Trust and Loan Companies Act

Explanatory Notes

Issued by
The Honourable Gilles Loiselle
Minister of State (Finance)

Fall 1990

Canada

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Department of Finance Canada
Ministère des Finances Canada

PREFACE

These explanatory notes are intended as a reader's guide to the Trust and Loan Companies Bill. They are not meant as a substitute for a careful reading of the Bill itself, but as a road map to identify the aspects of the Bill that are likely to be of interest to those in the financial services industry and the legal profession with an interest in financial sector reform.

The notes identify significant deviations of the Bill from corresponding provisions in the current *Bank Act* (the most up-to-date of the federal statutes governing financial institutions) and the *Canada Business Corporations Act*. In addition, they indicate the general nature of the key regulations for which the Bill provides.

The majority of the provisions in the Trust and Loan Companies Bill are the same as those to be included in the forthcoming bank, insurance company and cooperative credit association legislation. Accordingly, when these Bills are tabled in Parliament, their explanatory notes will discuss only provisions specific to them. Most of the comments in these notes should therefore be interpreted as applying to banks, insurance companies and cooperative credit associations as well as trust and loan companies.

Short title

Section 1

This Act is to be cited as the *Trust and Loan Companies Act* and will replace the current *Trust Companies Act* and *Loan Companies Act.*

PART I - INTERPRETATION

Definitions

Definitions

Section 2

This section provides specific definitions for some of the key words and expressions that are used in the Act. Most are identical to the corresponding definitions in the current *Bank Act* and the *Canada Business Corporations Act (CBCA).* In a few cases involving concepts relating to trusts, they are drawn from the *Trust Companies Act.* Among these unchanged definitions, the most significant are:

"body corporate" This term describes a corporation, regardless of where or how it is incorporated.

"guaranteed trust money" This is the form of deposits that may be accepted by trust companies under section 423 of this Act.

"Minister" The Minister responsible for this Act is the Minister of Finance, although section 523 authorizes the Minister to delegate any Ministerial powers, duties and functions under the Act to a Minister of State.

"Superintendent" The Superintendent of Financial Institutions.

New Definitions

The more significant of the new definitions set out in this section are:

"company" This term applies to both trust and loan companies governed by the Act (see section 12). Where particular provisions apply only to trust companies, reference is made to "a company that is a trust company pursuant to subsection 57(2)".

"entity" This term has been explicitly defined because many of the expressions used in the Act, (including "affiliate", "control", "debt obligation", "officer" and "security") refer to both corporations and unincorporated entities (such as partnerships, trusts and funds). In contrast, both the current *Bank Act* and the *CBCA*

as a general rule apply only to corporations. Accordingly, many of the provisions in this Act (especially those in Parts VII to XI) have a different scope than they would if current *CBCA* or *Bank Act* definitions had been used.

"financial institution" The definition of this term lists the various entities considered to be financial institutions under the Act. It includes banks to which the *Bank Act* applies; trust, loan and insurance companies, securities dealers and cooperative credit societies, whether federally or provincially incorporated; and foreign institutions.

"foreign institution" This term refers to an entity created otherwise than under Canadian law that is primarily engaged in the business of providing financial services, including the business of banking or dealing in securities and the business of trust, loan or insurance companies or cooperative credit societies.

"former-Act company" This term refers to existing federal trust and loan companies governed by the current *Trust Companies Act* or *Loan Companies Act.*

"incorporated" References to companies "incorporated" under this Act also apply to companies continued or amalgamated under this Act.

"officer" In a corporation, an officer is an individual holding any of a number of listed offices, and anyone designated as an officer by by-law or a resolution of its board of directors. In an unincorporated entity, an officer is an individual designated as an officer by by-law or a resolution of its members.

"personal representative" This term replaces a lengthy and recurring term found in the current *Bank Act* and *CBCA* that lists "trustees, executors, administrators, committees, guardians" and a number of other functions.

"real property" In this Act, interests in real property include leasehold as well as equity interests.

"regulatory capital" This term — which is to be defined in the regulations — is used in the portfolio investment limits of sections 454 to 457 and in the limit on certain classes of related party transactions in section 475. The term does *not* refer to the minimum capital requirements for the purpose of the capital adequacy requirements in section 463 or to the minimum start-up capital requirement of subsection 50(1).

"subordinated indebtedness" This term replaces the terms "bank debenture" in the current *Bank Act* and "subordinated note" in the current *Trust Companies Act* and *Loan Companies Act* (see section 83).

Modified definitions

In addition to the new definitions noted above, a number of definitions drawn from the *CBCA* and the current *Bank Act* have been adapted for this Act. The more significant are described in the explanatory note on the new definition of "entity" above and in the following:

"complainant" This Act makes explicit the Superintendent's role in the remedial measures provisions of sections 339 to 343 and 528 and does not include the Superintendent in the definition of "complainant". This departs from the *CBCA*, in which "complainant" includes the primary regulator (the Director appointed under that Act).

"director" The plural — directors — is used to refer to the board of directors as a body.

"guaranteed trust money" Although the definition of "guaranteed trust money" is substantially the same as in the current *Trust Companies Act*, a number of other definitions have been modified to make it clear that they include guaranteed trust money or assets held in respect of such money in accordance with section 423. In particular:

- "Deposit" and "deposit liabilities", in the case of a trust company, refer to the money it accepts as guaranteed trust money.
- The "assets" and "property" of a trust company include the assets and property it holds in respect of guaranteed trust money.
- "Creditor", in respect of a trust company, includes persons who deposit money as guaranteed trust money.

"security" In addition to modifying the scope of this term to cover securities issued by unincorporated entities (see "entity" above), the new definition makes clear that deposit instruments issued by a financial institution are not considered to be securities.

"security interest" Unlike the *CBCA*, where this term only applies to security pledged by *CBCA* corporations, this Act defines the term more generally as property pledged as security for the performance of an obligation by any person.

Definition of "control"

Section 3

The definition of "control" in this Act differs from the one used in the current *Bank Act* and *Canada Business Corporations Act* in that this Act defines control of unincorporated entities and employs the concept of *de facto* control, or "control in fact".

Paragraph 3(1)(*a*) corresponds to the traditional test for determining control (known as *de jure* or "legal" control) of a corporation, namely that a person beneficially own shares carrying more than 50 per cent of the votes that may be cast to elect directors, provided they are sufficient to elect a majority of the board. Paragraph 3(1)(*b*) sets out a corresponding test that applies to unincorporated entities, other than limited partnerships, namely that a person beneficially own more than 50 per cent of the ownership interests in the entity and be able to direct its business and affairs. Paragraph 3(1)(*c*) establishes that the general partner controls a limited partnership even if the person's ownership interest is less than 50 per cent.

Paragraph 3(1)(*d*) recognizes that control of an entity can be exercised in circumstances not captured by the specific tests described above. It permits a determination of control — known as "*de facto* control" or "control in fact" — based on the facts of the relationship between a person and the entity. Throughout the Act, an unqualified reference to "control" means either *de jure* or *de facto* control. Where the Act means only *de jure* control, as in the definition of "subsidiary" in section 5, it refers to "control, determined without regard to paragraph 3(1)(*d*)".

Subsection 3(2) addresses the situation where control of a particular entity is exercised indirectly through control of another entity. It provides that, if a person controls entity "A", and entity "A" controls entity "B", the person is deemed to control entity "B". Control therefore extends through a chain of owners where there is control at every link of the chain.

Subsection 3(3) deals with the more complicated situation where control of a corporation or an unincorporated entity is achieved through the holding of its shares or ownership interests by several entities controlled by the same person. The person is deemed to control the corporation or unincorporated entity if the aggregate of shares or ownership interests beneficially owned by the person and entities controlled by the person would constitute control within the meaning of subsection 3(1).

Definitions of "holding body corporate" and "subsidiary"

Sections 4 and 5

In this Act, the expressions "holding body corporate" and "subsidiary" apply only to corporations linked by *de jure* control. "Entity controlled by" is used in those instances where "subsidiary" would be too narrow.

Definition of "affiliate"

Section 6

Two entities are affiliated if either controls the other or if both are controlled by the same third party. Since the general definition of "affiliate" in subsection 6(1) is based on the definition of control in section 3 — which includes both *de facto* and *de jure* tests — and applies to both corporations and unincorporated entities, it has a different meaning than in the current *Bank Act* or *Canada Business Corporations Act*. Subsection 6(2) sets out a second definition of "affiliate", based on *de jure* control, which is used in a few instances in this Act.

Meaning of "shareholder"

Section 7

The Act treats a person as the holder of a share if the person either is, or is entitled to become, its registered holder.

Definition of "significant interest"

Section 8

The concept of a "significant interest" is defined in reference to a class of shares of a company and is used primarily in Part VII to determine the transfers of share ownership that require approval by the Minister.

A person is considered to have a significant interest in a class of shares of a company if the aggregate number beneficially owned by the person and entities controlled by the person exceeds 10 per cent of the outstanding shares of that class.

Subsection 8(2) makes clear that an **increase** in a significant interest in a class of shares of a company means an increase in the *percentage* of shares of that class beneficially owned by a person and the entities controlled by that person. Acquisition of additional shares of that class *pro rata* with other shareholders does not constitute an increase of a significant interest.

"Acting in concert" constitutes deemed acquisition of shares, etc.

Section 9

The concept of persons "acting in concert" is used in connection with the requirements in Part VII for ministerial approval of acquisitions or increases of significant interests in classes of shares of a company. By virtue of this concept, two or more persons who individually may not have a significant interest, but who act jointly in respect of their interests in a company, would require ministerial approval if their combined interests would constitute a significant interest. This concept replaces those aspects of the "associated

shareholder" definition in the current *Bank Act* that deal with "associations" of a type other than affiliations of corporations through *de jure* control links. [The latter type of affiliation is already taken into account by the definition of "significant interest".]

Persons who have a significant interest in a company by reason of an agreement to act in concert may also be designated as related parties of a company for the purposes of Part XI (see section 464).

Subsection 9(2) specifies that an agreement giving each party to the agreement a veto over proposals put to the board of directors or resolutions of the board is an agreement to "act in concert".

Subsection 9(3) makes clear that shareholders and their proxyholders are not considered to be acting in concert if that is the only relation between them, and that shareholders are not considered to be acting in concert with other shareholders solely because they happen to vote the same way.

Subsection 9(4) allows the Superintendent to deem persons to be acting in concert where it is reasonable for the Superintendent to conclude that such an arrangement exists.

Definition of "substantial investment"

Section 10

The "substantial investment" concept is used for two principal purposes in this Act:

- In the investment rules (Part IX), companies are restricted from having investments in entities that exceed the thresholds described below, unless the substantial investment is one that is held on a temporary basis (as a temporary investment, following a realization on security, or otherwise) or one that is authorized for an indeterminate period (for example, investments in permitted subsidiaries of a company).
- The concept is also used in section 464 to identify which downstream interests of certain related parties of a company are themselves considered to be related parties of the company.

Under subsection 10(1), a person has a substantial investment in a **corporation** if the person and the entities controlled by the person beneficially own shares that, in the aggregate,

- carry more than 10 per cent of the voting rights attached to all of the outstanding shares of the corporation or
- represent ownership of more than 25 per cent of its shareholders' equity.

For the purpose of the latter test, different classes of shares may represent different claims on shareholders' equity. For example, a share of a particular class of preferred shares might represent ownership of only a prorated portion of the stated capital (including any contributed surplus) recorded for that class of shares, whereas a fully participating share, such as a common share, would represent ownership of a

prorated portion of both the stated capital (including contributed surplus) for that class of shares and retained earnings.

Under subsection 10(5), a person has a substantial investment in an **unincorporated entity** if the person and any entities controlled by the person beneficially own more than 25 per cent of its ownership interests.

Subsections 10(2), (3) and (6) make clear that a person who already has a substantial investment in a corporation or unincorporated entity increases it if the person or entities the person controls either acquire more shares or ownership interests or acquire control of another entity that holds such shares or ownership interests, provided the acquisition increases the proportion of voting rights or shareholders' equity in the corporation, or of ownership interests in the unincorporated entity, that are held in the aggregate by the person and the entities controlled by the person.

Subsection 10(4) makes clear that a person also acquires a *new* substantial investment in a corporation if the person already has a substantial investment in it, by virtue of either the "10 per cent of voting rights" test or the "25 per cent of shareholders' equity" test, and then exceeds the threshold of the other test by making further acquisitions.

Definition of "distribution to the public"

Section 11

The concept of a "distribution to the public" is used in a number of places in the Bill and is substantially the same as the corresponding provision in the *Canada Business Corporations Act.*

Application

Application to federal trust and loan companies

Sections 12 and 13

This Act will apply to former-Act companies and to new companies incorporated or continued under it, unless discontinued under sections 38 to 40. The provisions of this Act take precedence if they present any conflict or inconsistency with the incorporating instrument of a former-Act company (its special Act or letters patent).

PART II - STATUS AND POWERS

Summary. **This Part provides companies with the usual status and powers accorded to corporations. Its provisions are substantially the same as the corresponding provisions in the current *Bank Act* and *Canada Business Corporations Act*.**

Companies have powers of a natural person

Sections 14 to 19

Unlike the current *Trust Companies Act* and *Loan Companies Act*, which limit companies to powers expressly conferred on them by their special Act or letters patent of incorporation, this Act confers on companies the rights, powers and capacities of a natural person. As a result of sections 14 and 15:

- A company has the power to do anything the Act does not expressly prohibit or restrict.
- A company may contravene the Act or its incorporating instrument without the action being void — as it would be under the current legislation owing to the absence of the natural-person power — but the company may incur sanctions and other consequences under the Act.
- A company can carry on business throughout Canada.
- A company has the capacity to carry on business abroad, subject to the laws of foreign jurisdictions.

Sections 16 to 18 set out standard corporate law provisions, the most important of which are:

- A company may exercise its powers even in the absence of by-laws.
- Shareholders are not, as a general rule, liable for liabilities of the company.

Requirement for regular review of this Act

Section 20

This section is similar to a long-standing provision in the *Bank Act*; its effect is to require Parliament to review the new Act by setting a time limit on the carrying on of business by the companies it governs. Unlike the current *Bank Act*, which requires a review after 10 years, this Act provides for a review after only five years. It is expected that subsequent versions of this Act will provide for decennial reviews.

PART III - INCORPORATION, CONTINUANCE AND DISCONTINUANCE

Summary. Sections 21 to 40 set out how companies are incorporated, how corporations incorporated under other Acts can be continued under this Act, and how companies incorporated under this Act can be continued under other Acts. Sections 41 to 48 set out rules governing the corporate names of companies and their affiliates.

Restrictions on incorporation

Sections 21 to 23

Unlike the *Canada Business Corporations Act*, which confers a right to incorporation, this Act provides that incorporations are at the discretion of the Minister and subject to the following restrictions:

- A company may not be incorporated if the applicant for letters patent is a domestic or foreign government, an agency of such a government, or an entity controlled by such a government. A limited exemption is provided for an applicant controlled by a government if the applicant is a foreign institution or the subsidiary of a foreign institution.
- If a proposed company would be controlled by a foreign institution engaged in the trust or loan business, the Minister must be satisfied that the company is capable of making a contribution to the Canadian financial system and that the home jurisdiction of the foreign institution provides or will provide treatment as favourable to Canadian companies as that provided to foreign institutions under this Bill.

Subsection 23(2) makes clear that where the foreign institution is a foreign bank, these provisions are superseded by the *Bank Act* provisions governing foreign entry.

Application procedures and public inquiry

Sections 24 and 25

Applicants must publish a notice of their intention to apply for the incorporation of a company. The application itself must contain the names of the first directors of the company and be filed together with any other information required by the Superintendent. As in the current *Bank Act*, interested parties are given an opportunity to raise objections to an application for incorporation.

Factors to be considered by Minister in deciding on proposed incorporations

Section 26

The Act requires the Minister to take into account all factors the Minister considers relevant to the application for incorporation and specifies several for which the Minister should have particular regard. These include several indicators of whether the business is likely to be run successfully, in particular

- the financial resources of the applicants (to ensure that the new company can be successfully financed on an ongoing basis);
- the soundness of the applicants' business plans;
- the applicants' business record and experience; and
- the character, competence and experience of the persons who will be running the company.

The Minister must also consider whether the incorporation would be in the best interests of Canada's financial system.

All these factors are also cited in section 388 as matters that must be taken into consideration when the Minister considers an application for significant transfers of share ownership or control of a company.

Provisions contained in letters patent of incorporation

Section 27

Unlike the incorporating instruments of former-Act companies, the letters patent incorporating new companies will generally contain only basic information: company name, location of head office, and date of incorporation. All other matters formerly dealt with in incorporating instruments — in particular the capital structure of a company — will normally be set out in the company's by-laws. This permits changes to a company's capital structure to be made through the "fundamental by-law" provisions of sections 222 to 227 and avoids the need to apply to the Minister for supplementary letters patent under sections 220 and 221.

Subsections (2) and (3) provide flexibility, however, by allowing the Minister to insert additional provisions in the letters patent. In addition, the Minister may impose terms and conditions for issuing the letters patent.

Effect of issue of letters patent

Sections 28 to 30

The proposed company comes into existence on the date set out in its letters patent of incorporation, which may be different from the date they were issued. Notice of the issue of the letters patent must be published.

Summary. Sections 31 to 37 deal with continuance, the process whereby a corporation incorporated under one statute or jurisdiction transfers to another.

Application for continuance

Sections 31 to 33

As with new incorporations (section 21), the continuance of a corporation as a company under this Act is at the Minister's discretion. Corporations may apply for continuance only if they are authorized to do so under their governing statute. Such applications are subject to all the requirements in sections 22 to 27 that apply to new incorporations.

Effect of issue of letters patent

Sections 34 to 36

A corporation is continued as a company on the date set out in its letters patent of continuance, which may be different from the date of issue. Notice of the issue of the letters patent must immediately be sent to the appropriate government official or body responsible for the corporation, such as the Director under the *Canada Business Corporations Act*; a notice must also be published.

Transitional provisions for continued companies

Section 37

This section is modelled on section 269 of the current *Bank Act*; it recognizes that some corporations continued as companies under this Act may have outstanding business commitments, or hold assets acquired before its continuance, that are not permitted under this Act. It authorizes the Governor in Council to grant continued companies a transition period to comply with this Act in respect of

- their business activities;
- their debt obligations outstanding on the date of the application for continuance;
- the continued issue of voting shares to non-residents on the conversion of outstanding convertible securities of a company;
- the type of assets they hold; and
- the maintenance of records, or the processing of information arising from such records, outside Canada.

The transition period for the issue of voting shares to non-residents is a temporary exemption from the restrictions in section 397 that prohibit a company from registering the acquisition by non-residents of voting shares of the company in cases where particular non-residents and the entities they control beneficially own more than 10 per cent of its voting shares, or where non-residents in total beneficially own more than 25 per cent of its voting shares.

Subsection 37(2) limits the period for which the Governor in Council can give permission to carry on a non-conforming practice. For a business activity, the permission can only be given for a period of 30 days after continuance. If the activity is carried on as a result of an existing contractual obligation, the permission expires on the expiry of the obligation. For non-conforming debt obligations, the period may not exceed 10 years. In all other cases, it may not exceed two years.

Subsection 37(3) permits the Governor in Council to renew any permission other than permission relating to business activities or record keeping for as long as the Governor in Council considers necessary. This subsection must be read in conjunction with subsection 37(4), which limits the Governor in Council's ability to extend these periods. The period for non-conforming debt obligations may only be extended if the Governor in Council is satisfied, on proper evidence supplied by the company, that the company is not able at law to redeem those obligations at the end of the 10-year period. The initial two-year period for owning non-conforming assets cannot be extended beyond 10 years from the date the company received its commencement order (see sections 52 and 53).

Discontinuance

Discontinuance into other jurisdictions and continuance as other financial institutions

Sections 38 to 40

Discontinuance is the process by which legislative responsibility for a corporation and its activities is transferred to a different public body or agency or to a different jurisdiction. Subsection 38(1) permits a company, with the permission of the Minister, to discontinue under this Act only if the company is applying to be continued under the *Canada Business Corporations Act* or to become a bank under the *Bank Act.* This list will be expanded by consequential amendment provisions of the coming insurance companies and cooperative credit societies legislation to allow companies to apply for continuance under those Acts as well.

Since discontinuance changes the fundamental corporate nature of the company, a special resolution of the shareholders must first be obtained. Subsection 38(2) requires the Minister to be satisfied that this resolution has been obtained and that the company meets certain other requirements designed to ensure that no confusion over the nature of the discontinued company remains with the public. In particular, the Minister must be satisfied that:

- in the case of a company seeking continuance under the *Canada Business Corporations Act*, the company is no longer carrying on the business of a trust or loan company (that is, it no longer holds deposits insured by the Canada Deposit Insurance Corporation and — if a trust company — no longer carries on fiduciary activities);

- in the case of a trust company seeking to become a bank under the *Bank Act*, the company no longer carries on fiduciary activities; and
- in both cases, the company will no longer use words reserved for trust and loan companies in its corporate name after the discontinuance, unless specifically authorized under section 48.

Corporate Name

Restrictions governing corporate names

Sections 41 to 48

These sections set out a number of restrictions on trust and loan company names:

- Section 41 prohibits companies from having names forbidden by another federal statute, names reserved for another company under section 45, or names that in the opinion of the Minister are potentially misleading: for example, because they are deceptive or similar to an existing trademark, trade name, or name of any other entity carrying on business.
- Section 42 requires that trust company names contain the words "trust", "fiducie" or certain variations of them to clearly identify them as trust companies.
- Section 47 prohibits entities incorporated or formed under federal jurisdiction from having names that use words reserved for trust and loan companies: "trust", "fiducie", "loan", "prêt" and certain variations of those words.

Sections 43 and 48 provide limited exemptions for companies and their affiliates from these restrictions. To allow affiliates of companies to be recognized as such, the Minister may permit companies to have names similar to those of their affiliates and may permit their affiliates to use the words "trust", "fiducie", "loan", "prêt" and certain variations of them in their names. "Affiliate" in these instances is used in the *de jure* sense of subsection 6(2).

If a company is for any reason incorporated with a prohibited name, section 46 enables the Minister to direct it to change its name and, if it fails to do so within 60 days, to revoke the name and assign another.

PART IV - ORGANIZATION AND COMMENCEMENT

Summary. This Part of the Act deals with what is required of companies to organize themselves and commence business. The requirements apply to both newly incorporated companies and companies continued or amalgamated under the Act.

Organization meetings

Sections 49 to 51

At its first meeting following incorporation, the board of directors may deal with matters necessary to organize the company. These may include making by-laws, appointing officers and an auditor, and authorizing the issue of shares. The first meeting of shareholders may only take place after the company has raised a minimum start-up capital of $10 million from the issue of shares. The first shareholders' meeting is required to approve, reject or amend the by-laws made by the board of directors and formally elect directors and appoint an auditor.

Permission to commence and carry on business

Sections 52 and 53

A company may not carry on any business until the Superintendent issues a commencement order. Existing licences issued under the *Trust Companies Act* and *Loan Companies Act* are deemed to be commencement orders. Unlike licences, which needed to be renewed periodically, commencement orders are valid indefinitely. Restrictions or conditions attached to an existing trust or loan company licence continue in effect as if they were restrictions or conditions included in a commencement order under section 58.

Restrictions on use of start-up capital before commencement order

Sections 54 and 55

These sections govern the use of company funds during the period after a company has come into existence but before the issue of a commencement order.

Conditions to be met before commencement order

Section 56

Before issuing a commencement order, the Superintendent must be satisfied that a number of requirements have been complied with — in particular that the first shareholders' meeting has been held, the minimum $10 million start-up capital has been raised, and the expenses paid out of start-up capital have been reasonable. Subsection 56(2) prohibits the issue of a commencement order if the company is unable to satisfy the issuance requirements within a year of its incorporation. Section 60 provides that the incorporation of the company lapses in such cases.

Commencement order may contain additional authorities, conditions and restrictions

Sections 57 and 58

The Superintendent may permit a company to carry on the fiduciary activities described in section 412 of the Act by including an authorization to that effect in its commencement order. Subsection 57(2) distinguishes a trust company from a loan company by defining a trust company to be a company whose commencement order contains this authorization. Companies that hold a valid licence under the current *Trust Companies Act* at the time this Act comes into force are deemed to have such a commencement order.

Subsection 57(3) permits the Superintendent to include in the commencement order conditions and limitations concerning the business of a company, provided they are consistent with the Act. The practice of attaching conditions and limitations to commencement orders parallels the licensing system under the current trust and loan companies legislation.

Although the commencement order is essentially a once-only event, subsequent changes in circumstance may make it appropriate to alter it. Section 58 authorizes the Superintendent to make such alterations for the purposes of

- granting or revoking the authorization for a company to carry on the fiduciary activities described in section 412;
- making an existing commencement order subject to conditions and limitations the Superintendent considers necessary; or
- amending or revoking conditions and limitations to which the order is subject.

The power to amend or revoke the authorization for fiduciary activities and to impose or vary conditions and limitations can only be exercised if the Superintendent has given the company a reasonable opportunity to make representations on the matter.

Publication of notice of commencement order

Section 59

Both the company and the Superintendent are required to publish a notice of the issue of a commencement order. This requirement does not apply to former-Act companies deemed to have been issued a commencement order under section 52.

Company to be wound-up if no commencement order is issued

Sections 60 and 61

As noted above (section 56), if a company fails to obtain a commencement order within its first year, the company ceases to exist, except for the purpose of distributing its assets to the shareholders or incorporators and otherwise winding up its affairs.

PART V - CAPITAL STRUCTURE

Summary. This Part of the Act sets out rules governing a company's capital, including the characteristics of its shares and subordinated indebtedness and the transfer of security certificates it issues. Most of its provisions are modelled on Parts V and VII of the *Canada Business Corporations Act* and Divisions C and D of Part IV of the current *Bank Act*.

Share Capital

Power to issue shares

Subsection 62(1)

Subsection 62(1) confers on the board of directors of a company the general power to authorize the issue shares at any time to any person for any consideration. This general power is subject to the other provisions of the Act (notably section 68 and the ownership restrictions of Part VII) and the by-laws of the company.

Concept of "par value" shares to be phased out

Subsections 62(2) to (5)

Subsection 62(2) requires that shares of a company must be in registered form and without nominal or par value. At one time, corporations commonly issued shares with a nominal or par value. Since the par value did not necessarily bear any relationship to the real value of the share, modern corporate statutes such as the *Canada Business Corporations Act* require shares to be without nominal or par value.

To accommodate former-Act companies and continued companies that may have outstanding par value shares when they come under the jurisdiction of this Act, subsections 62(3) and (4) deem such shares to be shares without par value. In addition, subsection 62(5) preserves any existing rights that are expressed in terms of the par value of such shares. For example, the right of a share to dividend payments expressed as a percentage of its par value would be unaffected by the fact that the share is deemed to be a share without par value.

Restriction on use of term "common share" to designate shares

Section 63

Subsection 63(1) requires companies to have one class of shares designated as "common shares" that must carry the right to

- vote at shareholders' meetings;
- receive dividends; and
- receive the remaining property of the company on dissolution.

Subsection 63(2) prohibits the use of the term "common shares" or any variation of that term for more than one class of shares.

Accordingly, a company may not have one class designated as "common shares" and another class designated as "non-voting common shares". Subsections 63(3) and (4) provide a twelve-month grace period to enable former-Act and continued companies with more than one class of shares designated as "common shares" to redesignate their shares in compliance with the Act.

Restrictions on issue of other classes of shares

Sections 64 and 65

These sections allow companies to issue classes of shares in addition to the common shares described in section 63 if authorized by by-law adopted by special resolution of their shareholders and approved in writing by the Superintendent. The by-laws may also provide for a class of shares to be divided into separate series. Series within a particular class must rank equally with each other in voting rights and the right to receive dividends or participate in the repayment of capital. This differs from the current *Bank Act* and *Canada Business Corporations Act*, which do not require the same voting rights for series within a class.

One share, one vote

Section 66

Subsection 66(1) establishes the general rule that all voting shares of a company carry one vote. Subsection 66(2) is a grandfathering provision that permits former-Act companies to continue to have outstanding voting shares that carry more than one vote or a fraction of a vote. No grandfathering is provided for continued companies, since they will not be granted continuance unless they arrange their share structure to comply with the rule.

Shares to be paid for in money

Sections 67 and 68

Like the current *Bank Act* — but unlike the *Canada Business Corporation Act* and the current trust and loan legislation — subsection 68(1) allows shares of a company to be issued only if they are fully paid for in money. Exceptions are made for shares issued

- in exchange for outstanding securities of the company;
- in the form of a share dividend;
- in exchange for shares of a continued company;
- under an amalgamation or similar agreement; or
- in exchange for shares of another corporation — with the approval of the Superintendent.

Subsection 68(2) is a transitional rule governing the treatment of shares of former-Act companies issued — but not fully paid for — under the current trust and loan legislation. Section 67 is a standard corporate law provision: once a share is fully paid, its holder has no other obligation to the company that issued it.

Transitional rules regarding capital structure

Sections 69 and 70

These sections set out the standard corporate law rules governing the establishment of a stated capital account for each class and series of shares (subsections 69(1) and (2)) as well as transitional rules governing modifications to the stated capital account on the coming into force of this Act (subsections 69(3) to (5)) and on continuance (section 70).

Pre-emptive rights

Section 71

Section 71 deals with pre-emptive rights: the right of shareholders to take up their proportionate share of new share issues on the same terms offered to others. Usually, such a right is conferred by law, subject to any restrictions set out in the incorporating instrument or by-laws. This Bill, however, only allows for pre-emptive rights if the by-laws explicitly provide for them. Furthermore, such rights may not be exercised when

- shares are issued in the circumstances cited as exemptions to the requirement in subsection 68(1) that shares be issued only when fully paid for in money; or
- the issue of the shares to a particular shareholder would be prohibited by the Act or — if the shareholder is a non-resident — the board of directors is aware of a requirement in the non-resident's country that appropriate authorities should first be notified.

Convertible shares and share options

Section 72

Companies may issue conversion privileges, options and other rights to acquire shares. These may be transferable and may also be made separable from any other security to which they may be attached.

Prohibition against holding of own shares and equity securities of upstream entities

Sections 73 to 77

In modern corporate law statutes, corporations are usually not permitted to own their own shares or the shares of any corporations that control them *de jure*. Section 73 modifies this prohibition to apply to equity investments in any entity, including an unincorporated entity, that controls the company within the meaning of section 3. It also requires the company to prevent its subsidiaries from holding shares of the company or shares or ownership interests in any entity that controls the company. Exceptions to these restrictions are set out in sections 74 and 75:

- Section 74 allows companies to accept donations of their shares, acquire them through issuer bids, and redeem their redeemable shares in accordance with the terms of the issue. Such transactions require the consent of the Superintendent and may not be entered into if they would result in a violation of the capital adequacy requirements of section 463.
- Subsection 75(1) allows companies and their subsidiaries to hold

such shares or ownership interests as personal representatives, provided they do not beneficially own them.

- Subsection 75(2) allows companies and their subsidiaries to have security interests in such shares or ownership interests, provided the amounts are nominal or immaterial.

The regulations will set out additional exceptions to this rule. One will enable the securities subsidiary of a company to participate in a distribution of the shares or ownership interests of the company or its parent entities.

Sections 76 and 77 set out the requirements for disposition of shares and ownership interests in a company and its parent entities:

- Companies and their subsidiaries must dispose of such shares or ownership interests without delay after acquiring them through the realization of a security interest.
- The subsidiaries of a former-Act company that hold such shares or ownership interests on the coming into force of this Act must dispose of them within six months.
- Companies are required to cancel all their shares acquired through issuer bids, redemptions and donations.

Reductions in stated capital

Sections 78 and 79

These are standard corporate law provisions that allow a company to reduce its stated capital and reimburse shareholders if authorized by special resolution and approved in writing by the Superintendent. As with redemptions and issuer bids (section 74) and dividend payments (section 82), a reduction in stated capital must not result in a violation of the capital adequacy requirements of section 463.

Adjustments to stated capital accounts

Sections 80 and 81

These sections are modelled on *Bank Act* and *Canada Business Corporations Act* provisions that set rules for making adjustments to stated capital accounts when a company acquires or redeems its shares, when shares are converted from one class or series to another or when debt obligations are converted into shares.

Declaration of dividends

Section 82

The board of directors of a company is authorized to declare a dividend payable in money, property, fully paid shares, or rights to acquire fully paid shares. The declaration of dividends is subject to certain notice requirements and must not result in a violation of the capital adequacy requirements of section 463.

Subordinated Indebtedness

Subordinated indebtedness

Section 83

This section sets out rules governing the issue of subordinated indebtedness by companies. These rules are less restrictive than those governing bank debentures — the equivalent concept in the current *Bank Act* — and those governing subordinated notes — the equivalent concept in the current trust and loan companies legislation. The only restrictions imposed on its issue by this section are the following:

- Since it is considered an element of a company's capital, subordinated indebtedness — like shares — may only be issued if it is fully paid for in money.
- Subordinated indebtedness is deemed not to be a deposit and — in order to avoid the possibility that it might be mistaken for a deposit — companies are required to specifically refer to it as subordinated indebtedness in public documents.

Security Certificates and Transfers

Procedures for transfer of ownership of security certificates

Sections 84 to 138

Sections 84 to 138 are standard corporate law provisions governing the transfer of security certificates issued by companies. They are substantially the same as Part VII of the *Canada Business Corporations Act* and sections 75 to 108 of the current *Bank Act.*

PART VI - CORPORATE GOVERNANCE

Shareholders

Summary. Sections 139 to 160 set out the basic rights of shareholders and the rules governing shareholders' meetings. They are modelled on sections 132 to 146 of the *Canada Business Corporations Act* and sections 60 to 74 of the current *Bank Act*. They deal with such matters as the rules governing the calling and holding of shareholders' meetings, the creation and use of lists of shareholders, and the resolution of disputes by the courts. Unlike the *Canada Business Corporations Act*, this Act does not permit the shareholders to relieve the directors of their responsibility to manage the business and affairs of the company by a unanimous shareholders' agreement.

Procedures for calling shareholders' meeting

Sections 139 to 150

These sections include a provision that annual meetings of shareholders must be held within six months of the end of each financial year (subsection 140(1)). They also govern

- the calling and holding of shareholders' meetings (sections 139 and 150 and subsection 140(1));
- the fixing of record dates for various purposes, including the payment of dividends and notice of meetings (subsections 140(2) to (5));
- the giving of notice of shareholders' meetings (sections 141 to 145);
- the presentation and consideration of shareholder proposals (sections 146 and 147);
- the preparation and use of shareholder lists (section 148); and
- the determination of a quorum for shareholders' meetings (section 149).

Exercise of voting rights at shareholders' meetings

Section 151

Section 151 allows shareholders only one vote per voting share. It complements section 66, which prohibits the issue of new shares that carry multiple or fractional voting rights. Like section 66, it grandfathers the voting rights of existing shares of former-Act companies that would contravene this rule.

Procedures for holding shareholders' meetings

Sections 152 to 160

These sections govern the following matters:

- representation at shareholders' meetings of shareholders that are not natural persons (section 152);
- treatment of joint shareholders (section 153);
- voting procedures at shareholders' meetings (section 154);
- adoption of written unanimous resolutions of shareholders in place of shareholders' meetings (section 155);
- requisitioning of shareholders' meetings by groups of shareholders (section 156);
- intervention by the courts when the requirement for shareholders' meetings cannot be met, or when disputes about the election or appointment of directors or auditors must be resolved (sections 157 to 159); and
- establishment of agreements among shareholders to exercise their voting rights in concert (section 160).

Directors and Officers

Summary. **Sections 161 to 219 deal with the roles, responsibilities and qualifications of officers and directors. Most are standard corporate law provisions modelled on the current *Bank Act* and *Canada Business Corporations Act*, though some changes have been made to reflect the policy set out in the *New Directions* policy paper.**

Duties

Duties of directors

Section 161

Subsection 161(1) sets out the general duties of the board of directors, charging it with the management — or supervising the management — of the business and affairs of the company. In addition, subsection 161(2) charges the board with a number of specific duties, requiring it to:

- establish an audit committee and a conduct review committee;
- establish procedures to resolve conflict of interest problems, and designate a committee to monitor these efforts;
- set up procedures to disclose prescribed information to customers; and
- establish appropriate investment and lending policies and procedures.

Subsection 161(3) permits a company that is a wholly-owned subsidiary of another federally incorporated financial institution to

dispense with an audit committee and conduct review committee, if their functions are performed on its behalf by those of the parent financial institution.

Standards of conduct

Section 162

This section sets general standards of conduct for directors and officers, including a requirement to act prudently and to comply with this Act, the regulations, and the incorporating instrument and by-laws of the company.

Qualification and Number — Directors

Summary. Sections 163 to 168 are mostly new provisions that reflect changes to the rules governing directors set out in the *New Directions* policy paper. Most of those that have *Bank Act* and *CBCA* precedents have also been modified.

Minimum size of board of directors and residency requirements

Section 163

The board of directors must consist of at least seven members. If the company is a subsidiary of a foreign institution, at least half of the directors must be resident Canadians. In all other cases, at least three-quarters must be resident Canadians.

Certain persons disqualified from being directors

Sections 164 and 165

As in other corporate statutes, only natural persons who are not minors, bankrupts or persons determined by a court to be of unsound mind may be directors of a company. Section 164 extends the prohibition to the following persons:

- shareholders who are prohibited by the ownership provisions (sections 386, 399 and 400) from voting their shares, as well as the directors, officers and employees of such shareholders;
- ministers, agents or employees of the federal or provincial governments; or
- employees of a foreign government.

Section 165 makes clear that there is no statutory requirement for a director to be a shareholder. Companies may, however, have by-laws requiring directors to hold at least some shares. Such shares — which are referred to in this Act as "directors' qualifying shares" — are not counted in determining whether a company is a wholly-owned subsidiary for the purposes of subsections 161(3) and 167(2).

Restriction on number of affiliated directors

Sections 166 and 167

No more than two-thirds of the directors of a company may be affiliated with it. The section 166 definition of an affiliated *person* is

different from the section 6 definition of "affiliate" — which applies only to entities — and includes:

- officers and employees of the company or its affiliates;
- persons with a significant interest in a class of shares of the company or with a substantial investment in any of its affiliates;
- significant borrowers from the company, persons who control a significant borrower, and officers, directors and employees of a significant borrower;
- significant suppliers of goods or services to the company;
- persons who have a loan not in good standing from the company or any of its affiliates, persons who control an entity that has such a loan not in good standing, and directors, officers and employees of such entities; and
- the spouse of any person referred to above.

Subsection 167(2) provides an exemption from this requirement for companies that are wholly-owned subsidiaries of another federally incorporated financial institution.

Restrictions on number of "inside directors"

Section 168

In addition to the restriction on the number of affiliated directors, no more than 15 per cent of the directors of a company may be employees of the company or its subsidiaries. To accommodate companies with small boards, an exception is made to allow up to four employee directors, provided they do not constitute a majority of the board.

Election and Tenure — Directors

Rules governing election and tenure of directors

Sections 169 to 171

These sections set out the general rules for the election and tenure of directors. They are modelled on standard corporate law provisions governing the fixing of the number of directors by by-law, the election of directors at the annual meetings of shareholders, and their terms of office.

Cumulative voting

Section 172

As in the current *Bank Act*, *Canada Business Corporations Act* and other corporate statutes, this Act gives companies the option of electing their directors by cumulative voting. Unlike those other statutes, however, this Act also *requires* a company that has more than one shareholder to elect its directors by cumulative voting if any person, whether directly or through entities the person controls, can exercise more than 10 per cent of the voting rights attached to its shares.

Subsection 172(1) is the standard corporate law provision that sets out the procedures for cumulative voting. Under cumulative voting rules:

- The exact number of directors to be elected must be fixed by by-law.
- The total number of votes eligible to be cast is determined by multiplying the number of directors to be elected by the total number of votes attached to all voting shares of the company.
- Shareholders may cast all of their votes for a particular candidate or may distribute them among more than one candidate.
- A person is elected director if the person is among those receiving the highest number of votes.

These features facilitate the election of directors representing minority shareholders by giving them a better opportunity to influence the vote for a particular candidate than they would have under the standard plurality voting system. In particular, minority shareholders (or groups of such shareholders) can always ensure the election of such a director if they hold a certain minimum fraction (equal to the reciprocal of the number of directors to be elected) of a company's total voting rights: for example, where the by-laws provide for 20 directors, a minority shareholder who has over 5 per cent of the voting rights is able to elect at least one director.

Re-election of directors

Section 173

This section makes clear that directors may be re-elected any number of times.

Incomplete Elections and Director Vacancies

Faulty election of directors

Sections 174 and 175

These sections set out rules governing the faulty election or appointment of directors:

- An election or appointment of directors is **void** if the board fails to meet the composition requirements of subsection 163(2) or 167(1) or section 168, or if the shareholders fail to elect a quorum of directors at a shareholders' meeting.
- The election of directors at a meeting of shareholders is **valid but incomplete** if, after the election, a quorum is in place but the number of directors is less than the minimum number required by this Act or the by-laws.

In both cases, the Act designates interim directors and requires them to call a special meeting of shareholders to conduct a proper election or fill the remaining vacancies.

Creation of director vacancies

Sections 176 to 177

These sections are standard corporate law provisions governing vacancies on the board of directors created through resignation, removal by shareholders, disqualification, or death.

Statements submitted by directors on resignation or replacement

Sections 178 to 179

As in the *Canada Business Corporations Act* and the current *Bank Act,* a director who resigns or learns that he or she will be removed as a director or replaced at the end of a term is entitled to submit a written statement to the company giving reasons for the resignation or setting out objections to the removal or replacement. The company is required to send a copy of the statement to all holders of its voting shares and to the Superintendent.

In addition, subsection 178(2) is a new provision that *requires* a director who resigns as a result of a disagreement with the other directors or management of a company to submit a written statement to the Superintendent describing the disagreement.

Filling of director vacancies

Sections 180 to 183

These sections provide for the filling of vacancies resulting from events other than void or incomplete elections (see sections 174 and 175):

- Except when vacancies cause a company to be in violation of the "minimum number" and composition requirements in sections 163, 167 and 168, the by-laws may require that vacancies be filled only by a vote of all shareholders, or of the shareholders of the class or series that has the exclusive right to elect the directors among whom a vacancy exists.
- When the "minimum number" and composition requirements are not met as the result of a vacancy, they must be filled by a quorum of directors without delay.

Meetings of the Board

Directors' meetings

Sections 184 to 190

These sections are modelled on standard corporate law provisions in the *Canada Business Corporations Act* and the current *Bank Act* that govern the holding of meetings of the board or of its committees, including the requirement for giving notice of such meetings, their adjournment, the determination of a quorum, the requirement for the presence of a majority of resident Canadian directors, the recognition of the validity of meetings held by means of telephone or other electronic communications media, the recording of directors' dissent, and the recording of director attendance.

The principal differences in this Act from the others are:

- The rules are extended to apply to meetings of committees of the board as well as the board itself;
- Section 186 fixes the quorum at a majority of the actual number of directors or committee members, rather than a majority of the minimum number of directors provided for in the by-laws. Also, the quorum rule cannot be varied by by-law.
- The "Canadian majority" requirement in section 187 is expressed in terms of the number of directors who are "resident Canadians" (as defined in section 2) rather than the number who are Canadian citizens.
- References to the validity of meetings by telephone and other methods have been extended to cover a broader range of electronic media that enable participants to communicate.

Superintendent may require board meetings to be held

Section 191

This is a new provision that allows the Superintendent to call a meeting of the board of directors when the Superintendent considers it necessary.

By-laws

By-laws

Sections 192 to 195

Sections 192 and 193 are standard corporate law provisions governing the making, amendment and repeal of ordinary by-laws by the board of directors, subject to confirmation by shareholders; shareholders may also make by-laws by way of proposals approved at shareholders' meetings. [Section 222 sets out additional provisions governing the making, amendment and repeal of "fundamental" by-laws.]

Sections 194 and 195 provide that by-laws of former-Act companies not inconsistent with this Act continue in effect. They do, however, require by-laws for the remuneration of directors to be reconfirmed at the first annual meeting after the Act comes into force.

Provisions in incorporating instrument deemed to be by-laws

Section 196

This Act consigns to by-laws many matters set out in the incorporating instruments of former-Act and continued companies (see section 27). Section 196 deems such provisions to be set out in the by-laws of former-Act and continued companies and provides that they may be modified or repealed in the same way as other by-laws.

Committees of the Board

Committees of the board

Sections 197 to 199

These sections set out the general power of the board to establish committees of directors and assign them duties, as well as a statutory requirement to establish an audit committee and a conduct review committee. They also set out the Act's requirements for the composition of the audit and conduct review committees, their powers and duties, and certain requirements for the reporting of their activities:

- The majority of members of the two committees must be unaffiliated directors. None may be an officer or employee of the company or its subsidiaries.
- The audit committee must review the financial statements and returns of a company, meet with auditors to discuss the financial statements, ensure that the company maintains appropriate internal controls, and review transactions brought to its attention that could adversely affect the well-being of the company. The audit committee may also call a meeting of the full board to consider any matter of concern to it.
- The conduct review committee must review related party transactions as required by Part XI and ensure that any that might materially affect the stability or solvency of the company are identified.

Directors and Officers — Authority

Summary. **Sections 200 to 206 deal with the appointment of officers and the authority that the board of directors may delegate to them.**

Appointment of officers and delegation of powers

Sections 200 to 202

The board is required to appoint one of its members, who must ordinarily reside in Canada, to be the chief executive officer of the company and may appoint other officers of the company. Subject to certain restrictions, the board may also delegate its powers to management or to committees of the board.

Delegation of trustee powers to management

Section 203

While in legal terms it is the board of directors that is responsible for fulfilling fiduciary responsibilities arising out of a company's trust activities, it would be impractical to require the board to be involved in their day-to-day administration. Accordingly, this section — which applies only to trust companies — permits their boards to delegate their authority to exercise trust powers to management.

Remuneration, validity of acts, and participation of directors at shareholders' meetings

Sections 204 to 206

These sections govern:

- the authorization given by the board of directors for the remuneration of directors, officers and employees;
- the validity of actions of directors and officers despite defects in their qualifications or irregularities in their election or appointment; and
- the right of directors to participate at meetings of shareholders.

Conflicts of Interest

Rules governing conflicts of interest of members of the board

Sections 207 to 211

These sections set out rules requiring officers and directors to make timely disclosure to the company of contracts between themselves and the company and between the company and entities in which they may have an interest.

Liability, Exculpation and Indemnification

Rules governing liability, indemnification and insurance of directors and officers

Sections 212 to 219

These sections set out rules governing

- the liability of directors to the company and its employees;
- the indemnification by the company of its directors and officers, and other persons acting on its behalf, for the expenses of legal actions against them in their official capacity; and
- the obtaining of insurance to cover the liability of its directors and officers, and other persons acting on its behalf.

Amendments

Summary. **Sections 220 to 227 govern the amendment of the incorporating instrument and fundamental by-laws of companies. They are loosely modelled on current *Bank Act* and *Canada Business Corporations Act* provisions.**

Amendment of incorporating instrument

Sections 220 and 221

These sections enable a company to apply to the Minister for an amendment to its incorporating instrument for the purposes of changing its name or adding, changing or removing any other provision permitted by the Act. Proposals to this effect are subject to certain notice requirements and must be authorized by a special resolution of shareholders. In order for the amendment to take effect, the Minister must approve the application and issue supplementary letters patent.

Amendment of fundamental by-laws

Sections 222 to 227

Many of the basic provisions currently set out in the incorporating instrument of corporations are, under this Act, consigned to the by-laws (see the explanatory notes to sections 27 and 196). Unlike ordinary by-laws, but like amendments to the incorporating instrument, the making, amendment or repeal of these "fundamental" by-laws — those governing capital structure, the number of directors and changes in the location of the company's head office — requires a special resolution of all shareholders, including (in some cases) the holders of shares that ordinarily do not carry the right to vote. In most cases, the Superintendent must also approve the changes in order for them to take effect.

Amalgamation

Rules governing the amalgamation of corporations and their continuance as a company

Sections 228 to 236

These sections are modelled on the *Bank Act* and *Canada Business Corporations Act* and govern the creation of new companies by the amalgamation of existing companies and/or other federally incorporated corporations (including other financial institutions) that are authorized to apply for an amalgamation under this Act. Other corporations seeking amalgamation under this Act must first be continued as companies under the Act (see sections 31 to 37).

The applicants must set out the terms of their proposed amalgamation in a draft amalgamation agreement, which must be approved by the Minister before being submitted to their shareholders.

All shareholders — including those who normally do not have voting rights — are eligible to vote on the amalgamation agreement. Holders of different classes or series of shares are entitled to vote separately if their rights under the amalgamation would differ from those of other shareholders. The amalgamation agreement is approved when the shareholders of all the applicants have approved it by separate special resolutions.

The applicants must then meet certain notice requirements and send the approved amalgamation agreement to the Minister within three months. Before issuing letters patent to give effect to the amalgamation agreement, the Minister must be satisfied that all the requirements of the Act relating to amalgamations have been met. In addition, as with new incorporations and continuances, the issue of letters patent of amalgamation is subject to sections 22 to 27.

Section 232 provides for "short-form amalgamations": streamlined amalgamation procedures to facilitate the amalgamation of wholly-owned subsidiaries of the same person. Section 236 is a provision similar to the one that applies to continuances (section 37) and provides a limited transition period during which newly-amalgamated companies may continue to engage in certain practices that would otherwise be prohibited by the Act.

Transfer of Business

Rules governing the sale of all of a company's business

Sections 237 to 241

These sections govern the sale of all or substantially all of the assets of a company to another federally-incorporated financial institution. Most of them closely parallel provisions in sections 228 to 236 governing amalgamations — in particular the requirement for approval of a draft sale agreement by the Minister, the procedures for subsequently obtaining the approval of shareholders, and the three-month time limit for submitting the approved agreement to the Minister.

Ministerial approval is also required before the sale agreement can take effect. Before giving final approval, the Minister must be satisfied that the company has met all relevant requirements and, in the case of a trust company, has made proper arrangements for the protection of the beneficiaries of trusts under its administration.

Head Office and Corporate Records

Summary. Sections 242 to 252 describe the records companies are required to keep and the rules governing their maintenance and retention. Some records are unique to trust companies and deposit-taking institutions, others are general corporate records. The rules governing them are modelled on similar rules in the *Canada Business Corporations Act* and the current *Bank Act*.

Location of head office and records to be kept

Sections 242 and 243

These sections require a company to maintain its head office at an address in the place specified in its incorporating instrument or by-laws. They also specify the records a company must keep and maintain. These include corporate records, such as its incorporating instrument, by-laws, and minutes of shareholders' and directors' meetings, as well as records of deposit-taking and fiduciary activities.

Keeping of company records and access of shareholders and creditors

Sections 244 to 247

These sections set out the rules governing the keeping of company records and access by shareholders, creditors and other persons to company records such as by-laws and shareholder lists.

Form and protection of records

Sections 248 and 249

These sections set out rules governing the form in which records may be kept and a requirement that companies take reasonable precautions to protect their records from loss or falsification, to detect and correct any errors they contain, and to prevent unauthorized access to them.

Processing of records in Canada

Section 250

This section requires companies to maintain and process information and data relating to their records in Canada. Companies may, however, keep copies of such records outside Canada unless expressly prohibited from doing so by the Minister or the Superintendent. These rules do not apply to records of the activities of a company outside Canada.

Regulations governing retention of records

Sections 251 and 252

Companies are required to retain their records for a period that may vary with the type of record. While the period of retention of certain deposit records is governed by section 424, subsection 251(1) and the regulations under section 252 govern all other records. This

approach is more flexible than the approach in the current *Bank Act*, which sets a fixed 10-year retention period for most records.

Securities Registers

Rules on establishment and maintenance of securities registers

Sections 253 to 259

These sections establish rules for keeping registers recording the securities issued by the company in registered form. They are modelled on corresponding provisions in the *Bank Act* and *Canada Business Corporations Act.*

Corporate Name and Seal

Use of corporate name in legal documents

Sections 260 and 261

These sections require a company to set out its name in contracts and other documents. However, they also provide that a document is not invalid merely because it does not bear the company's corporate seal.

Proxies

Rules governing proxies

Sections 262 to 269

These sections are standard corporate law rules dealing with proxies. They are substantially the same as those in the corresponding provisions of the *Canada Business Corporations Act* and the current *Bank Act.*

Insiders

Rules governing insider reports and insider trading

Sections 270 to 277

These sections are substantially the same as the current *Canada Business Corporations Act* and *Bank Act* provisions that set out reporting requirements for company insiders, prohibit insider trading, and provide for civil remedies.

Prospectus

Prospectus requirements

Sections 278 to 287

These sections are modelled on sections 145 to 154 of the current *Bank Act* and require the filing of a prospectus before any distribution of the securities of a company. Regulations made under section 280 will provide exemptions for private placements and other classes of securities issues that are not part of a distribution to the public. In addition, since provincial securities laws also impose prospectus requirements on the distribution of companies' securities, section 281 permits the Superintendent to exempt an issue from the prospectus requirements if satisfied that the company has filed a prospectus substantially complying with these rules in another jurisdiction.

Compulsory Acquisitions

Squeeze-out of minority shareholders after successful takeover bid

Sections 288 to 298

These sections correspond to section 206 of the *Canada Business Corporations Act (CBCA)*. Commonly known as "squeeze-out" provisions, they enable a person who has acquired 90 per cent or more of a class of shares of a company through a takeover bid to acquire the remaining shares of that class by paying fair compensation to their owners.

Trust Indentures

Rules governing issue of subordinated indebtedness under trust indentures

Sections 299 to 311

These sections are modelled on sections 82 to 93 of the *Canada Business Corporations Act (CBCA)* and sections 133 to 144 of the current *Bank Act*. They set out procedures governing the issue of debt obligations under a trust indenture. Like the *Bank Act*, but unlike the *CBCA*, they permit only subordinated indebtedness to be issued in this way.

Summary. Sections 312 to 338 set out the requirements for financial disclosure by companies and the rules governing the appointment and duties of auditors. Most are standard corporate law provisions modelled on the current *Bank Act* and *Canada Business Corporations Act*, though some changes have been made to reflect the policy set out in the *New Directions* policy paper.

Annual Financial Statement

Financial year

Section 312

Companies can choose December 31 or October 31 as their financial year end. Current trust and loan companies legislation provides for December 31, the current *Bank Act* for October 31.

Annual financial statements and accounting principles

Section 313

The board of directors must submit a comparative annual financial statement and auditor's report to every annual meeting of shareholders. The annual financial statement must contain:

- a balance sheet, income statement, statement of change in financial position, and statement of change in shareholders' equity for the most recently completed financial year;
- a list of entities in which the company has a substantial investment, other than those acquired through realizations or loan workouts;
- any other information necessary to fairly present the company's financial condition; and
- any other information required by the regulations.

Subsection 313(4) requires companies to prepare financial statements in accordance with generally accepted accounting principles unless the Superintendent specifies otherwise. As with auditing standards (section 328), generally accepted accounting principles are those described in the Handbook of the Canadian Institute of Chartered Accountants.

Approval of annual statement by the board of directors

Section 314

Annual statements must be approved by the board of directors before they are published and submitted to the annual meeting of shareholders.

Retention of financial statements of downstream interests

Section 315

A company is required to keep copies of current financial statements of entities in which it has a substantial investment. Shareholders of a company and their representatives may examine such statements unless the company obtains a court order barring access to them.

Distribution of annual statements

Sections 316 and 317

Companies must send a copy of the annual statement to each shareholder at least 21 days before the annual meeting, unless the shareholder waives the requirement. If a company fails to do so, the annual meeting must be adjourned until the requirement is met. A copy of the annual statement must also be sent to the Superintendent within 45 days after each annual meeting.

Auditor

Appointment of auditor

Sections 318 and 319

The shareholders are required to appoint an auditor at each annual meeting. This Act differs from the *Bank Act* in that:

- companies under this Act are required to appoint only one auditor, rather than two;
- the auditor may be a natural person and need not be a firm of accountants; and
- regular rotation in the office of auditor is not required.

Qualifications for company auditor

Section 320

If a natural person is appointed auditor of a company, that person must

- be a member in good standing of a provincial association of accountants;
- have five years' experience at a senior level in auditing financial institutions; and
- ordinarily reside in Canada.

In addition, the auditor must be independent of the company. Independence is a question of fact to be determined with regard to the particular circumstances of a proposed appointment. However, a person is deemed *not* to be independent if the person, another member of the person's accounting firm, or any other business partner of the person

- is a director, officer, employee of the company or any of its affiliates;
- is a business partner of a director, officer or employee of the company or any of its affiliates;
- has a material interest in equity securities of the company or any of its affiliates; or
- has been involved in the receivership, bankruptcy or liquidation of any affiliate of the company within the preceding two years.

A firm appointed auditor must designate one of its members who meets the requirements noted above to conduct the audit of the company.

Resignation and removal of auditor

Sections 321 to 324

An auditor who ceases to be qualified under section 320 is required to resign. A court order removing the auditor may be obtained if the disqualified auditor does not resign. The Superintendent may revoke the appointment of an auditor by sending a written notice to the auditor and the company. An auditor may also be replaced by ordinary resolution of the shareholders. The board of directors is authorized to fill any vacancy occurring in the office of auditor. If it does not, the Superintendent may fill the vacancy.

Attendance of auditor and Superintendent at meetings

Section 325

As in the *Canada Business Corporations Act* and the current *Bank Act*, a company's auditor is entitled to attend shareholders' meetings and may be required to do so by any director or shareholder. Subsections 325(3) and (4) are new provisions that require the Superintendent to be notified when a director or shareholder requires the auditor to be in attendance at a shareholders' meeting. They enable the Superintendent to attend the meeting and provide an opportunity

for the Superintendent to participate in the discussion of the matters that the auditor may be required to address.

Statement made by auditor on resignation

Sections 326 and 327

Section 326 makes mandatory the current *Bank Act* and *Canada Business Corporations Act* provisions that allow an auditor who is removed or resigns to submit a statement to the company and the Superintendent regarding the reasons for the resignation or the factors that led to the removal. A person or firm appointed to replace such an auditor may not take office until the former auditor provides them with such a statement.

Audits

Sections 328 to 334

These sections set out rules governing the auditing of companies. In general, auditors must conduct any examinations they consider necessary to enable them to make the report to shareholders on a company's annual statement required by section 331. To that end, auditors may require directors, officers and employees of a company to give them access to both its own records and those of entities in which it has a substantial investment, provided the directors or other persons are reasonably able to do so (section 329).

Section 328 provides that — as with accounting principles (subsection 313(4)) — audits are to be conducted according to generally accepted auditing standards unless the Superintendent specifies otherwise. These standards are those described in the Handbook of the Canadian Institute of Chartered Accountants.

In addition to these requirements:

- The Superintendent may require the auditor of a company to make special examinations and report on the auditing procedures used in examining the company's annual statement and on the internal control procedures used by the company (section 330).
- The shareholders of a company may require the auditor to audit any financial statement prepared for them by the directors and report on whether it fairly presents the information required by shareholders (section 332).
- The auditor of a company must report to its chief executive officer and chief financial officer, and to the Superintendent, on transactions entered into that are not within the company's powers, expected losses on loans in excess of one-half of 1 per cent of regulatory capital, and any other unsatisfactory situation requiring rectification (section 333).
- Companies must ensure that their own auditors are also appointed to audit their subsidiaries, except in the case of foreign subsidiaries where the laws of the jurisdiction concerned do not permit it (section 334).

Auditor's relationship with audit committee and internal auditors

Sections 335 and 336

As in corresponding provisions of the *Canada Business Corporations Act* and the current *Bank Act*, section 335 and subsection 336(1) provide that the auditor of a company

- is entitled to participate in meetings of the company's audit committee and must attend every such meeting if requested to do so by a member of the committee; and
- has the power to call a meeting of the committee.

Subsection 336(2) is a new provision that requires the chief internal auditor of a company to meet with the auditor at the auditor's request.

Detection of errors in financial statements

Sections 337 and 338

Directors and officers are required to notify the auditor and the audit committee if they become aware of any error in a financial statement. Conversely, if auditors or former auditors discover a material error in a financial statement on which they reported, they must inform the board of directors, which is then required to prepare and issue a revised statement and inform the shareholders and Superintendent of the error.

Remedial Actions

Derivative actions and actions to rectify records

Sections 339 to 343

These sections are modelled on corresponding provisions in Part XX of the *Canada Business Corporations Act*. Sections 339 to 342 permit the Superintendent or a complainant to bring a derivative action: legal action taken in the name of a company or any of its subsidiaries if the company or subsidiary refuses to take the action itself and a court agrees that the action should be taken. Section 343 permits persons adversely affected by errors or omissions in a company's securities register to apply to a court for an order rectifying the error or omission.

Liquidation and Dissolution

Rules governing voluntary liquidation of companies

Sections 344 to 373

These sections deal with procedures to be followed in the voluntary liquidation of a company that is not insolvent. They are standard corporate law provisions modelled on Part XVIII of the *Canada Business Corporations Act* and Part XI of the *Bank Act* and govern

- the liquidation of companies with no assets or liabilities, such as those whose incorporation lapses under section 60 (section 347);

- the liquidation process for other companies and the issuing of letters patent of dissolution by the Minister (sections 348 to 351);
- applications by the Superintendent or any other person for supervision of the liquidation process by a court (sections 352 and 353);
- the powers of the court to supervise a dissolution, including the appointment of a liquidator (sections 354 to 357);
- the duties, powers and privileges of a liquidator (sections 358 to 362);
- the making of a final order of liquidation by the court, the right of shareholders to be paid in money, and the issue of letters patent of dissolution (sections 363 to 365);
- the continuation of legal liability of a company after its dissolution (sections 366 to 368); and
- the transfer to the Bank of Canada of amounts remaining unclaimed by shareholders after dissolution and the retention of a dissolved company's records (sections 369 to 373).

Priority on insolvency

Section 374

This section governs the priorities of various classes of creditors when a company is found to be insolvent and is forced into liquidation under the *Winding-Up Act*. Modelled on section 277 of the *Bank Act*, its effect is as follows:

- Secured creditors enjoy priority over all other creditors to the extent of the value of their security.
- With regard to unsecured and unsubordinated liabilities, the Crown enjoys priority over all other creditors with otherwise equivalent claims. As in the current *Bank Act*, however, this Act waives Crown priority in respect of fines and penalties for which companies are liable and explicitly gives them the lowest ranking among creditor claims: after deposits, other unsecured creditors and subordinated indebtedness, but before shareholder claims.
- Deposit liabilities and other unsubordinated liabilities rank ahead of subordinated indebtedness.

Subsection (3) makes clear that the relative ranking of claims within each of these classes is to be determined in accordance with applicable laws governing priorities.

PART VII - OWNERSHIP

DIVISION I

CONSTRAINTS ON OWNERSHIP

Summary. This Division sets out the general restrictions on the ownership of company shares. As stated by the Minister of State (Finance) in his press release of August 11, 1989, the key element of the ownership rules in the Bill is a requirement for Ministerial approval of all acquisitions and increases of significant interests in classes of company shares. The detailed rules governing Ministerial review of such transactions are similar to those set out in the 1987 discussion draft of the trust and loan companies legislation, though a number of changes have been made to provide greater flexibility. In particular, the Bill provides exemptions from the approval requirement for *de minimis* fluctuations in shareholdings and certain other cases. In addition to the provisions requiring Ministerial approval, this Division contains a "35 per cent widely-held" rule for the ownership of voting shares of large companies as well as sanctions for violations of its provisions.

Ministerial approval required for acquisition or increase of significant interests

Section 375

This section requires written Ministerial approval before a person, or an entity controlled by the person, may acquire shares of a company — either directly or through the acquisition of control of an entity that holds such shares — if the acquisition would cause the person to acquire or increase a significant interest in a class of shares of the company. By extension, this requirement also applies to situations where a person acquires *control* of a company: changes in control of a company would invariably involve the acquisition or increase of a significant interest by the person acquiring control.

Sections 387 to 394 set out the criteria and procedures governing approval. Where more than one person would acquire or increase a significant interest as the result of a transaction, each of them must obtain the approval of the Minister. For example, if a corporation were to acquire a significant interest in a class of shares of a company, its controlling shareholder would also acquire a significant interest by virtue of the way "significant interest" is defined (see section 8). Section 387(2) allows any person requiring approval to apply on behalf of all such persons.

Subsection 375(2) makes clear that an amalgamation, merger or other reorganization of entities that have interests in shares of a company also requires prior approval in writing of the Minister if the resulting entity would have a significant interest in a class of shares of the company.

Subsections 375(3) and (4) are transitional provisions that require persons who may have acquired control of a company (either directly or by way of the acquisition of control of one or more other entities that hold shares in the company) to obtain Ministerial approval in accordance with this Part. This requirement applies only where the acquisition of control occurred between August 11, 1989 — the effective date for the implementation of the requirement for Ministerial review, as announced in the press release issued by the Minister of State (Finance) on that date — and the coming into force of this Act. An exemption from this requirement is provided, however, if the acquisition of control was made pursuant to a binding written agreement that was substantially completed by August 11, 1989.

Ministerial approval required for registration of acquisition or increase of significant interests

Section 376

This provision complements section 375 — which prohibits direct or indirect acquisitions of shares that would cause a person to acquire or increase a significant interest without prior Ministerial approval — by also prohibiting the company from registering any direct acquisition of shares in its securities register without such approval.

Exceptions for small fluctuations in share holdings

Section 377

This section provides flexibility by waiving the requirement for Ministerial approval in the case of small fluctuations in the level of a person's significant interest.

Subsection (1) provides a general exemption from the requirements of sections 375 and 376 for small fluctuations in a person's existing significant interest in a class of shares of a company. The "smallness" test is set out in subsections (2) and (3). It provides exceptions for fluctuations in existing significant interests (through direct acquisitions of shares, acquisitions made by entities controlled by the person, and acquisition of control of entities that hold such shares) within a band of plus or minus 5 percentage points from

- the latest benchmark level reached with the approval of the Minister, or
- the level of the person's significant interest on the date of tabling of this Bill, if the person has made no subsequent acquisition requiring approval.

If a person's significant interest drops below the lower bound of this range, the exemption applies only to subsequent rebounds totalling 10 percentage points or less. That is, if a person's significant interest declined by as much as 10 percentage points, the person could still get back to the original benchmark level; larger rebounds — for example, back to the former upper bound of the range — would require Ministerial approval.

Because the exemption for small fluctuations applies only to persons with an *existing* significant interest, it does not allow a person

who ceases to have a significant interest by virtue of a small decline in the percentage of shares held to reacquire a significant interest without Ministerial approval.

Subsection (4) provides that the above exceptions do not apply to a fluctuation resulting in the acquisition of control of a company. They also do not apply where a person already has *de facto* control of an entity and the fluctuation would cause the person and the entities controlled by the person to have beneficial ownership of more than 50 per cent of the voting rights in the company.

Exception for infusions of capital ordered by the Superintendent

Subsection 378(1)

The requirement for Ministerial approval of share acquisitions does not apply when a company issues shares in accordance with an order of the Superintendent to increase its capital.

Approval in advance

Subsection 378(2)

The Minister may approve in advance the acquisition of a particular number or percentage of shares over a specified period.

Requirement for 35% of voting shares to be widely held

Section 379

This section requires a company with equity, including minority interests in its subsidiaries, of $750 million or more to take the steps necessary to ensure that at least 35 per cent of total voting rights of the company are attached to shares both widely held and belonging to classes listed for public trading on a recognized stock exchange.

Companies exceeding the $750 million equity threshold have five years to comply, measured from the day of the first annual general meeting after the threshold is reached or, for companies already above the threshold, from the day this Part comes into force. Subsection (4) enables the Minister to extend the period if general market conditions make it unduly onerous for a company to meet the requirement within the initial five years.

Failure to meet the "35% widely-held" rule: sanctions

Section 380

A company that fails to comply with the "35 per cent widely-held" rule in section 379 within the required period is prohibited from having average total assets in any period of three calendar months that are greater than its average total assets in the last three complete calendar months before its failure to comply. The test must be met at the end of each month, beginning with the first complete calendar month after the failure to comply.

For this restriction, "total assets" will be defined in the regulations to mean the consolidated assets of the company and its subsidiaries at the end of each month. "Average total assets" are to be

calculated as a three-month moving average of total assets, measured at the end of each calendar month in the period.

These restrictions cease to apply once the company resumes compliance with section 379 or if an exemption order is granted under section 382.

Exception where infusion of capital ordered by the Superintendent

Section 381

Section 381 provides for an exception from section 379 if a company issues shares in accordance with an order of the Superintendent to increase its capital. This exception parallels the exception from the requirement for Ministerial approval of share acquisitions in subsection 378(1). The Superintendent may, however, set a time limit after which the company would once again be required to comply with section 379.

"35% widely-held" test may be met by parent entity

Section 382

If a company is controlled *de jure* by another entity whose activities are primarily financial (including a domestic or foreign financial institution described in paragraphs 382(1)(*a*) to (*h*)), that entity may apply to the Minister to exempt the company from the "35 per cent widely-held" rule.

Such entities are required to comply with any terms and conditions the Minister may set. Where the entity is not a financial institution described in paragraphs 382(1)(*a*) to (*h*), it must also give undertakings to adopt cumulative voting procedures for the election of its board of directors (see section 172) and to comply with the "35 per cent widely-held" test as if it were a company under this Act.

The Minister may terminate an exemption order if the entity in question ceases to comply with any of the conditions described above; the company is then required to comply with the "35 per cent widely-held" rule on the day the exemption expires. If it is not in compliance, the sanctions are the same as in section 380: the moving average of the company's total assets in any three-month period may not increase after the exemption expires, unless the Minister grants an extension.

Temporary exemptions from the "35% widely-held" rule

Section 383

This section grants companies a six-month period to remedy temporary breaches of the "35 per cent widely-held" rule that arise

- in the course of a distribution of shares to the public — for example, because of an uneven take-up of shares;
- because of the redemption of shares — for example, if the purpose of the redemption is to issue new shares to the same shareholders;
- because the holder of an option or conversion privilege exercises the right to acquire shares; or

- because non-voting shares that are not widely held acquire voting rights — for example, because preferred dividends are in arrears.

The restrictions on the growth of average total assets only begin to apply if the company fails to comply with the test before the end of the grace period. The Minister may, however, extend the grace period if the temporary failure to comply is due to the acquisition of voting rights by non-voting shares.

"35% widely-held" rule does not preclude acquisition of control of company

Sections 384 and 385

These sections provide an additional temporary exception to the "35 per cent widely-held" rule to allow takeover bids for a company. Since securities laws require certain takeover bids to be made to all shareholders on the same terms, the "widely-held float" — the percentage of voting rights attached to shares that are widely held and publicly traded — could not be maintained throughout the period of the takeover.

Accordingly, the Act provides an exception if the person acquiring control of the company undertakes to restore the widely-held float to the greater of 35 per cent or the level prevailing at the time of the takeover bid and agrees to do so within five years or such other period as the Minister may allow. At the end of this period, the company resumes its responsibility for maintaining the widely-held float, and must maintain it at a level at least as high as the level of the undertaking given by the successful bidder at the time of the takeover bid.

A similar exemption is not required for takeovers of holding bodies corporate that are meeting the "35 per cent widely-held" test on behalf of their subsidiaries since there is sufficient flexibility in the provisions in section 382 for granting and revoking exemption orders to enable a temporary non-compliance with this requirement to occur in the course of a takeover without causing the sanctions in section 380 to be triggered.

Sanctions: suspension of voting rights

Section 386

If a person acquires shares of a company in contravention of section 375 (the requirement for prior Ministerial approval) or fails to comply with an undertaking under subsection 384(2) to restore the widely-held float to its pre-takeover level, the voting rights attached to all shares of the company held by the person and entities controlled by the person may not be exercised either in person or by proxy.

Procedures for share transfer approval

Section 387

Persons requiring approval for the acquisition or increase of a significant interest in a class of shares must file applications with the Superintendent. The application must contain information — to be set out in published guidelines — required by the Superintendent. Where the requirement applies to more than one person — for example, where an entity acquiring a significant interest is controlled by another person — the application may be made by any one of them on behalf of all of them.

Factors to be considered by Minister

Section 388

This section requires the Minister to take into account all factors that are, in the Minister's opinion, relevant to the application. The following factors are specifically mentioned:

- the financial resources of the applicants;
- the soundness of their proposed business plan;
- their business record and experience;
- the character, competence and experience of the persons who would operate the company;
- the size of the company, and of any of the applicants or their affiliates that is another deposit-taking institution; and
- the best interests of Canada's financial system.

These factors parallel those in section 26 concerning approval of new incorporations, with the addition of the "size" factor. Generally, large deposit-taking institutions will not receive approval to acquire large trust or loan companies. Large foreign deposit-taking institutions will be considered large even though their Canadian operations may be small.

In addition, where the acquisition of the shares would result in the company becoming a subsidiary of a foreign institution engaged in the trust or loan business, the Minister must consider whether the jurisdiction in which the foreign institution is incorporated provides treatment as favourable to Canadian trust and loan companies as that provided to foreign institutions under this Act. As with new incorporations (subsection 23(2)), this section also makes clear that where the foreign institution is a foreign bank, these provisions are superseded by the *Bank Act* provisions governing foreign entry.

Terms and conditions

Section 389

The Minister may set out terms and conditions for the approval of acquisitions or increases of significant interests.

Superintendent to certify receipt of application

Section 390

When an application under section 387 contains all the information required by the Superintendent, the Superintendent must refer it to the Minister and send a receipt to the applicant certifying the date on which the complete application was received. If the Superintendent receives an incomplete application, notice must be sent to the applicant specifying the missing information.

Notice of decision to applicant

Section 391

The Minister must send a notice to the applicant within 30 days (or 45 days, if the application involves the acquisition of control of a company), measured from the certified date of receipt of a complete application referred to in subsection 390(1), indicating whether the Minister has approved the transaction. The Minister must also advise the applicant of the right to make representations if the Minister gives notice of not being satisfied that the application should be approved.

If unable to complete consideration of the application in the initial 30- or 45-day period, the Minister may extend it

- for a further 30 days (or longer if the applicant agrees), if the application does not involve acquisition of control of the company; or
- for any number of additional 45-day periods, if the application does involve acquisition of control.

Representations and final decision

Sections 392 to 394

When the Minister has notified the applicant of not being satisfied that the application should be approved, the applicant must be given an opportunity to make representations within 30 days of the date of the notice — or within 45 days, if the application involves the acquisition of control of a company — or some other period that may be mutually agreed upon.

After the period for making representations has expired, the Minister must reach a decision and notify the applicant within a further 30-day (or 45-day) period. In cases where the application does not involve the acquisition of control of a company, the Minister is deemed to have approved the application if any of the notifications required by sections 391 to 393 is not given.

DIVISION II

OTHER CONSTRAINTS ON OWNERSHIP

Summary. This division contains rules governing ownership of company shares by non-residents and governments. The provisions are modelled on the current *Bank Act*, *Trust Companies Act* and *Loan Companies Act* and incorporate the provisions of the Free Trade Agreement governing ownership of financial institutions.

Definitions and interpretation

Section 395

Definitions in this division are generally modelled on the corresponding definitions in the current *Bank Act*. The principal exception is the definition of "non-resident", the scope of which has been modified by virtue of the definition of "control" used in this Act. In particular, while both this Act and the *Bank Act* treat entities controlled by a non-resident as non-residents, the applicable definition of "control" in this Act is the section 3 definition rather than the *de jure* definition used in the current *Bank Act*. The definitions of "United States resident" and "corporation" and the special definition of "control" used to determine U.S. residents are the same as those in the legislation implementing the Free Trade Agreement.

Restrictions on share ownership by governments

Section 396

Companies are prohibited from registering any acquisition of their shares by or on behalf of the federal government, a provincial or foreign government, or any of their agencies. This section is modelled on a prohibition in the current *Bank Act* but is new for trust and loan companies. Subsection 396(2) provides an exception for acquisitions of shares by agencies of a foreign government that are foreign institutions. It is similar to the exception in section 22 that allows foreign institutions controlled by a foreign government to incorporate a trust or loan company subsidiary.

Restrictions on share ownership by non-residents

Sections 397 and 398

Companies are also prohibited from registering acquisitions of their shares by non-residents (including shares jointly held by residents and non-residents) if, after the acquisition,

- the voting rights attached to the aggregate of the shares beneficially owned by any single non-resident and the non-resident entities the person controls exceeds — or would exceed — 10 per cent of the total; or
- the voting rights attached to all shares beneficially owned by non-residents would exceed 25 per cent of the total.

This rule does not apply to former-Act companies controlled *de jure* by a non-resident at all times after the date of tabling of this Bill, or to

any new company controlled *de jure* by a non-resident at all times after its incorporation.

The "10/25" rule noted above differs in a number of ways from the corresponding rule in the current *Bank Act* and trust and loan companies legislation:

- In the current trust and loan companies legislation, the "10/25" thresholds are based on the percentage of shares held, not on the percentage of voting rights held. The old approach dates from a time when trust and loan companies did not issue significant numbers of non-voting shares. It has been replaced by the new approach to maintain the intent of the rules in changed circumstances.
- In the current *Bank Act*, the "10/25" thresholds are based on the holding of a percentage of shares of classes or series of shares, rather than on voting shares or voting rights.

A further difference between the proposed "10/25" rule and the corresponding rules in current legislation is in the calculation of the direct and indirect share holdings of a particular person. Current legislation uses the concept of shares held by persons and their "associates". This Act expresses a similar concept through "a person and any entities controlled by that person" and the operation of the "acting in concert" provision (see section 9).

Section 398 is a grandfathering provision that applies to entities controlled *de facto* by a non-resident. Because of the definition of "control" used in this Act, such entities would now be considered non-residents (see section 395). Section 398 ensures that any existing control positions based on *de facto* control that were legally acquired by non-residents under the previous ownership regime do not trigger the restrictions and sanctions in this Act that apply to entities controlled either *de facto* or *de jure* by non-residents.

Subsection 397(3) grandfathers the status of companies that were subsidiaries of U.S. residents at the time of the Free Trade Agreement.

Sanctions: suspension of voting rights

Sections 399 and 400

Subsection 399(1) is modelled on a provision in the current *Bank Act* and trust and loan companies legislation. It prohibits a non-resident and the entities controlled by the non-resident — excluding trusts (such as pension fund trusts) in which residents have a majority of the beneficial interest — from exercising voting rights attached to shares of a company they beneficially own if the aggregate of their voting rights exceeds the 10 per cent threshold in subsection 397(1). Like the "10/25" restrictions themselves (section 397), this rule does not apply to existing or newly incorporated companies that have always been controlled *de jure* by a non-resident.

Section 400, also modelled on a provision in the current legislation, supplements the above by prohibiting the exercise of voting rights attached to shares that are beneficially owned by a non-resident but held by a resident nominee.

Subsection 399(2) is modelled on a provision in the current *Bank Act* that prohibits the exercise of all voting rights attached to shares of a company held by or on behalf of the federal government, a provincial or foreign government, or any of their agencies. Since this is a new provision for trust and loan companies, existing voting rights attached to shares legally acquired by governments or their agencies under the previous ownership regime are grandfathered by subsection 399(3).

Subsection 399(3) also grandfathers the voting rights attached to shares legally acquired by non-residents under the previous ownership regime.

DIVISION III

DIRECTIONS

Summary. Sections 401 and 402 set out the sanctions the Minister may impose for violations of the ownership restrictions.

Disposition of shareholdings

Subsection 401(1)

The Minister may order a person and any entity the person controls to dispose of a specified number of shares of a company, and suspend voting rights attached to the shares, if

- the person fails to obtain the Minister's approval required by section 375 before acquiring or increasing a significant interest in a class of shares of the company;
- the person fails, after a takeover, to comply with an undertaking to restore the "widely-held float" of voting rights to the level required by section 384; or
- the person fails to comply with any terms and conditions the Minister imposes under section 389 in respect of an approval under this Part.

Representations, appeals and court enforcement

Subsections 401(2) to (4) and Section 402

The Minister must give persons subject to an order under subsection 401(1) a reasonable opportunity to make representations before making the order. The person may also appeal to the courts within 30 days of the date of the order, but an order that suspends voting rights may not be stayed on appeal. If a person fails to comply

with a Ministerial order, the Minister may seek enforcement through the courts.

General Provisions

Summary. The following are miscellaneous provisions, including an exemption for certain classes of share transactions from the ownership restrictions in this Part, and provisions to facilitate the gathering of information that may be necessary to enable companies to meet its requirements.

Part does not apply to interests held by securities underwriter

Section 403

The ownership restrictions in this Part do not apply to shares acquired by a securities underwriter for distribution to the public, provided the shares are held for no longer than six months.

Arrangements to effect compliance

Sections 404 to 406

These sections authorize the board of directors of a company to make arrangements necessary to carry out the requirements of this Part. In particular, a company's board may require registered shareholders, or persons seeking to become registered shareholders, to disclose relevant facts about the beneficial ownership of the shares and other matters the board considers relevant, such as the names of entities controlled by the registered shareholder that are themselves shareholders of the company. If a person required to make such a disclosure fails to do so, the company may refuse to record the share acquisition. In addition, the company and other persons acting in good faith on such a disclosure enjoy legal immunity for those actions.

Section 406 sets out a *de minimis* exemption from the requirement that companies ensure that proposed share transfers do not violate this Part before registering them. Companies are entitled to assume that small share transfers — those involving fewer than 5,000 shares and less than one-tenth of 1 per cent of the shares of a class — comply with the Act.

Subsections 404(2) and (3) also allow the Superintendent to require a company to obtain information from its registered shareholders about the beneficial ownership of shares and other matters relevant to the administration of this Part.

Exemptions from the ownership restrictions for estate planning purposes

Section 407

The regulations may exempt from ownership restrictions the transfer of shares from an individual's estate to heirs or a trust on their behalf.

Application of *Competition Act*

Section 408

This section makes clear that the ownership rules in this Act do not affect the operation of the *Competition Act*. However, consequential amendments designed to clarify the respective roles of the two Acts in regulating takeovers of financial institutions are set out in sections 537 to 540.

PART VIII - BUSINESS AND POWERS

GENERAL BUSINESS

Summary. Sections 409 to 421 correspond to Divisions A and C of Part V of the current *Bank Act* but have been extensively restructured in light of the changes to institutional powers announced in the *New Directions* policy paper. These changes eliminate, or consign to regulations, many of the restrictions in the current *Bank Act* and trust and loan companies legislation.

Main business and powers

Sections 409 and 410

Unlike the current legislation governing non-bank financial institutions, which sets out a long list of authorized businesses and powers, this Act provides companies with the powers of a natural person (see section 14) but confines their business activities to those that appertain to the business of providing financial services.

"Financial services" is left undefined because the term is still evolving. However, since it may be unclear whether "financial services" include certain activities currently carried on by financial institutions, subsection 409(2) and section 410 specifically authorize companies to engage in a number of these activities. The regulations may set out restrictions on some of these — in particular real property brokerage services; data processing and other related activities that an information services corporation could engage in (see subsection 439(1)); and investment counselling and portfolio management services.

Networking

Section 411

This section makes clear that companies may enter into networking arrangements to sell any financial service, subject to the regulations governing the retailing of insurance (see section 416). Such arrangements may include both

- the company acting as agent for persons who provide services that can be provided by a financial institution, or by any other

entity in which a company could have a substantial investment pursuant to section 443, and

- the company leasing its premises for use by those persons.

Restriction on fiduciary activities

Section 412

Only companies recognized as trust companies under Part IV may act as trustees for a trust or serve as executors of wills or as administrators, guardians, etc. of minors and mentally incompetent persons. Loan companies will, however, be able to provide trust services to their customers through networking arrangements with trust companies, including their affiliates.

Restriction on deposit taking

Section 413

This section is modelled on provisions in the current *Bank Act* and trust and loan companies legislation that require federal deposit-taking institutions to be members of the Canada Deposit Insurance Corporation.

Restriction on guarantees

Section 414

This section is modelled on provisions in the current *Bank Act* and its regulations. It allows a company to make a guarantee on behalf of a third party only if

- the amount of the guarantee is stated as a fixed sum;
- the third party undertakes to unconditionally reimburse the company for the full amount of the guarantee; and
- the guarantee complies in all other respects with the regulations.

The stated amount of such guarantees may be taken into account in the portfolio limit on commercial loans in sections 451 to 453 and the restrictions on certain classes of related party transactions in section 475.

Subsections (2) and (3) make clear that these requirements do not apply to guarantees of the repayment of guaranteed trust money deposits by trust companies or to indemnities given by any company to its directors and officers under section 217.

Restriction on securities activities

Section 415

Companies may deal in securities except as prohibited or restricted by the regulations. The principal prohibitions to be set out in regulations are:

- Companies will be prohibited from participating in the primary distribution of corporate debt and equity securities and other classes of equity securities, such as mutual funds.
- Companies will be prohibited from acting as brokers in secondary market trading of equity securities.

Companies will be permitted to carry on other securities activities, including all money market activities, activities relating to government or government-guaranteed securities, and secondary market trading in corporate debt securities.

Restrictions on insurance activities

Section 416

This section contains a number of restrictions on the insurance activities of trust and loan companies; other restrictions will be set out in regulations. The principal restrictions are:

- Regulations under subsection (1) will prohibit companies from underwriting insurance.
- Subsection (2) prohibits companies from acting as agents for insurance companies and providing space — for example, through networking arrangements — in company branches to insurance companies, agents or brokers.
- Subsection (5) prohibits companies from exerting pressure on clients to place insurance for the security of the company with a particular insurance agency.

Regulations under subsection (3) will specify the extent of the prohibition against companies "acting as agents" for insurance companies, agents and brokers. Subsections (4) and (5) make clear that none of the restrictions prohibit a company from obtaining group insurance for its own employees and employees of its downstream interests, from requiring insurance to be taken out for its own security, or from requiring that such insurance be taken out with an insurance company it has approved.

Restriction on leasing

Section 417

Companies may engage in financial leasing but must comply with the same restrictions as financial leasing corporations (see section 439). In particular, restrictions on the leasing of motor vehicles and personal household property will be the same as in the current *Bank Act* and its regulations.

Restriction on residential mortgage lending

Section 418

This section is modelled on provisions found in all current federal financial institutions legislation and requires mortgage insurance to cover the amount of any mortgage loan made by a company in excess of 75 per cent of the value of the mortgaged property. It has been modified to make clear that this requirement applies only to mortgage loans made for acquiring, renovating or improving a residential property, or refinancing such loans, and does not apply to other "lending" related to real property, such as the acquisition of bonds issued by real property development corporations on the security of residential buildings.

Restrictions on security interests and receivers

Sections 419 and 420

Companies are prohibited from pledging their assets as security, except to secure obligations to the Canada Deposit Insurance Corporation or the Bank of Canada, or in cases approved by the Superintendent. Companies are also required to notify the Superintendent after acquiring any asset subject to an existing security interest.

A company is also prohibited from granting any person the right to appoint a receiver or receiver-manager for the company.

Restrictions on partnerships

Section 421

Companies are prohibited from entering into partnerships with other persons except as a limited partner in a limited partnership.

SPECIFIC BUSINESS

Fiduciary Activities

Fiduciary activities

Section 422

This section requires funds and assets held in trust by a trust company to be kept separate from all other assets of the company, including its own assets and those it holds in respect of guaranteed trust money. A company may invest such trust funds in one or more common trust funds unless the instrument creating a trust provides otherwise.

Deposit Acceptance

Summary. Sections 423 to 425 are modelled on the rules governing deposits in Part V of the current *Bank Act*. The provisions governing the acceptance of deposits have, however, been modified in light of the slightly different rules applicable to deposits accepted in the form of guaranteed trust money by trust companies.

Deposit acceptance

Section 423

Companies may accept deposits from any person, including minors and others not able to enter into contracts, without requiring the intervention of other persons, such as a minor's parents or legal guardian. Companies are not bound to execute any provisions of the trust to which a deposit is subject unless they are themselves trustees of that trust.

Trust companies under this Act may accept deposits only in the form of guaranteed trust money and are required to earmark assets equal to the total amount of such deposits. Depositors' claims rank before other unsecured creditors' claims on such earmarked assets in a liquidation (see section 374).

Notification and transfers of unclaimed balances and unpaid bills of exchange

Sections 424 and 425

These sections are modelled on the current *Bank Act* provisions governing notification of inactive accounts and unpaid cheques and other bills of exchange, and the transfer to the Bank of Canada of the value of unclaimed deposits and unpaid bills of exchange after 10 years. The Bank of Canada then becomes liable to pay out the amount of such deposits or bills of exchange to persons who had a right to them.

INTEREST AND CHARGES

Summary. Sections 426 to 438 are modelled on Division F of Part V of the current *Bank Act*. They consist primarily of requirements for the disclosure of certain terms and conditions of deposit accounts and loans made by companies.

Accounts

Account charges and disclosure of interest and charges

Sections 426 to 429

These sections are modelled on the current *Bank Act* provisions that prohibit a company from levying charges for keeping an account except by an express agreement with the customer or by the order of a court: for example, where the customer is unable to do so because of legal incapacity. They also parallel the current *Bank Act* requirements governing notification of the method of calculating interest on interest-bearing accounts, and disclosure of interest rates on such deposits in advertisements, and provide for regulations governing these matters.

Borrowing Costs

Disclosure of costs of borrowing

Sections 430 to 435

These sections are modelled on the current *Bank Act* provisions that set out rules governing the calculation of costs of borrowing and their disclosure to customers.

Prepayment of loans

Subsections 436(1) and (2)

These subsections prohibit companies from making loans to natural persons on terms that prohibit prepayment. An exception is provided for mortgage loans and large loans over $100,000 or a prescribed larger amount.

Financial arrangements of companies with the federal government

Subsections 436(3) and (4)

These subsections set out rules governing the financial arrangements between the federal government and companies. Companies are not allowed to levy charges for cashing cheques issued by the federal government or deposited to its account. This restriction does not prohibit arrangements between the government and a company for compensation for services, or prohibit the payment of interest on government deposits.

Regulations governing use of customer information

Section 437

This section provides for regulations governing the use of confidential customer information. The regulations will be prepared in consultation with industry and other interested persons.

Grandfathering of special security interests held by a bank continued as a trust company

Section 438

The coming Bill to replace the existing *Bank Act* will allow Schedule II banks to apply for continuance under this Act in certain cases where they are unable to meet the ownership requirements of the new *Bank Act*. Section 438 is a transitional provision that applies where a bank continued as a company under this Act holds a security interest under the provisions corresponding to section 177 or 178 of the current *Bank Act*. The continued company may continue to exercise the rights attached to that security as if it were still a bank.

PART IX - INVESTMENTS

Summary. This Part sets out investment rules based on a "prudent portfolio approach". It essentially replaces Divisions D and E of Part V of the current *Bank Act*, sections 73, 78, 80 and 80.1 of the *Trust Companies Act*, and sections 61, 63 and 63.1 of the *Loan Companies Act*.

Definitions

Section 439(1)

This subsection defines a number of key concepts used in this Part, including the different types of corporations and unincorporated entities in which a company is permitted to have a substantial investment under section 443. The definitions of "factoring corporation", "financial leasing corporation", "investment counselling and portfolio management corporation", "mutual fund distribution corporation", "real property brokerage corporation", "real property corporation" and "service corporation" are modelled on the current *Bank Act* and trust and loan legislation. The new types of entities in which companies are permitted to have substantial investments are:

"information service corporation" A corporation whose activities are limited to: data processing; providing services relating to information management systems; and designing, developing and marketing computer software and special purpose computer hardware. These activities are subject to restrictions that may be set out in the regulations.

"real property holding vehicle" The unincorporated equivalent of a real property corporation.

"specialized financing corporation" A corporation providing specialized business management, investment, financing and advisory services. These activities subsume those that may be engaged in by venture capital corporation subsidiaries allowed under the current *Bank Act*; they are also intended to cover a wider range of merchant banking activities than is allowed under the current *Bank Act* and trust and loan companies legislation. As in the current provisions governing banks' venture capital subsidiaries, the activities of specialized financing corporations will be subject to terms and conditions set out in the regulations.

The section also contains several other new definitions, the more significant of which are:

"commercial loan" This term is defined to include not only loans in the conventional sense but also certain loan substitutes (see the definition of "loan" below) and investments in debt and equity securities of corporations and unincorporated entities. The definition does, however, exclude several classes of "loans" and investments that are not to be considered commercial loans. These include:

- small "loans" — less than $250,000 — to natural persons: these are essentially what the *New Directions* policy paper referred to as "consumer" loans and will not be subject to portfolio limits under the Act;

- mortgage loans that are insured or meet certain requirements regarding loan-to-value ratios;
- certain deposits by a company with another financial institution;
- "loans" and investments in debt obligations directly or indirectly backed by the guarantee of a government or prescribed international agency, such as the World Bank and other international development banks;
- "loans" and investments in debt obligations either directly or indirectly backed by the guarantee of another financial institution or secured by deposits with any financial institution, including the company;
- investments in debt or equity securities that are widely distributed within the meaning of the regulations; and
- investments in participating shares.

"loan" The definition of "loan" used in defining "commercial loan" has a modified meaning that incorporates close substitutes for loans, such as acceptances and other guarantees, financial leases, conditional sales contracts, repurchase agreements, and similar arrangements.

"participating share" This term embraces both voting and non-voting common shares; it excludes preferred shares that have characteristics that make them close loan substitutes.

"prescribed subsidiary" The regulations will set out which classes of entities controlled by a company are to be consolidated with the company in applying the portfolio limits in sections 451 to 457. In particular, the regulations are expected to set out the following rules:

- For any portfolio limits that differ between federally incorporated deposit-taking institutions on the one hand, and insurance companies and securities dealers on the other, the insurance company and securities subsidiaries of a company will not be consolidated.
- Where joint ventures to invest in real property are structured as real property corporations, these will not normally be consolidated for the purposes of the real property limits. [The method of calculating the value of such interests would instead be set out in the real property valuation regulations under section 455.]
- Other subsidiaries listed in subsection 443(1) will normally be consolidated.
- In all other cases — notably where control of an entity is acquired through realization of security interests or loan workouts referred to in sections 447 or 448 — such entities will not be consolidated.

The same inclusions and exclusions will apply in consolidating a parent company's regulatory capital for the purposes of sections 451 to 457.

Non-application of Part

Subsection 439(2)

The restrictions on investments in this Part do not apply to the investment of money and assets held in trust, except assets held in respect of guaranteed trust money. A company is also considered *not* to have made an investment in real property or in securities of an entity solely because it has a security interest in those assets.

General Constraints on Investments

Summary. **Sections 440 to 442 set out a general requirement that companies maintain a prudent portfolio of investments and a general rule governing substantial investments of a company. They also provide for regulations determining the amount or value of various classes of loans, investments and other interests that are subject to this Part, and regulations limiting the exposure of a company to a single person or group of connected persons.**

Investment standards

Section 440

This section requires the board of directors of a company to establish standards and procedures governing its lending and investment activities with a view to maintaining a portfolio of loans and investments that is "reasonable and prudent" when viewed as a whole. In addition to adhering to such standards and procedures, companies must also comply with the portfolio limits on certain classes of loans and investments set out in sections 450 to 457.

General rule governing substantial investments by companies and principal exceptions

Section 441

This section sets out the general rule that companies are not permitted to have or increase a substantial investment in any entity. The principal exceptions to this rule are:

- substantial investments acquired indirectly through subsidiaries of a company that are either financial institutions or specialized financing corporations;
- substantial investments in other entities engaged in providing financial or other related services, as permitted by sections 443 and 444; and
- substantial investments acquired through realizations or loan workouts, or as temporary investments (see sections 446 to 448).

Regulations setting single exposure limits and valuation rules

Section 442

This section provides for two different classes of regulations:

- Paragraph (*a*) provides for regulations determining the value of assets for the purposes of the portfolio limits in sections 450 to 457 and the limit on asset transactions in section 460. In particular, for the purpose of the portfolio limits, they will make clear that the assets of a company include not only those appearing on its own books, but also those of its "prescribed subsidiaries" (see section 439).
- Paragraphs (*b*) and (*c*) provide for regulations limiting the exposure of a company to a single person or group of connected persons.

Subsidiaries and Equity Investments

Summary. **Sections 443 to 449 set out detailed rules governing acquisitions and increases of substantial investments by companies.**

Permitted substantial investments and undertakings

Sections 443 to 445

These sections describe the entities in which a company may acquire permanent substantial investments and the conditions under which it may do so. Subsections 443(1) and (2) contain the list of entities in which a company is permitted to have a permanent substantial investment; these include other financial institutions, various corporations that provide financial services or engage in activities ancillary to the business of financial institutions, real property corporations, and unincorporated real property holding vehicles. Section 444 also allows the Minister to deem certain corporations to be corporations described in section 443 if their activities are substantially similar.

Subsection 443(3) prohibits a company from acquiring a substantial investment in certain corporations unless it also acquires *de jure* control (see section 3). The restriction applies if the corporation is a financial institution or carries on the business of one or more of the following corporations listed in subsection 443(1):

- factoring corporation,
- financial leasing corporation,
- investment counselling and portfolio management corporation,
- mutual fund distribution corporation,
- real property brokerage corporation,
- specialized financing corporation, or
- financial holding corporation.

The restriction does not apply to information service corporations, service corporations, real property corporations, real property holding vehicles, and ancillary business corporations. The requirement for *de jure* control is also waived for foreign corporations in which a company has a substantial investment if it would be illegal or contrary to normal business customs in the foreign jurisdiction for the company to have *de jure* control of the corporation.

Subsection 443(3) also requires Ministerial approval for the acquisition of substantial investments in financial institutions, information service corporations, and specialized financing corporations.

When a company acquires control of an entity in which it is permitted to have a substantial investment under section 443, subsections 445(1) to (3) require certain undertakings from the company. Except for subsidiaries that are financial institutions regulated by provincial or foreign jurisdictions, the undertakings required by the Superintendent would involve the activities of the subsidiary, notably its transactions with related parties of the company (see section 467), and access to information about it. For provincial and foreign-incorporated financial institutions, the undertakings would be broadly similar, though a provision for agreements between the Superintendent and regulatory agencies in those jurisdictions permits additional flexibility.

In addition, subsection 445(4) requires a company to obtain an undertaking from all corporations it controls to provide the Superintendent reasonable access to their records.

Temporary investments

Section 446

Companies may acquire or increase substantial investments on a temporary basis if they undertake to do all that is necessary to dispose of them within two years, or such longer period as the Superintendent considers necessary. A temporary substantial investment in a corporation is subject to the additional restriction that a company and the corporations listed in section 443 that are its subsidiaries may not hold shares of the corporation carrying more than 50 per cent of voting rights.

Subsection (3) is a transitional exemption that will apply to companies that, on the date of introduction of the Bill, have substantial investments acquired under the investment rules in the current trust and loan companies legislation — which permit companies to own up to 30 per cent of the shares of most corporations. Companies will be allowed to temporarily increase such substantial investments, and will only be required to reduce them to their initial level — rather than dispose of them completely — within two years or such longer period as the Superintendent considers necessary.

Loan workouts

Section 447

This section allows a company to acquire any number of shares or ownership interests in entities as part of the working out of loans made by the company that are in default. As with the provision allowing acquisitions through realization of security (section 448), this provision overrides the restriction on acquiring or increasing substantial investments.

The entity whose shares or ownership interests may be acquired may be the debtor in default, any of its affiliates, or any other entity that holds securities of the debtor or its affiliates, or assets acquired from them. As with temporary investments, however, if the acquisition of such shares or ownership interests results in the acquisition of a substantial investment, companies are required to take all steps necessary to dispose of that substantial investment within two years or such longer period as the Superintendent considers necessary.

Subsection (2) is a transitional exemption that applies to companies that, on the date of introduction of the Bill, have substantial investments acquired under the current investment rules. It operates in the same way as subsection 446(3).

Realization of security

Section 448

This section allows companies to acquire any number of shares or ownership interests in entities through the realization of a security interest held by the company. As with loan workouts (section 447), it overrides the restriction on acquiring or increasing substantial investments. In addition, it overrides all other restrictions on share acquisitions under the Act, including the prohibitions in Part XI on related party transactions and the prohibition in Part V on companies acquiring shares or ownership interests in entities that control them.

As with loan workouts, if the acquisition of such shares or ownership interests results in the acquisition of a substantial investment, companies are required to take all steps necessary to dispose of it within two years or such longer period as the Superintendent considers necessary. Subsection (3) is a transitional exemption modelled on subsection 446(3) that applies to companies with substantial investments when the Bill is introduced.

The Minister may waive the disposition requirement entirely in cases where the entity in which the substantial investment was acquired is one that the company could acquire under section 443.

Regulations restricting ownership

Section 449

This section is modelled on subsection 193(7) of the current *Bank Act* and provides for regulations imposing restrictions, terms and conditions on the ownership of shares or ownership interests by a company under sections 443 to 448. These will include regulations

modelled on existing *Bank Act* regulations governing the activities of a company's financial leasing, specialized financing and real property subsidiaries.

Portfolio Limits

Treatment of realizations and loan workouts for the purposes of the portfolio limits

Section 450

This section makes clear how investments acquired through realizations and loan workouts are to be treated in determining the total of various classes of investments subject to the portfolio limits in sections 451 to 458. The general rule is that investments acquired in this way do not count for 12 years, in the case of the portfolio limits on interests in real property, and for two years, in the case of all other portfolio limits.

Commercial Loans

Limits on commercial lending

Sections 451 to 453

Where a company has less than $25 million in regulatory capital, the total value of commercial loans held by the company and its prescribed subsidiaries is limited to 5 per cent of the total assets of the company. The regulations will define "total assets" to incorporate the assets of a company's prescribed subsidiaries.

Section 452 removes the restrictions on commercial lending in the case of companies that have regulatory capital in excess of the $25-million threshold, provided the companies receive the prior approval of the Superintendent.

Real Property

Portfolio limits on real property

Sections 454 and 455

A company and its prescribed subsidiaries are not permitted to acquire an interest in real property or make an improvement to real property in which they have an interest if, after the acquisition or improvement, the total value of such real property holdings would exceed 70 per cent of the company's regulatory capital. The regulations under section 455 will set out rules for calculating the value of interests in real property. The purpose of the regulations will be to make clear the distinction between

- the types of exposure to real property that are subject to the real property portfolio limits: equity investments by companies

and their prescribed subsidiaries in real property and commitments that are the equivalent of such investments, and

- the types of exposure to real property that are not subject to the limits: debt financing provided by companies to real property ventures in which they have an interest, where the financing is on the same terms as their other commercial lending.

Equities

Portfolio limits on investments in equity securities

Section 456

A company and its prescribed subsidiaries may not acquire portfolio investments in participating shares (see the definition in section 439) or ownership interests in unincorporated entities if, after the acquisition, the total value of such securities would exceed 70 per cent of the company's regulatory capital. This test does not include shares of corporations mentioned in section 443 or 444 in which the company has a substantial investment.

Aggregate Limits

Combined portfolio limit for investments in real property and equity securities

Section 457

A company and its prescribed subsidiaries may not acquire interests in real property, make improvements to real property in which they have an interest, or acquire investments in equity securities referred to in section 456 if, as a result, the total value of all such investments and interests would exceed 100 per cent of the company's regulatory capital.

Miscellaneous

Superintendent may order divestment of illegal investments

Section 458

The Superintendent may order a company to dispose of any investment acquired in contravention of this Part. In addition, the Superintendent may order a company to

- dispose of any investment in equity securities of an entity — other than one in which it is permitted to have a substantial investment — if the investment enables it to control the entity;
- take the necessary steps to terminate any arrangement allowing it to exercise a veto over any proposal put before the board of directors or other governing body of an entity, other than a permitted substantial investment; or

- dispose of any substantial investment in an entity in respect of which the company has failed to provide, obtain or ensure compliance with the undertakings referred to in section 445.

Deemed temporary investment

Section 459

When a company has a substantial investment in an entity and becomes aware of a change in the entity's business or affairs that would have precluded it from acquiring the substantial investment, the company is deemed to have acquired a temporary investment in the entity (see section 446) on the day it became aware of the change. This requires the company to dispose of the substantial investment within two years or such longer period as the Superintendent considers necessary.

Assets transactions

Section 460

A company must obtain the approval of the Superintendent before entering into a single large transaction — one with a value in excess of 10 per cent of the total assets of the company — or a series of direct or indirect transactions with a single person over any 12-month period that together would amount to a large transaction. As in the portfolio limit on commercial lending (sections 451 to 453), "total assets" are to be defined to incorporate the assets of a company's prescribed subsidiaries.

This restriction does not apply to transactions involving assets that are frequently traded and easily valued, such as government securities, money market instruments and other widely-distributed debt securities.

Transitional rules

Sections 461 and 462

These sections grandfather existing loans, loan commitments, and investments allowed under the current trust and loan companies legislation but prohibit any increases in them if they would be prohibited by this Act.

PART X - ADEQUACY OF CAPITAL AND LIQUIDITY

Adequacy of capital and liquidity

Section 463

Companies are required to maintain adequate capital and liquidity and comply with any regulations concerning them. In addition, even though a company may be complying with the regulations, the Superintendent may direct it to increase its capital or

provide additional liquidity to ensure it meets the requirements for adequate capital and liquidity.

PART XI - SELF-DEALING

Summary. This Part sets out a general ban on self-dealing and a number of exceptions.

Interpretation and Application

Definition of related party

Section 464

Subsection (1) lists the classes of persons who are related parties of a company for the purposes of this Part. These include:

- persons who have a significant interest in any class of shares of a company — including those who control the company;
- directors and officers of the company and of entities that control the company;
- spouses and minor children of natural persons listed above;
- entities in which the company's directors or officers, a person who controls the company, or any of their spouses or minor children have a substantial investment (see next paragraph, however); and
- entities controlled by any of the above.

Entities in which a company has a substantial investment (including its subsidiaries) are not normally treated as related parties of the company. Subsection (2) ensures that such entities are not treated as related parties solely because they are technically captured by the definition in subsection (1) — since substantial investments of a company are also substantial investments of a person who controls the company (see section 10). However, such an entity *would* be considered a related party if the person who controls the company had other interests in the entity that would result in its being captured under the related party definition even if the company's own stake in the entity were not taken into account. Subsection (2) also does not prevent such entities from being considered related parties if they are captured by some other criterion in subsection (1) — for example, if a director of the company had a substantial investment in one of its subsidiaries.

In addition, the Superintendent may designate any other specific persons or classes of persons as related parties if they have an interest or relationship that might reasonably be expected to affect the behaviour of the company in any transaction involving those persons.

Finally, a person is deemed to be a related party in any transaction entered into in the expectation that the person will subsequently become a related party.

General exemptions from the application of this Part

Section 465

This section exempts from the restrictions and requirements of this Part:

- transactions entered into before the coming into force of this Part (though renewals or subsequent changes to their terms *would* be subject to its provisions);
- transactions with the parent of a company, if the company is its wholly-owned subsidiary and the parent is another federally-incorporated financial institution;
- transactions involving money and assets held in a fiduciary capacity, excluding guaranteed trust money deposits;
- the issuing of shares of the company to related parties or the payment of dividends on such shares; and
- the payment of salaries, fees and other fringe benefits normally included in the remuneration packages of directors, officers and employees of the company, except when the remuneration is for duties outside the ordinary course of business of the company, or for the purchase of services referred to in paragraph 473(1)(*a*).

Definition of "transaction" and "loan"

Section 466

This section defines the term "transaction" to include, for the purposes of this Part, not only transactions with related parties, such as loans made by a company to its related parties, but also:

- guarantees given to third parties on behalf of related parties,
- investments in related party securities, including those acquired from unrelated third parties,
- the acquisition by a company of loans originally made to related parties by third parties, and
- the taking of a security interest in related party securities for a loan or other obligation of a third party.

As in Part IX (Investments), the definition of "loan" in this Part includes close loan substitutes such as financial leases, conditional sales contracts, repurchase agreements, and other similar arrangements.

Prohibited Related Party Transactions

General prohibition on transactions with related parties and application of self-dealing rules to entities controlled by a company

Section 467

Subsection (1) sets out a blanket prohibition against entering into related party transactions. The exceptions to this rule are set out in sections 468 to 478.

Subsections (2) to (4) require companies to ensure that the entities they control comply with the restrictions of this Part: transactions entered into by such entities are treated as if they were entered into by the company itself. Subsection (3) provides an exemption to make clear that this requirement does not apply to subsidiaries that are provincially incorporated financial institutions, provided the Minister is satisfied that the provincial subsidiary is subject to essentially equivalent rules regarding its transactions with the related parties of the parent.

The regulations may provide additional exceptions, including exceptions for transactions entered into by insurance subsidiaries that involve the provision of certain classes of financial services that deposit-taking institutions do not have the power to provide and that are permitted under the self-dealing rules governing transactions of insurance companies with their related parties.

Permitted Related Party Transactions

Exemption for nominal or immaterial transactions

Section 468

This section permits all transactions of nominal or immaterial value. The conduct review committee of every company must set out the criteria for materiality, which must be approved in writing by the Superintendent.

Exceptions: lending to and borrowing from related parties

Sections 469 to 471

A limited range of exceptions from the general ban on related party transactions applies to borrowing transactions among related parties. In particular, companies may

- make loans to related parties that are fully secured by federal or provincial government securities;
- make mortgage loans to related parties that are secured by the principal residence of the related party, provided the loan either is insured or meets the "75 per cent loan-to-value" rule in section 418;
- deposit funds for cheque-clearing purposes with a related party financial institution that is a direct clearer under Canadian Payments Association by-laws; and

- borrow funds from related parties, notably by taking deposits from them or issuing them subordinated indebtedness.

Exceptions: sale, purchase and leasing of assets

Section 472

This section sets out a number of exceptions from the general ban on related party transactions. These exceptions cover a number of different classes of transactions involving the sale, purchase or leasing of assets to or from related parties in general, or to or from a particular class of related parties.

Asset transactions involving related parties generally:

Companies may enter into transactions with any related party to

- acquire federal or provincial government securities, securities guaranteed by those governments, or assets — such as loans — fully secured by such securities;
- lease space in buildings for use by the company in the ordinary course of business; or
- acquire or lease goods — excluding real property, securities, loans and other financial assets — used by the company in the ordinary course of business.

Companies may also sell or lease any assets to any related party provided an active market exists for the sale or leasing of the assets and the sale or lease payments are in money.

Asset transactions involving particular classes of related parties:

Companies may also enter into transactions with other related financial institutions to acquire and dispose of any asset, other than real property, in the ordinary course of business if the Superintendent has approved the arrangement. The principal purpose of this provision is to accommodate recurring asset transfers between parent financial institutions and their subsidiaries, such as regular transfers of mortgage loans between a mortgage loan company and its parent bank or trust company.

In addition, the Superintendent may authorize specific acquisitions and dispositions of assets for the purpose of restructuring a company.

Exceptions: provision and purchase of services

Section 473

This section provides exceptions from the general ban for transactions involving the provision or purchase of certain services by a company. Specifically, a company may

- purchase from related parties services that it normally uses in the ordinary course of business, provided the term of the contracts does not exceed five years;
- provide to related parties services that it normally offers to the public in the ordinary course of business (for example, investment counselling and other financial services, but not loans and other transactions explicitly covered by this Part);
- enter into networking arrangements with related parties for the sale of services on an agency basis, provided the term of the contracts does not exceed five years; and
- enter into arrangements with related parties for the establishment, management or administration of pension or benefit plans for the benefit of officers and employees of the company or its subsidiaries.

Companies may not, however, enter into contracts involving the purchase of services from related parties if the combined effect of all such contracts is that substantially all of the management functions of the company are exercised by persons who are not its employees. The Superintendent may enforce this prohibition by ordering the company to ensure that its own employees resume the exercise of its essential management functions.

Exceptions: transactions with directors, officers and their interests

Sections 474 to 476

These sections set out the rules governing transactions with the following classes of related parties:

- natural persons who are directors or officers of a company or of an entity that controls it (or their spouses or minor children), but who are not otherwise related parties;
- entities in which the directors or officers of a company (or their spouses or minor children) have a substantial investment; and
- entities controlled by the directors or officers of an entity that controls the company, or their spouses and minor children.

In particular, subsection 474(1) allows a company to enter into any type of transaction with these related parties, subject to a number of restrictions in the case of certain classes of transactions.

Subsections 474(2) to (4) govern the making or acquisition — by a company — of loans to its full-time officers:

- The aggregate of all such loans to any full-time officer of a company may not exceed the greater of $50,000 and the officer's annual salary.
- For the purposes of the $50,000 limit, the term "loan" is used in the modified sense of section 466. The limit does not, however, apply to margin loans to an officer or to loans secured by a mortgage on the officer's principal residence.

- Both mortgage loans secured by an officer's principal residence and the class of "loans" that is subject to the $50,000 limit are considered part of officers' compensation packages: they are the only permitted related party transactions that need not be entered into on market terms and conditions (see section 479).

Section 475 governs the following classes of transactions with any related party referred to above (including companies' full-time officers):

- making any "loan" (as defined in section 466) to the related party;
- acquiring any "loan" made to the related party by a third party;
- making guarantees on behalf of the related party; and
- investing in securities of the related party.

Subsection 475(1) is not a restriction in itself, but shifts the responsibility for approving such transactions to the board of directors of a company in cases where, after the proposed transaction, the aggregate value of

- all loans to any single related party held by the company and its subsidiaries,
- all guarantees on behalf of that related party made by a company and its subsidiaries, and
- all investments in securities of that related party that are held by the company and its subsidiaries

would exceed 2 per cent of the regulatory capital of the company. Two-thirds of the directors in office at the time of the proposed transaction must approve the transaction in advance.

Subsection 475(2), on the other hand, is a portfolio limit similar to those in Part IX and limits total exposure to all such related parties — in the form of loans to them, guarantees on their behalf, and investments in their securities — to 50 per cent of a company's regulatory capital.

The following valuation rules apply in determining the aggregate value of loans, guarantees and investments under subsections 475(1) and (2):

- Nominal or immaterial transactions (see section 468) are not counted.
- Neither mortgage loans on the principal residence of a related party nor preferential loans subject to the $50,000 limit (in the case of full-time officers of a company) are counted.
- Loans secured by government securities are not counted toward the 50 per cent limit, but are counted toward the 2 per cent threshold.

Section 476 makes clear that the making of margin loans to a

company's directors or officers may be made subject to additional terms and conditions set by the Superintendent.

Other exceptions

Sections 477 and 478

Regulations under these sections may provide additional flexibility to accommodate other classes of related party transactions found not to raise prudential concerns. In addition, the Minister, on the recommendation of the Superintendent, may approve proposed related party transactions on a case-by-case basis if the Minister is satisfied they do not result from any undue influence on a company and would not significantly affect the interests of a related party of the company.

Restrictions on Permitted Transactions

Permitted related party transactions to be on market terms and conditions

Section 479

Except for preferential loans to full-time officers under section 474, all permitted related party transactions — including restructuring transactions approved by the Superintendent and special-case transactions approved by the Minister — are required to be under terms and conditions at least as favourable to the company as market terms and conditions. Market terms and conditions are defined as

- the terms and conditions that the company offers to the public in the ordinary course of business, in the case of financial and other services provided by a company; and
- in the case of any other transaction, the terms and conditions that would ordinarily be expected to apply in a similar transaction conducted in an open market under conditions requisite to a fair transaction between arm's length parties acting prudently, knowledgeably and willingly.

Related party transactions require prior approval of conduct review committee

Sections 480 and 481

These sections set out the general rule that all proposed transactions of a company with related parties be reviewed and approved by the company's conduct review committee. In addition, when a person ceases to be a related party of a company, transactions with that person continue to be subject to review for twelve months. The conduct review committee must be satisfied the transaction is on terms at least as favourable to the company as market terms and conditions.

The requirement for approval by the conduct review committee does not apply, however, to transactions that

- are nominal or immaterial in value (see section 468);
- consist of preferential loans to full-time officers under section 474;

- must be approved by two-thirds of the directors under subsection 475(1); or
- are exempted from this requirement by regulation.

For additional flexibility, subsections 480(2) and (3) make clear that the conduct review committee may approve general arrangements covering a series of similar transactions. It must review the arrangements at least once a year.

Disclosure

Companies must seek disclosure of interests of possible related parties

Section 482

In considering transactions with a person who it has reason to believe is a related party, a company must take the measures necessary to obtain full disclosure from that person of any interest and relationship that would make the person a related party. The company, its directors, officers, employees and agents enjoy legal immunity for actions taken or omitted to be taken in reliance on any such disclosure.

Companies to notify Superintendent of the discovery of inadvertent violations

Section 483

Where a company inadvertently enters into a prohibited related party transaction or one requiring approval under subsection 475(1) or section 480 or 481, it must immediately notify the Superintendent upon discovering the violation.

Remedial Actions

Sanctions: illegal transactions may be overturned

Section 484

Where a prohibited related party transaction takes place, either the company or the Superintendent may apply for a court order setting it aside and ordering the related party to pay compensation to the company.

PART XII - REGULATION OF COMPANIES

Supervision

Summary. **Sections 485 to 497 contain reporting requirements and provisions for the inspection of companies and the valuation of company assets. Their goal is to ensure that the Superintendent can accurately assess the true financial condition of companies governed by the Act. The provisions correspond to Parts VII and IX of the current *Bank Act*, to sections 88 to 91, 92 and 94 of the *Trust Companies Act*, and sections 77 to 80, 81 and 85 of the *Loan Companies Act*.**

Returns

Superintendent may require companies to provide information

Section 485

This section is designed to harmonize the publication requirements under the various federal statutes governing financial institutions. Except for a few provisions (sections 486 to 491) taken from the current *Bank Act* and trust and loan company legislation, it replaces the detailed reporting provisions found in the current legislation — in particular those requiring monthly returns and returns covering reserves, foreign currency, and domestic assets — with more flexible provisions that allow the Superintendent to obtain such information as the Superintendent may require. The Superintendent will issue guidelines describing periodic returns that will be required and may also from time to time seek specific information about the business and financial condition of any company governed by the Act.

Returns, principal corporate records, and reports of unclaimed deposits and bills of exchange

Sections 486 to 491

These sections set out requirements for two different types of return. Sections 486 to 488 are closely modelled on the current *Bank Act* provisions requiring returns for deposit accounts that remain inactive and bills of exchange that remain unpaid for nine years or more.

Sections 489 to 491 are also modelled on the current *Bank Act* and require companies to provide the Superintendent with copies of the company by-laws, an annual report on the directors and auditor of the company, and notification of certain changes in the information contained in the report. They also require the Superintendent to establish a public register containing copies of those documents as well as the incorporating instrument of the company.

Superintendent may require information from affiliates of companies

Section 492

This section allows the Superintendent to require the persons who control a company and its other affiliates to provide any information additional to requirements under section 485 that may be needed to show that the provisions of this Act are being complied with and that the company is in sound financial condition.

Subsection (3) provides an exemption from this provision for affiliates that are federally regulated financial institutions and — where the Superintendent has entered into an information-sharing agreement with the relevant provincial jurisdiction — affiliates that are provincially regulated financial institutions.

Confidentiality of information received by the Superintendent

Section 493

This section complements the provision governing confidentiality of information contained in the *Office of the Superintendent of Financial Institutions Act*. As in that Act, all information on the business and affairs of a company obtained by the Superintendent is confidential and must be treated accordingly.

The section also makes clear that the Superintendent may disclose such information to other agencies with responsibilities for regulating financial institutions if satisfied they will also treat the information as confidential.

Publication of information

Section 494

This section is modelled on a provision in the current *Bank Act* and requires the Superintendent to publish the information set out in the returns referred to in sections 486 and 487 on unclaimed deposits and unpaid bills of exchange, and any other information obtained pursuant to the Act as the Minister may determine.

Inspection of Companies

Examination of companies

Sections 495 and 496

These sections provide for examination of every company by or on behalf of the Superintendent at least once a year. The Superintendent, or the person acting on behalf of the Superintendent, has a right of access to the records of a company and may require its directors, officers and auditor to provide any information or explanation that may be required regarding the condition and affairs of the company, its subsidiaries, or any entities in which it has a substantial investment. The Superintendent has the powers of a commissioner appointed under Part II of the *Inquiries Act* and may delegate those powers.

Superintendent to notify companies and auditor of material differences in valuation of assets

Section 497

This section is modelled on the current *Bank Act* and requires the Superintendent to notify the company, its auditor and its audit committee when the appropriate value of any asset, as determined by the Superintendent, varies materially from the value placed on it by the company.

Remedial Powers

Summary. Sections 498 to 511 provide the Superintendent with the power to issue directions of compliance (sections 498 and 499), to obtain court enforcement of the Act (section 500), and to take control of companies or their assets under certain conditions (sections 501 to 511). They correspond to provisions added to the current financial institutions legislation by Bills C-42 and C-56 in July 1987.

Directions of compliance

Sections 498 and 499

The Superintendent may issue directions to a company or persons involved in its operations requiring them to:

- cease any action or conduct the Superintendent believes to be an unsafe or unsound business practice, or
- take measures the Superintendent considers necessary to remedy the situation.

The Superintendent must give the company or person a reasonable opportunity to make representations before issuing a direction of compliance but may issue a temporary direction if the length of time required to allow a company or person to make representations would be prejudicial to the public interest. Both types of direction may be appealed: first to the Minister, then to the Federal Court—Trial Division. A decision of the Minister cannot be stayed by an appeal to the court without the consent of the Superintendent.

Court enforcement of the Act

Section 500

This section allows the Superintendent to apply for a court order if a company or person contravenes the Act or fails to comply with a direction of compliance. Orders of the court may be appealed in the usual manner.

"Temporary" control of assets by the Superintendent

Section 501

This section allows the Superintendent to take temporary control of the assets of a company, as well as the assets it holds in trust, if the Superintendent is of the opinion that

- its assets, or those it holds in trust, are not satisfactorily accounted for;
- it has failed to pay its obligations as they come due, or is likely to fail to do so;
- its assets are inadequate to protect the interests of its creditors; or
- some other practice or state of affairs exists that is materially prejudicial to the interests of its creditors or the beneficiaries of trusts under its administration.

Report to Minister regarding grounds for taking "temporary" control

Section 502(1)

The Superintendent must report to the Minister when

- the Superintendent takes temporary control of a company's assets under section 501,
- the requisite conditions for taking temporary control under section 501 exist; or
- the requisite conditions exist for the cancellation of a company's deposit insurance coverage under the *Canada Deposit Insurance Corporation Act*.

Further action by the Minister leading to assumption of control over a company's business and affairs

Subsection 502(2) to Section 511

The Minister, after receiving a report under subsection 502(1) and giving the company a reasonable opportunity to be heard, may give the company additional time to rectify the situation. Alternatively — or subsequently, if the company fails to rectify the situation — the Minister may direct the Superintendent to take full control over the business and affairs of the company. The powers of its directors and management are suspended and the Superintendent is authorized to manage the company and assume all of their duties and functions.

The Minister may also at any time seek a winding-up order under the *Winding-up Act*. Alternatively, if the Minister believes that the company has been restored to a state that meets the requirements of the Act and that control can properly be restored to its directors and officers, the Minister may direct the Superintendent to relinquish control.

Legal rules governing notices, documents and declarations required under the Act

Sections 512 to 518

These sections set out a number of legal rules and requirements, including:

- provisions for sending notices, including notices to directors or shareholders, or to the company (sections 512 and 515);
- a legal presumption that the list of directors sent by a company to the Superintendent is accurate and that certain notices or documents are received within a certain period after they are sent (sections 513 and 515 and subsection 514(1));
- an exemption from the requirement that a notice or document be sent to a shareholder after the third unsuccessful attempt to do so (subsection 514(2));
- rules of evidence governing certified statements of certain facts issued by a company, the validity of entries in a company's securities register, and the verification of documents or facts required by the Act or by the Superintendent (sections 516 to 518).

Certain orders exempt from publication requirements

Section 519

To ensure confidentiality of the business and affairs of companies and other persons subject to the Act, this section provides an exemption from the requirement in the *Statutory Instruments Act* that all statutory instruments — including regulations, guidelines, orders, and directions — be made public. The exemption applies to all instruments issued and directed toward a single company or person except for case-by-case Ministerial approvals of self-dealing transactions under section 477.

Required form of applications

Section 520

This section replaces provisions in the current legislation that set out detailed forms to be used in making applications to the Minister or Superintendent. It provides greater flexibility by allowing the Superintendent to specify the form that such applications should take.

Decisions of Minister appealable to the Federal Court

Section 521

This section provides that directions and decisions of the Minister may be appealed to the Federal Court—Trial Division in the following cases:

- a decision of the Minister to dismiss an appeal of the Superintendent's decision to revoke or amend an authorization or to add conditions and limitations to a company's commencement order (see section 58);

- a decision of the Minister to dismiss the appeal by a company or person of a direction of compliance issued by the Superintendent (see section 499);
- an order of the Minister that a person not vote shares acquired in contravention of the ownership provisions, or that the person dispose of such shares (see section 401); and
- an order of the Minister to the Superintendent to take control of the business and affairs of a company under section 502.

Any person launching an appeal may require the Minister to provide a certified copy of the order or decision, along with the reason for it. The court has the power to set aside any such direction or decision and/or refer the matter back to the Minister or Superintendent.

Authority to make regulations

Section 522

This section provides the regulation-making authority for all regulations referred to in this Act for which such authority has not been provided elsewhere in the Act.

Delegation of Minister's authority to Minister of State (Finance)

Section 523

Any of the powers, duties and functions of the Minister of Finance under this Act may be delegated to a Minister of State.

PART XIV - SANCTIONS

Summary. **This Part sets out the offences and sanctions under the Act. It differs from the current legislation governing federal financial institutions, in which the various provisions governing offences and sanctions are widely separated.**

Offences

Section 524

A person is guilty of an offence when the person contravenes any of the provisions of the Act or its regulations without reasonable cause. In addition, the following persons are also guilty of an offence:

- a director, officer or employee of a company who gives a fraudulent preference to any creditor of the company;
- a director, officer or auditor of a company who fails to provide the Superintendent with any information required under section subsection 495(2); and
- any person who uses the name of a company in any document relating to a securities transaction in contravention of the rules set out in the regulations.

Sanctions and other enforcement

Sections 525 to 530

Offenders under the Act may be prosecuted and punished on summary conviction by fines of up to $100,000 and/or a prison term of up to a year, in the case of a natural person, and by fines of up to $500,000, in the case of an entity. In addition:

- The court may order the person to comply with the provision of the Act that was violated.
- If a violation results in a financial gain to the person or a close relative of the person, the court may impose an additional fine in the amount of the gain.
- Where a violation is committed by an entity, the officers, directors or agents of the entity who participated in the offence are also guilty and may be prosecuted even if the entity itself is not prosecuted.

In addition to being prosecuted, offenders may be made subject to compliance or restraining orders granted by a court on application by the Superintendent or any complainant or creditor.

The above-noted provisions do not, however, invalidate any contract entered into in contravention of any provision of the Act.

All orders of a court under this Act may be appealed to the relevant appeals court in the usual manner. Fines are payable to Her Majesty in right of Canada.

PART XV - GENERAL

Transitional and consequential amendments

Sections 531 to 549

Most of these amendments involve the replacement of references to "trust companies", "loan companies" and the current trust and loan companies legislation by references to this Act and to companies to which this Act applies in the following statutes:

- the *Canada Deposit Insurance Corporations Act*;
- the *Canadian Payments Association Act*;
- the *Competition Act*;
- the *Canada Business Corporations Act*; and
- the *Office of the Superintendent of Financial Institutions Act.*

In addition, these sections contain a number of substantive consequential amendments, the most significant of which are the following:

Competition Act:

- Sections 538 and 539 broaden the scope of the *Competition Act* provisions that currently govern agreements among banks regarding interest rates, charges, and the amount or kind of loans and services provided to customers. The rules are being generalized to apply to both banks and companies governed by this Act.

- Section 540 broadens the scope of the current provision whereby the Minister of Finance may exempt an amalgamation or other merger of banks from the provisions of the *Competition Act* that empower the Competition Tribunal to prevent or overturn mergers. As with sections 538 and 539, this provision is being generalized to apply to mergers of federal trust and loan companies as well. Section 541 also removes such exempted mergers from the category of "notifiable transactions" subject to Part VIII of that Act.

Canada Business Corporations Act (CBCA):

- Section 542 repeals subsection 3(2) of the *CBCA* and replaces subsection 3(4) — which currently prohibits *CBCA* corporations from carrying on the business of a bank or of a trust, loan or insurance company — with a more specific prohibition on carrying on the business of a bank or insurance company or the fiduciary activities described in section 412 of this Act.

- Sections 543 to 545 expand the list of public *CBCA* corporations that may constrain the issue or transfer of their shares to include the holding bodies corporate of federal trust or loan companies. However, the constraints may only be imposed for the purpose of enabling the holding bodies corporate to comply with the "35 per cent widely-held" requirement on behalf of their subsidiaries (see section 382).

- The amendment in section 546 makes clear that *CBCA* corporations may apply for continuance as a trust or loan company under this Act (see sections 31 to 37).

Repeal of current trust and loan legislation and coming into force of this Act

Sections 550 and 551

These sections repeal the *Trust Companies Act* and the *Loan Companies Act* and provide for the coming into force of this Act either as a whole or in parts.

Subsection 551(2) provides companies with six months to comply with the provision governing the maintenance and processing of company records in Canada (section 250) after the provision identifying those records (section 243) comes into force.