directors.

The intent of the residency requirements can also be avoided through the appointment of nominee directors or directors who do not reflect a Canadian perspective.

It is also worth pointing out that, although the residency requirements apply to the board of directors and committees of the board, there is no requirement that the quorum needed at meetings of committees of the board must be composed of resident Canadian members. As a result, it is possible to have committees with a majority of Canadian resident members, but which conduct meetings and business without such a majority or even without having any Canadians present.

In August 1995, Industry Canada released a Discussion Paper, *Directors' and Other Corporate Residency Issues*,<sup>(4)</sup> which outlined various arguments for and against the directors' residency requirements and set out options for consideration.

The Discussion Paper refers to the debate about the need to impose residency requirements on corporate directors. Some argue that the requirements interfere with the ability of global-oriented companies to move into foreign markets.<sup>(5)</sup> Others contend that they inhibit the inflow of investment capital into Canada.<sup>(6)</sup> Yet others maintain that the requirements have outlived their usefulness now that ensuring Canadian businesses become more active in foreign markets has become a more important concern than resisting the influence of foreign investment in Canadian markets. Moreover, the Discussion Paper also notes that residency requirements for corporate directors are not widespread; few European countries or U.S. states have such requirements.<sup>(7)</sup>

In support of the residency requirements, it is argued that they promote Canadian participation in corporate decision-making, foster compliance with and enforcement of legal

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(4) Industry Canada, *Canada Business Corporations Act*, Discussion Paper, *Directors' and Other Corporate Residency Issues*, August 1995.

(5) *Ibid.*, p. 1.

(6) *Ibid.*

(7) *Ibid.*, p. 22-23.

obligations, promote Canadian participation in the decision-making of multinational enterprises, and help foreign firms to understand the economic, political and social environment of Canada.<sup>(8)</sup>

After reviewing the residency provisions and outlining arguments for and against their retention, the Discussion Paper presented possible options for revising the CBCA provisions, including:

- maintaining the status quo;
- requiring the majority of directors to be resident Canadians and eliminating the quorum requirement for the board and the committee residency requirement;
- reducing the directors' residency requirement to one resident Canadian and eliminating the quorum requirement for the board and the residency requirement for members of committees; and
- eliminating the residency requirements altogether.<sup>(9)</sup>

In 1996, the Standing Senate Committee on Banking, Trade and Commerce considered the directors' residency requirements during its study of corporate governance issues. Witnesses who commented on the issue before the Committee either favoured the requirements or strongly opposed them.

The Committee was of the view that the residency requirement should remain for the board of directors as a whole, but did not see a need to retain it for committees of the board.<sup>(10)</sup>

## **LOCATION OF CORPORATE RECORDS**

The CBCA requires that certain corporate records must be kept in Canada. Section 20(1) of the CBCA provides that a corporation must maintain at its registered office records such as its articles and by-laws, minutes of meetings and resolutions of shareholders,

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(8) *Ibid.*, p. 25.

(9) *Ibid.*, p. 26-27.

(10) Senate of Canada, Standing Senate Committee on Banking, Trade and Commerce, *Corporate Governance*, August 1996, p. 44.

copies of certain notices, and a securities register. If directors' records (including accounting records) are maintained outside Canada, "accounting records adequate to enable the directors to ascertain the financial position of the corporation with reasonable accuracy on a quarterly basis" must be available in Canada (section 20(5)). Corporations are permitted under the Act to maintain registers and records on computer.

Ontario corporations law allows provincially incorporated companies to keep their corporate and directors' records at a place of the corporation's choice, as long as the records can be inspected at the company's registered office by means of computer or other form of electronic technology.

It has been suggested that the CBCA should be amended to allow corporations to keep corporate records off-site, provided they were available for inspection on-line at the registered office.

## **REGISTERED OFFICE**

The Discussion Paper outlines arguments for and against the CBCA requirement for corporations to maintain a registered office in Canada. In favour of the requirement, it is said that it ensures that there is a local place for delivery and service of notices and legal documents and that the incorporating statutes commonly require corporations to have an office in the jurisdiction where they incorporate.

## **LOCATION OF SHAREHOLDER MEETINGS**

Under the CBCA, shareholder meetings must be held within Canada unless all the shareholders entitled to vote at that meeting agree otherwise (section 132).

A number of provincial laws specify that meetings are to be held in the jurisdiction of incorporation unless all the shareholders agree or unless the articles specify another location.

Because Canadian companies whose shares are listed on stock exchanges within and outside Canada have significant numbers of shareholders outside this country, it has been suggested that the CBCA should be amended to allow shareholder meetings to be held outside Canada.