



***CANADA BUSINESS CORPORATIONS ACT:***  
**SHAREHOLDER COMMUNICATIONS**

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## ***CANADA BUSINESS CORPORATIONS ACT: SHAREHOLDER COMMUNICATIONS***

### **INTRODUCTION**

As part of its review of the *Canada Business Corporations Act* (CBCA), in August 1995, Industry Canada issued the Discussion Paper *Shareholder Communications and Proxy Solicitation Rules*.<sup>(1)</sup>

Among the issues addressed in the Discussion Paper are:

- whether the CBCA should be amended to require intermediaries to provide share issuers with lists of beneficial shareholders;
- whether the CBCA should be amended with respect to:
  - a) the record date for determining shareholders entitled to receive notice of annual or special meetings;
  - b) the period within which notice of annual meetings shall be sent to shareholders;
  - c) the record date for purposes other than those regarding notice of, or votes at, annual or special meetings;
- whether the CBCA should provide for a fixed record date for the voting of shares;
- whether the CBCA should specify voting right entitlement for loaned shares;
- whether the rules governing the mandatory solicitation of proxies should be specifically harmonized with provincial securities and corporate laws, in particular
  - a) should the CBCA be amended to require that the management of all distributing corporations be covered by mandatory proxy solicitation rules;

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(1) Industry Canada, *Canada Business Corporations Act*, Discussion Paper, *Shareholder Communications and Proxy Solicitation Rules*, August 1995.

- b) should the CBCA be amended to exempt management of a non-distributing corporation with fewer than 50 shareholders (rather than the current 15) from having to send a form of proxy to each shareholder entitled to receive notice of a meeting of shareholders;
- whether the CBCA proxy solicitation rules should be amended in a manner similar to those adopted by the Securities and Exchange Commission in the United States, particularly in the area of facilitating communication among shareholders.

This note is limited to a discussion of the two issues that have generated considerable comment. They are:

1. whether the CBCA should be amended to require intermediaries to provide share issuers with lists of beneficial shareholders; and
2. whether there should be amendments to the proxy solicitation rules to facilitate communication among shareholders.

## **WHETHER THE CBCA SHOULD BE AMENDED TO REQUIRE INTERMEDIARIES TO PROVIDE SHARE ISSUERS WITH LISTS OF BENEFICIAL SHAREHOLDERS**

This issue focuses on communications between corporations and their shareholders. The Discussion Paper describes three developments that have affected the ability of corporations to communicate with their shareholders: the nominee system, the depository system, and National Policy 41.

The discussion of these developments presented in the Discussion Paper is set out below.

### **A. The Nominee System**

Under the CBCA, a corporation is required to send shareholders corporate information, such as notices of meetings, proxy-related materials, and audited financial statements. The growth in the number of two kinds of shareholders -- beneficial and registered -- has made sending this material more difficult.

Beneficial shareholders are persons who have purchased shares and are entitled to dividends and capital gains but who may not be registered on the corporation's records for the

purposes of voting at annual meetings. Usually, a depository, broker or other intermediary is listed as the registered owner.

The Discussion Paper notes that over the past few decades shareholder ownership practices have changed. Formerly, individual shareholders had possession of their share certificates and were recorded as shareholders on the books of the corporation. Now, the shares of publicly traded corporations are registered in the names of nominees, usually brokers, financial institutions or other intermediaries, rather than of the individuals who have bought them.

Under the nominee system, intermediaries hold securities in “nominee form,” and maintain a list of the beneficial owners they represent. Thus, the issuing corporation shows the intermediary as the registered shareholder and is not aware of the beneficial owner of the shares.<sup>(2)</sup>

### **B. The Depository System**

The growth of the depository system has increased the gap between the corporation and its beneficial shareholders. In the 1970s, securities depositories were developed so that the trading and settlement of securities could be facilitated by eliminating the need for delivery of share certificates between intermediaries. Clearing agencies now hold most securities on deposit for intermediaries and ownership changes are recorded as book-entry transfers in the relevant accounts. As a result, when shares are traded, the shareholders’ register of the corporation does not have to be changed.<sup>(3)</sup>

### **C. National Policy 41**

National Policy Statement 41 (“NP 41”) provides a procedure to enable issuers to communicate with non-registered share owners. Among other things, NP 41 is designed to ensure that proxy-related meeting materials, audited annual financial statements and interim financial statements are sent to non-registered holders of securities. A proposed new policy,

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(2) *Ibid.*, p. 3-4.

(3) *Ibid.*, p. 4.

National Instrument 54-101, would allow reporting issuers to communicate directly with non-objecting beneficial owners -- investors whose securities are registered in the name of a clearing agency or an investment dealer, broker, financial institution or other intermediary and who have not objected to the release of their names, addresses and securities holdings.<sup>(4)</sup>

#### **D. Section 153 of the CBCA**

The duties of a person who is the registered owner but not the beneficial owner of shares of a corporation are set out in section 153 of the CBCA. Subsection 153(1) provides as follows:

Shares of a corporation that are registered in the name of a registrant<sup>(5)</sup> or his nominee and not beneficially owned by the registrant shall not be voted unless the registrant, forthwith after receipt of the notice of meeting, financial statements, management proxy circular, dissident's proxy circular and any other documents other than the form of proxy sent to shareholders by or on behalf of any person for use in connection with the meeting, sends a copy thereof to the beneficial owner and, except where the registrant has received written voting instructions from the beneficial owner, a written request for such instructions.

Subsection 153(2) goes on to provide that:

A registrant shall not vote or appoint a proxyholder to vote shares registered in his name or in the name of his nominee that he does not beneficially own unless he receives voting instructions from the beneficial owner.

The Discussion Paper examines the possibility of amending the CBCA to require registrants to furnish to corporations a list of all beneficial owners of shares who do not object to being identified. This list could then be used by the corporation to communicate directly with the non-registered shareholders with respect to corporate governance matters.

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(4) *Ibid.*, p. 4-5.

(5) Under section 147 of the CBCA, a "registrant" is defined as "a securities broker or dealer required to be registered to trade or deal in securities under the laws of any jurisdiction."

When the Standing Senate Committee on Banking, Trade and Commerce held hearings in 1996 on corporate governance, a number of witnesses expressed concern about the problems that arise in communicating with shareholders. They pointed to difficulties in identifying a corporation's shareholders and to the fact that when shares are held electronically, shareholders often fail to receive annual or quarterly corporate statements. The overall view was that the current system for communicating with shareholders does not work and must be improved.

The Senate Banking Committee recommended that the CBCA be amended to require registrants to furnish issuers, upon request and within a fixed period of time, with a list of all beneficial shareholders. This list would allow issuers to communicate directly with non-registered shareholders with respect to matters relating to the business and affairs of the corporation. The Committee felt that intermediaries should be permitted to withhold from issuers the names and addresses of beneficial shareholders who have requested this in writing.<sup>(6)</sup>

The Banking Committee also noted that the definition of registrant in the CBCA might have to be broadened in order to capture all intermediaries.

### **WHETHER THERE SHOULD BE AMENDMENTS TO THE PROXY SOLICITATION RULES TO FACILITATE COMMUNICATION AMONG SHAREHOLDERS**

Concern has been expressed that the proxy solicitation rules under the CBCA impede communication among shareholders which, in turn, inhibits their participation in corporate governance.

Section 147 of the CBCA defines proxy solicitation to include:

- (a) a request for a proxy, whether or not accompanied by or included in a form of proxy;
- (b) a request to execute or not to execute a form of proxy or to revoke a proxy;

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(6) Senate of Canada, Standing Senate Committee on Banking, Trade and Commerce, *Corporate Governance*, August 1996, p. 62.



- (c) the sending of a form of proxy or other communication to a shareholder under circumstances reasonably calculated to result in the procurement, withholding or revocation of a proxy; and
- (d) the sending of a form of proxy to a shareholder under section 149.

The Discussion Paper points out that, according to this definition, many views expressed by shareholders, including informal discussions or personal letters criticizing management, may be deemed to be solicitation under section 147. Violations of section 147 carry a fine as well as a term of imprisonment. In addition, violators could be required to prepare and send proxy materials to all shareholders.<sup>(7)</sup>

In 1992, the Securities and Exchange Commission in the United States changed its proxy solicitation rules to foster more open “discussion, debate and learning among shareholders.” It was the view of the Commission that the federal proxy solicitation rules impeded communication among shareholders as well as the effective use of shareholder rights.

The Discussion Paper puts forward a number of recommendations to facilitate communication among shareholders. First, the paper recommends that oral and written communications between shareholders should be exempt from the proxy circular delivery and disclosure requirements in cases where the person communicating is not seeking proxy authority and written communications are made public.<sup>(8)</sup>

Other recommendations in the Discussion Paper that would facilitate communications among shareholders include:

- changing the definition of “solicitation” to specify that a shareholder could publicly announce how it intended to vote and why, without having to comply with the proxy rules;
- exempting solicitations conveyed by public broadcast or speech or publication from the requirements for proxy circular delivery, provided a definitive proxy circular was on file with the Director under the CBCA;
- allowing corporations and other soliciting parties to commence a solicitation on the basis of a preliminary proxy circular publicly filed with the Director; and

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(7) *Shareholder Communications and Proxy Solicitation Rules* (1995), p. 27-28.

(8) *Ibid.*, Executive Summary, p. iii.

- requiring corporations to provide shareholders with, in addition to the list of registered shareholders currently required, copies of any list of beneficial owners in the corporation's possession, provided these beneficial owners did not object.<sup>(9)</sup>

This issue was also brought before the Standing Senate Committee on Banking, Trade and Commerce during its corporate governance hearings. Witnesses supported changing the proxy rules to facilitate shareholder communication. It was stressed, however, that checks must be put in place to prevent abuse.

Supporting the thrust of the Discussion Paper proposals to promote open and meaningful communication among shareholders, the Senate Banking Committee recommended that the CBCA be amended to encourage and facilitate such communication.<sup>(10)</sup>

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(9) *Ibid.*

(10) *Corporate Governance* (1996), p. 67.