DISCUSSION PAPER

PROPOSAL FOR AMENDMENTS TO THE TAKEOVER BID SECTIONS OF THE CANADA BUSINESS CORPORATIONS ACT

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TABLE OF CONTENTS PAGE

INTRODUCTION 4

SUMMARY 4

A. Policy Considerations 4

B. Information Disclosure 5

C. Fair Treatment of Shareholders 5

D. Broader Coverage 6

E. Simplicity or Lower Transactions Costs 6

TAKEOVER BIDS, PART XVI 7

A. Policy Considerations 7

1) Takeover Bids 7

2) Issuer Bids 8

B. Proposed Changes 8

1) Defining Bids 8

a) Percentage of votes as takeover threshold
b) Percentage level
c) Offeror's presently-owned securities/"in concert"
d) Threshold for issuer bid

2) Exemptions: Takeover Bids 11

a) Private agreements
b) Follow-up offers
c) Bids through the facilities of an exchange
d) Bids for private corporations
e) "De minimis" purchases

3) Exemptions: Issuer Bids 15

a) Private corporations and through exchanges
b) Private agreements
c) Repurchases to hold under section 31.1
d) Redemptions/prior agreements
e) "De minimis" purchases

4) Terms Applicable to all Bids 18

a) Equal treatment of shareholders: offer and price
b) Sale of shares during bid
c) Conditions
d) Time extension for regulatory approval
e) Time limits/withdrawal rights

5) Bids-for-All 21

a) Time limits
b) Conversion of bid-for-all to partial bid

6) Partial Bids — 22

a) Time limits/pro rata

7) Disclosure: Information Circulars — 22

a) Amendments of circulars
b) Duty to correct misrepresentations
c) Definition of materiality
d) Variation in terms of offer

8) Acquisition from Dissenting Shareholders: "Squeezeout" — 25

a) Warrants, options and other rights to securities

9) The Dissenting Shareholder's Rights to "Put" his Shares to the Offeror — 26

a) The dissenting shareholder in a "squeeze"
b) The minority shareholder where no "squeeze" right is available
c) Limitation on the compulsory transfer right in issuer bids

10) Exemption Orders — 28

a) Exemption for bid-for-all and non-Canadians
b) General exemption power of the Director

INTRODUCTION

1. The Canada Business Corporations Act (CBCA) was enacted on March 24, 1975 and proclaimed in force on December 15, 1975. It has been amended several times; the most recent amendments were enacted in 1982 to effect provisions of the National Energy Program. When enacted, the CBCA provided a model for provincial corporations acts; several provinces drew heavily on the Act for their own acts. The stated purpose of the CBCA (s. 4) is to revise and reform the law applicable to business corporations incorporated to carry on business throughout Canada and to advance the cause of uniformity of business corporation law in Canada. Experience and developments in provincial acts indicate, however, that further amendments are needed to keep pace with the reality of business activities.

2. Takeover and issuer bids have become an increasingly common occurrence in Canadian business. Figures available from the Bureau of Competition Policy indicate that a significant proportion of these bids involve very large companies, which are more likely to be federally rather than provincially incorporated.

3. Experience with the workings of the CBCA indicates that it does not adequately reflect the reality of present-day business practices. Takeover and issuer bids have become more complex and sophisticated since the CBCA was enacted. The securities acts of the provinces, several of which have recently been rewritten or amended, show a greater appreciation for this reality. The need for continual review of legislative policy in this area is indicated by the current examination by both industry and provinces of the regulation of takeover bids. The evolution of provincial legislation has meant that the uniformity of corporation law sought through the CBCA has diminished.

4. The following proposals are the result of an examination of the takeover and issuer bid provisions (Part XVI) of the CBCA by the Department of Consumer and Corporate Affairs' officials and consultants. Much has been learned from the provincial response to experience gathered over the past few years and while uniformity has been a major consideration, alternative policies have been proposed in some cases. The purpose of the CBCA to provide a model for corporations laws has not been forgotten.

5. The proposals are being put forward for consultation and comments. They are accompanied by an unofficial draft prepared by consultants of the proposed Part XVI amendments to help readers focus their comments and stimulate a more detailed level of discussion.

SUMMARY

A. Policy Considerations

6. The regulation of takeover and issuer bids, like many other parts of the Act, is aimed at shareholder protection. The offeree shareholders in the bid are protected by information disclosure, are given time to

assess information and make their decisions, and must be treated fairly in other ways. Even the objective of neutrality between the offeror and target corporation is intended to create an atmosphere in which offeree shareholders can decide in a manner that will optimally lead to a better use of capital.

B. Information Disclosure

7. The proposals would improve the information available to the offeree shareholders by requiring that the offeror's and directors' circulars sent to the shareholders be amended if there is any important change in circumstances. The range of important information is broadened by defining information that an offeree shareholder would want to know to make his decision to tender, hold or sell in the market as material information in a bid. The specific conditions that an offeror can put in its bid would be listed to moderate shareholder uncertainty.

C. Fair Treatment of Shareholders

8. The fair treatment of offeree shareholders is enhanced by requiring that all shareholders receive the same consideration. The offeror would be prohibited from selling target shares in the market during the course of the bid and profiting from the effect of its own bid on the market. The offeror would also be prohibited from converting a bid for all the shares into a partial bid which would result in the different treatment of different shareholders at various points in the bid. An issuer would no longer be able to make an exempt bid through a private agreement with a few select shareholders who likely control the issuer's decision to make the bid. The Director of Corporations would make an individual determination on the exemption for an issuer bid to repurchase shares to be held to receive benefits under the National Energy Program. Thus, the different treatment of foreign and Canadian shareholders would be decided on a case by case basis.

9. An exemption for takeover bids through private agreements would still be permitted. This exemption, however, allows preferential treatment and unusual premiums to be given to a few shareholders that are not available to others. The perceived unfairness of this has been dealt with in Ontario by the requirement of a follow-up offer to the remaining shareholders if the purchaser pays a premium to the private agreement sellers. Quebec has taken a different approach in that the private agreement exemption is not available if the premium is paid. Both approaches should be examined as policy alternatives to enhance fairness to all shareholders.

10. The exemption for bids carried out through the facilities of a stock exchange must explicitly be carried out according to the rules, regulations and bylaws of the exchanges. These rules provide protection for the offeree shareholders and further protection might be required by having the Director of Corporations examine and approve the rules before bids for federal corporations can be made on an exchange.

11. The offeror is entitled under the Act to require that all shares be tendered if it has received more than 90 percent of the shares bid for. In some cases, the offeror may declare an intent to "squeeze" the minority, but not do so. Since shareholders should be able to rely on the offeror's representations and since some may prefer to sell their shares at that point, the minority shareholders should be able to require that the offeror buy the shares it stated in intended to buy.

D. Broader Coverage

12. Shareholders are further protected by broadening the coverage of the Act. Calculating a takeover bid according to the percentage of votes sought, for example, rather than the percentage of shares by number would mean that the requirements of the Act must be met when multiple-voting shares give influence or control to the purchaser sooner than if only their number were considered. Defining an issuer bid as the repurchase of any equity securities, not just voting securities, would protect shareholders in a broader range of situations.

13. The takeover bid threshold includes the holdings of the offeror when it makes the bid. Concern has been expressed about identifying persons who are acting in concert with the offeror or whose actions in concert would define them as offerors. The creation of rebuttable presumptions of persons deemed to be acting in concert would add greater certainty and help ensure that the requirements of the Act were followed when purchases constituted bids.

E. Simplicity or Lower Transaction Costs

14. A further purpose of the proposals is greater simplicity and certainty and lower transaction costs for the corporations involved to a degree that is compatible with the objective of shareholder protection. One aspect of this is consistency with provincial requirements, a factor that has been considered throughout these proposals. Exemptions for bids for private corporations or for the repurchase of shares according to their terms are included and parallel provincial legislation. The time limits in bids more closely parallel provincial requirements.

15. A major change proposed is the treatment of rights to shares in a "squeezeout". Currently, if an offeror receives more than 90 percent of the securities it bid for and has notified offeree shareholders of its intent in advance, it can require the dissenting minority shareholders to tender their shares. For greater clarity, the proposals would permit an offeror to bid for rights to shares, such as options and warrants, as well as the right feature stripped from its accompanying security, such as the convertible feature on a preferred share. If the offeror obtained 90 percent of these rights, whether stripped or standing alone, it could squeeze the holders of the remaining rights. The mechanics of carrying out the squeeze, which are the subject of some confusion in the present Act, are clarified and simplified.

16. To further simplify the making of bids, it is proposed to give the Director, rather than the courts, the general power to grant exemptions from the application of the takeover bid requirements. This would permit faster applications to the Director and alleviate the difficulties that practitioners have found with court applications.

TAKEOVER BIDS, PART XVI

A. Policy Considerations

1) Takeover Bids

17. Part XVI of the Act governs takeover bids, that is, an offer to purchase shares in a federal corporation. The primary policy consideration underlying this Part is to ensure that the offeree shareholders have sufficient information about the terms and implications of the bid to make a decision on the choices confronting them: to accept the bid, to reject it, or to sell their shares in the market. Not only must they be given certain information about the bid, but also they must have sufficient time to assess the information. Canadian legislation also follows the approach that all shareholders are to be treated equally. In partial bids, shareholders are given pro rata rights to ensure that they participate equally when shares are taken up and all shareholders have the right to benefit from an increase in consideration. Other protections are provided for the offeree shareholders such as: rights to withdraw their shares for a certain time if they change their minds; and limits on the length of time for which shares may be deposited but not taken up and paid for.

18. The other primary policy consideration in a takeover bid, when Company A makes a bid for the shares of Company B, is the maintenance of neutrality between the offeror and the offeree company to the degree consistent with the protection of the offeree shareholder. At one extreme, takeover bids, particularly hostile bids, have been characterized as attempts by "raiders" to "loot" vulnerable companies. On the other side, defensive tactics of offeree corporations have been characterized as attempts by self-interested and probably inefficient management to entrench itself in a comfortable position. The legislation should not encourage either extreme or favour either side in a bid. This further protects the offeree shareholder, with the emphasis theoretically being placed on his decision on the bid, which should reflect the market's assessment of its potential benefits. In practice, other factors, such as the behaviour of institutional investors and the activities of arbitrageurs, may affect the success of the bid more directly than an impartial assessment of the efficiency gains of the proposed change in control or merger. Nonetheless, informed offeree shareholders, acting in a basically neutral environment, are seen as the best preventive of abuse in takeover bids. The Combines Investigation Act provides the regulatory structure to deal with the potential of anti-competitive mergers and the CBCA provides the structure to deal with the mechanisms of bids or mergers.

2) Issuer Bids

19. Issuer bids, that is, bids by a federal corporation for its own shares, are presently treated as a type of takeover bid in the CBCA. The overriding policy concern in issuer bids, as in other takeover bids, is the provision of sufficient information and time to assess information to ensure shareholder protection. Certain policy concerns with issuer bids are different from other takeover bids, however. The desire to maintain neutrality between the offeror and the target company is not relevant because they are, in effect, the same corporation. Much of the concern about issuer bids stems from the rationale for a corporation's repurchasing its own shares. Potential abuses include insolvency resulting from expenditures for repurchases; the perceived unfairness of repurchasing at a very low price shares that were issued recently at a much higher price; the potential for favouring certain shareholders, particularly management, by purchasing their shares at a much higher price than the market would offer; the possibility of manipulating the market price through supporting purchases; and the fact that a corporation repurchasing its shares is the paradigmatic insider who may take advantage of information about the corporation that is unknown to outside shareholders.

20. On the other hand, when the market value of a share does not adequately reflect the underlying book value or potential earning capacity of a corporation, acquiring its own shares may be a good investment for the corporation. A corporation may also wish to repurchase shares to use in employee stock option or incentive plans, to improve earnings per share, or to use in future acquisitions involving shares. Purchasing all its shares, that is, "going private", may be in the best interests of the corporation because of the costs associated with being a public reporting company such as continuous disclosure requirements or because of the desire to make long-range business decisions without regard to short-term negative impacts on the market price of shares.

C. Proposed Changes

1) Defining Bids

21. Structurally and theoretically, the present Act considers issuer bids to be a type of takeover bid and defines them as every offer, other than an exempt offer, by an issuer to repurchase its own shares (s. 187). As noted in paragraph 19, however, there may be different policy considerations underlying the regulation of issuer bids and takeover bids for another corporation. Clarity of drafting, particularly in the formulation of the definitions of issuer bids and takeover bids and the exemptions for each, would indicate that the two types of bids should be separated in the Act. This would also be consistent with the approach taken in the securities acts of the provinces.

a) Percentage of Votes as Takeover Threshold

22. Background: An offeror, under the present Act, makes a takeover bid when it bids for a sufficient number of shares that, when combined with the shares the offeror already owns or controls, would exceed ten percent of that class of issued shares. A share is defined as a voting security.

23. Issue: The number of shares that an offeror bids for may not be an appropriate criterion for the threshold. Certain classes of shares carry multiple voting rights so it currently would be possible to control more than ten percent of the votes while holding less than ten percent of the shares by number. Takeover bid regulation is concerned with the concept of control and the importance of a change in control, both legal control (more than 50 percent of the votes) and *de facto* control or influence on the affairs of the corporation. The number of votes held by a person is thus more important than the number of shares.

24. Proposal: Define a takeover bid according to the number of votes that would be held by the offeror. This provides a more accurate recognition of the importance of control in rationalizing takeover bid regulation. Ontario has recognized this in its proposed amendments to the *Securities Act* by using the number of votes to trigger the threshold for defining a takeover bid. Although other provinces still define the bid threshold according to the number of shares, the coexistence of share number and vote number thresholds does not create an incompatible regulatory scheme: where the threshold is defined as a percentage of votes and multiple voting shares are subject to an offer, the offer will be considered a takeover bid earlier than if the threshold were a given percentage of shares.

b) Percentage Level

25. Background: The CBCA uses ten percent of the number of shares as the threshold to determine if the offer is a takeover bid. If the offeror bids for shares that, combined with its present holdings, would bring its total holdings to over ten percent of the class of shares, the offer is a takeover bid.

26. Issue: The choice of a particular percentage of shares or votes as a takeover bid threshold is ultimately arbitrary and a percentage is set for reasons of certainty and clarity. The size of the share holding that will permit the holder to effectively control or have great influence on the management of the company varies from company to company. The use of the legal control threshold, i.e., over 50 percent of the votes and sufficient votes to elect a majority of the board of directors, was rejected many years ago as an appropriate threshold in takeover bid regulation because it does not recognize the reality of effective control through a relatively small number of votes.

27. Proposal: Retain the existing percentage threshold as ten percent. This would be expressed as percentage of votes rather than percentage of the number of shares (see paragraph 24). Many provinces have chose 20 per-

cent of the votes or shares as the threshold; by contrast, the United States, in the Williams Act, regulates certain aspects of tender offers (takeover bids) when five percent of the shares have been or would be acquired. Experience indicates that the present CBCA ten percent threshold is a realistic recognition of the point at which a securityholder may strongly influence or control a corporation. Ontario, whose Securities Commission has extensive experience in regulating bids, has recently proposed amending its Securities Act to be consistent with the CBCA on this point.

c) Offeror's Presently-Owned Securities/"in concert"

28. Background: Defining a takeover bid according to the percentage of shares or votes an offeror aims to hold at the completion of the bid means that the shares or votes it owns or controls before the offer is made are considered in determining if an offer is a takeover bid under the CBCA. The holdings of persons who are so closely connected with the offeror that it may effectively control their votes are also considered. The holdings of the offeror are calculated to include the holdings of its affiliates and associates. Consideration must also be given to the calculation of the existing holdings when the offeror is acting jointly or in concert with another person in making the bid. It is a question of fact in each case whether a joint or in concert relationship exists.

29. Issue: The concept of "in concert" relationships was first used in the London City Code on Mergers and Acquisitions and has been adopted by most modern takeover bid legislation, including the CBCA, most provincial securities acts and the U.S. Williams Act. The CBCA, for example, defines "offeror" to include persons who make a takeover bid "jointly or in concert". The City Code deems certain relationships to create the rebuttable presumption that those persons are acting in concert. The relationships include not only those with associates and affiliates, but also certain relationships with financial advisors and the offeror's pension funds. It is not necessary that all those deemed to be acting in concert be related to each other or, indeed, even know each other. The more attenuated the relationship, of course, the more likely the presumption would be rebutted. Without intending a pejorative connotation, the closest analogy is the law of conspiracy. The present CBCA does not define "acting in concert" or create any presumption of relationships deemed to create an "in concert" offer.

30. Proposal: Create rebuttable presumptions that certain relationships are deemed to be "in concert". It is impossible to define the concept with absolute precision. The creation of presumptions, however, would put potential offerors on notice of their possible obligations and add a greater degree of certainty to enforcement of the Act.

d. Threshold for Issuer Bid

31. Background: The CBCA defines an issuer bid as "every offer... by an issuer to repurchase its own shares". There is no percentage threshold relating to the number of shares sought. A share is defined as a voting security.

32. Issue: Issuers, when repurchasing their securities, are not necessarily concerned with the question of voting control. Generally speaking, repurchased shares must be cancelled and, in any event, a corporation holding shares in itself may not vote those shares. The policy rationales for regulating issuer bids (see paragraph 19) are applicable to the repurchase of all types of equity securities. Issuer bid regulation, however, does not now apply to repurchases of nonvoting securities.

33. Proposal: Define issuer bids as offers to repurchase all types of equity securities. This would meet the policy goals of protecting securityholders against bids that are inherently unfair or that take advantage of the issuer's intimate knowledge of the corporation.

2) Exemptions: Takeover Bids

34. The CBCA defines all offers to purchase that meet certain criteria (e.g., percentage threshold in a takeover bid or any repurchase of voting shares in an issuer bid) as a bid initially subject to the requirements of Part XVI. In certain cases, the bids are exempt bids that may be carried out without further compliance with Part XVI. As presently drafted, certain exemptions apply to takeover and issuer bids and one is applicable only to issuer bids. Provincial acts also permit some further exemptions that are not included in the present CBCA. Clarity of drafting would indicate that takeover bid and issuer bid exemptions be treated separately in most cases and they will be discussed accordingly.

a) Private Agreements

35. Background: With respect to takeover bids, an offer is exempt if it is made to fewer than 15 shareholders; this is called the "private agreement exemption". It permits an offeror to purchase what are often large blocs of shares from a limited number of persons. The rationale for this exemption is that this is a privately negotiated agreement, generally without the time pressure associated with a public bid, with a knowledgeable investor or an investor with easy access to expert advice. The offeree in a private agreement can demand disclosure, possibly even more detailed or sophisticated than mandated in a public bid, and assess it. It is likely to be a true case of bargaining between equals.

36. Issue: The private agreement exemption, however, raises the question of counting the fewer than 15 shareholders. It is possible for a group of shareholders to combine themselves in an attempt to be counted as only one shareholder so that the limit of 15 would not be exceeded. Unlike provincial securities

acts, the CBCA does not address these attempts to avoid the spirit of the exemption. Two avoidance methods are the forming of a trust so that the legal owner of the shares, the trustee, is counted as one shareholder rather than several beneficial owners, and the intermediate sale of shares by several shareholders to a single person who would in turn sell under the private agreement exemption.

37. Proposal: Define how the fewer than 15 shareholders shall be counted. These avoidance techniques can be dealt with by counting the beneficiaries of the trust and the original sellers of the shares separately. An exception should be made for testamentary trusts and inter vivos trusts because, in the first case, it is unlikely that anyone would plan a testamentary trust to avoid the intent of the private agreement exemption and, in both cases, the beneficial owners have no control over the disposition of the shares. Joint registered owners of securities should be counted as one owner since joint registration provides joint control over a given share rather than combining two or more shareholdings.

b) Follow-up Offers

38. Background: The private agreement exemption is related to the question of "follow-up offers", which may well be the most controversial issue in the regulation of the sale of securities in Canada today. Ontario is unique in North America in requiring that, where a sale of shares under the private agreement exemption is made and where a premium (defined as a price in excess of 15 percent over the published market price) is paid, the offeror must follow up with a similar offer to all the other shareholders. Alberta has specifically rejected including a follow-up offer requirement in its new Securities Act and Manitoba, while including it in its new Act, has not yet proclaimed it in force. Quebec also decided against a follow-up requirement. A committee of the financial community chaired by Mr. Pierre Lortie, President of the Montreal Exchange, is presently examining the question and it is also under review in Ontario.

39. Issue: The follow-up offer is an attempt to deal with a problem inherent in the private agreement exemption. As noted above, the nature of the private negotiations protect the interest of the small number of shareholders involved in the agreement. It does not protect the other shareholders and the exemption carries the potential for preferential treatment of a select few that disadvantages the others. The present CBCA provides the exemption and does not address the question of the treatment of the shareholders who are outside the selling group.

40. Alternative Proposals:

1) Adopt some form of follow-up offer. The level of permitted premium, the threshold at which an offer is required, the form of the offer (e.g., whether the offeror can "top up" the consideration for the remaining shareholders without acquiring their shares), and the timing can be varied to ensure provincial compati-

bility. The argument in favour of follow-up offers is essentially one of equity or fairness: all shareholders should be treated alike and have the same opportunities to sell their shares at a given price. Underlying this is the view that one share is like another, and that owning a large number of shares should not confer any special privilege. The view that any premium that might attach to a control bloc is a corporate asset similar, for example, to corporate information would imply that the premium belongs to the corporation to increase the value of all shares. The argument against follow-up requirements, aside from the practical and interpretive difficulties that Ontario has encountered, is that shares are private property and that restraints on their alienation and bargaining with respect to their value should only be applied in the rarest circumstances. Furthermore, follow-up offers, which may impose financial burdens on offerors, result in the offeror's owning all the shares; the offeree corporation is no longer publicly traded, and assets are concentrated in fewer hands. As noted, the pros and cons of follow-up offers are still being debated and there does not appear to be any urgent need to include such a requirement in the CBCA at this time.

2) Limit the availability of the private agreement exemption. In considering policies for its new *Securities Act*, Quebec examined the option of eliminating the private agreement exemption. This approach met with strong resistance from the financial community. The Quebec approach, therefore, is to permit private agreements but to limit the premium permitted to be paid to the 14 shareholders. The select shareholders may be paid a premium of up to 15 percent over the established market price. The 15 percent figure matches the premium limit in Ontario that triggers the follow-up offer. In both cases, this was chosen to permit a small premium and, more important, to allow for variations in market price that would make private negotiations difficult if a price had to be chosen to exactly match market prices on a given day. The Quebec position represents a compromise between the follow-up requirement and a broad private agreement exemption that should be considered as an alternative policy choice.

c) Bids Through the Facilities of an Exchange

41. Background: Takeover bids carried out through the facilities of a stock exchange are also exempt offers. Most bids are through the Montreal Exchange and the Toronto Stock Exchange, which are supervised by their respective provincial securities commissions. Each has procedures for bids carried out through it. These procedures are embodied in the bylaws and regulations of the exchanges, which must be approved by the provincial securities commissions.

42. Issue: The present exemption in the CBCA does not specifically require that an exempt stock exchange bid be carried out according to the bylaws or regulations of the exchanges and the relevant CBCA regulation is neither clear nor consistent on this point. It is therefore possible to argue, indeed it has been argued, that a bid that did not comply with an exchange's rules is nonetheless an exempt bid under the CBCA. An exemption is thus being provided without the required protection of the shareholders that was intended.

43. Proposal: Permit the exemption only when the bid complies with the bylaws and regulations of the exchanges as approved by the Director of Corporations. The bylaws and regulations of the exchanges are subject to the oversight of the provincial securities commissions (or the Superintendent of Brokers for the Vancouver Stock Exchange) to ensure investor protection. The Director's approval would indicate what procedures are acceptable for CBCA exempt bids. This may become increasingly important as the exchanges move to self-regulation. The provision of regulation-making power could also ensure that specific procedures to either supplement or replace exchange rules could be furnished if necessary to ensure adequate shareholder protection.

d) Bids for Private Corporations

44. Background: Takeover bids for private corporations are also exempt bids. A private corporation is not publicly traded and an offer for the corporation's shares is much like the private agreement offer: it is likely to be a carefully negotiated acquisition. In many cases, it may be negotiated among the original shareholders who hold a "first refusal" right when one of them wishes to sell his shares.

45. Issue: "Private corporation" is not specifically defined under the CBCA, but refers to a corporation that does not distribute shares publicly. Lacking a definition for private corporation, the present exemption refers to the purchase of shares of a corporation with fewer than 15 shareholders. This provides a very narrow exemption that eliminates a number of truly private corporations.

46. Proposal: Define the private corporations to which the exemption would apply. This approach would consider some of the characteristics of private corporations, whose constating documents usually include a restriction on the right to transfer shares and a prohibition against inviting the public to subscribe to securities. Combining these criteria with the more realistic limit of not more than 50 shareholders, excluding employees, would identify those corporations that might appropriately be the subject of an exempt bid. This is also consistent with the definition of "private company" in the Ontario Securities Act.

e) "De Minimis" Purchases

47. Background: Most securities acts provide an exemption for what is called a "de minimis purchase", that is, the occasional purchase of a small number of securities over a relatively long period of time. If the size and time limit restrictions are complied with, the purchases do not constitute a bid even though the purchaser might move over the takeover bid threshold. Once he acquires ten percent, of course, he is deemed to be an insider and would be subject to disclosure and reporting requirements with respect to his acquisitions or sales of securities. The purpose of the exemption is to provide the purchaser with a moderate degree of flexibility in carrying out his affairs while preventing a "creeping bid". The CBCA does not provide such an exemption.

48. Issue: The de minimis exemption is used primarily when the private agreement exemption is not available, for example, when the purchase is in the over-the-counter market and the offer is technically made to all shareholders. It may also be used to supplement a private agreement if, say, 16 shareholders were part of the selling group. The existence of such an exemption, therefore, serves a useful function.

59. Proposal: Provide an exemption for de minimis purchases. The de minimis purchase should be coordinated with provincial legislation in this area. The general approach has been to permit the purchase of five percent of the voting shares within a 12 month period. To be consistent with the takeover bid threshold, this should be shares representing five percent of the votes. Ontario is likely to amend its Act to provide this consistency in the near future. Purchases by affiliates and associates should also be calculated in determining the five percent purchases. Because de minimis purchases are generally made in the open market (private agreements covering other situations), the provincial exemption relates to the exemption for bids made through the facilities of an exchange, including "normal course" purchases which would permit relatively large acquisitions of listed companies without compliance with Part XVI. The five percent figure is thus calculated to include purchases made by an exempt bid through the exchange; that is, if within 12 months an offeror had purchased shares accounting for five percent or more of the votes through an exempt exchange bid, the de minimis exemption would not be available.

3) Exemptions: Issuer Bids

a) Private Corporations and Through Exchanges

50. In two cases, the exemptions for issuer bids are the same as those for takeover bids: purchase of shares of private corporations and the bid through the facilities of the exchange. In these cases, the exemptions, as discussed above, can be drafted to cover all bids, both issuer and takeover.

b) Private Agreements

51. Background: The existing CBCA provides an exemption for issuer bids carried out by private agreement with fewer than 15 shareholders. The provincial acts, which began regulating issuer bids at a later date, provide no similar exemption.

52. Issue: An important difference between takeover and issuer bids in permitting this exemption for one and not the other is that, in takeover bids, it is a third party that wishes to make the purchase. This indicates a greater likelihood of true bargaining. The danger of permitting a private agreement exemption for issuer bids is not so much a question of protecting the selling shareholders, but protecting the shareholders who do not receive the offer. With a private agreement exemption, the controlling shareholders of the issuer may decide among themselves which one of them will receive the potential benefit of the sale. The same

insiders may both decide on the purchase and its terms and then sell their shares to the corporation. There is no third party intervening to moderate the preferential basis of the purchase. Since a repurchase of shares by the issuer decreases the outstanding equity of the corporation, the controlling shareholders can consolidate their control by, in effect, increasing the percentage of their holdings. If this is done by private agreement, there is no form of advance notice to the other shareholders. Although prohibitions exist in the Act's insider trading provisions, the private agreement exemption also provides a vehicle for purchases from insiders on the basis of confidential information.

53. Proposal: Eliminate the private agreement exemption for issuer bids. This would ensure the fairer treatment of offeree shareholders and eradicate the potential of inappropriate preferential treatment and possible insider trading.

c) Repurchase to Hold Under Section 31.1

54. Background: The exemption that is unique to issuer bids in the existing Act is an exempt offer by a corporation to repurchase its own shares to be held under section 31.1. Section 31.1 permits a corporation to hold shares, including shares whose transfer to non-Canadians is constrained, for the purpose of qualifying for certain benefits by attaining a specified level of Canadian ownership or control. This section was added to the CBCA in the summer of 1982 to aid corporations in meeting the Canadian ownership requirements of the National Energy Program.

55. Issue: The rationale for this exemption is unlike the other exemptions. The basic policy objectives of takeover and issuer bid regulation are shareholder protection through information and time limitations; the mechanisms of other exempt offers meet these objectives in other ways. The exemption for repurchase of shares to be held under section 31.1 looks only to the issuer's reason for the repurchase and does not address itself to the mechanism for the repurchase. This is a major policy change in the Act and represents a questionable balancing of the objectives of shareholder protection and the objectives of the National Energy Program. It might be argued that the shareholders to whom the bid is made in this case are likely to be foreign shareholders. A corporations act, however, is not intended to be a vehicle to regulate the affairs of a particular type of business or discriminate among different investors. As a general rule, the shareholders subject to a bid for the purposes of permitting a corporation to meet certain business objectives, including Canadian content levels, should be given the same protections.

56. Proposal: Provide the Director of Corporations with the authority to exempt an issuer's repurchase to hold shares under section 31.1. This would permit individual examination of each case and allow disclosure and timing requirements to be tailored to the mutual needs of the issuer and shareholders. A more finely tuned exemption such as this would be more appropriate to the objectives of the CBCA, while considering the government's policy objectives under the National Energy Program.

d) Redemptions/Prior Agreements

57. Background: Most provincial acts provide a further exemption for issuer bids that is not included in the CBCA. When an issuer is repurchasing securities according to the terms and conditions of repurchase stated at the time the securities were issued or are repurchases that are required by the instrument that created the class of securities or the governing corporations act, the repurchases are exempt. Repurchases to meet sinking fund requirements or from employees or former employees are also exempt.

58. Issue: Under these arrangements, the securityholder has prior notice of either a specific intent to repurchase or the possibility of repurchase and the terms and mechanics of the purchase are being carried out according to a prior agreement. The prior agreements provide protection for the shareholder whose securities are being repurchased. It should be noted that in all cases, issuers are subject to conditions (CBCA, ss. 32, 33, 34) that permit them to repurchase or redeem securities only if their solvency or cash flow positions would not be jeopardized by the expenditures for repurchase.

59. Proposal: Provide an exemption for issuers repurchasing securities according to the terms and conditions of repurchase stated when the securities were issued or for repurchases required by the instrument creating that class of securities or by the CBCA or to meet sinking fund requirements or repurchases from former or current employees.

e) "De Minimis" Purchases

60. Background: A form of "de minimis" exemption is also available to issuers under most provincial acts, but not in the CBCA. The issuer must first publish a notice of its intent to purchase securities. Having done so, it may purchase up to five percent of the class of securities sought within a 12 month period. This notice and purchase exemption, when applied to convertible debt securities, is expressed in terms of five percent of the aggregate principal amount.

61. Issue: The de minimis exemption permits an issuer to make small purchases and may be very useful, particularly if share are needed for employee compensation plans.

62. Proposal: Provide a de minimis exemption for issuer bids. The notice requirement is consistent with continuous disclosure requirements for public announcements of material changes in the business or affairs of a corporation. Both the expenditures involved and the corporation's reasons for repurchase may well be material facts that must be disclosed. The requirement in the exemption would ensure that this is always done.

4) Terms Applicable to All Bids

63. The CBCA provides terms that are applicable to all bids (issuer and takeover) and also distinguishes between terms that apply to bids for all the securities of a given class and partial bids for a specified number of the securities. These requirements relate to disclosure, timing, and the mechanics of the bid, such as prorationing or taking up and paying for the shares tendered. The provincial acts impose slightly different and more detailed requirements and the policies behind these are worth examining to determine if identical or similar requirements should be included in the CBCA.

a) Equal Treatment of Shareholders: Offer and Price

64. Background: The established Canadian approach to takeover bid regulation is to ensure that all shareholders are treated equally. While sophisticated or expert investors will always have certain advantages in the market (and this is their fair return for their development of expertise), the legislation creates a structure in which the less sophisticated are not unduly disadvantaged. The CBCA requires, for example, that an offering circular be sent to all holders of the target securities. The pro rata requirement in the partial bid reinforces this policy of shareholders' being treated equally.

65. Issue: Since offers are usually made at a price that includes a substantial premium over the market price to induce tenders, all shareholders should have the same opportunity to tender their shares and, in a partial bid, be subject to prorationing on the same terms. In the same sense, all shareholders should be offered the same price for their shares. This is presently not required by the Act.

66. Proposal: Require that the same price be offered to all securityholders. In addition to requiring the same price, the Act should clearly indicate that collateral agreements that raise the price of shares to select shareholders should not be permitted.

b) Sale of Shares During Bid

67. Background: The CBCA deals with an offeror's purchasing target shares during the course of the bid, which is permitted subject to certain requirements. It does not treat, however, whether the offeror may sell shares during the bid.

68. Issue: While an offeror might normally be expected to want to hold all the shares of the target that it has acquired, this is not true if it has decided to abandon the bid. If the offeror sells shares before announcing its withdrawal, it will profit from market prices stimulated by its own bid. If permitted to sell, the offeror can also tender its holdings to a competing bidder before withdrawing its bid, while the offeree shareholders who tendered to it cannot accept the competitor's offer. Tendering to a competitor while preventing others from doing so is unfair and may

create confusion and pressure when the first bid is withdrawn. Profiting from its own stimulation of the market price may be viewed as a form of market manipulation.

69. Proposal: Prohibit the offeror's selling target securities in the market during the course of the bid. An explicit prohibition against the offeror's selling, as is found in many provincial acts, would prevent this behaviour without the requirement of proving the intent to deliberately manipulate the market.

c) Conditions

70. Background: The CBCA does not treat the question of what, if any, conditions the offeror may put in its bid. By contrast, provincial acts permit certain specified conditions.

71. Issue: When takeover bids first became popular, offerors put multiple conditions in their offers that were often so broad that it was difficult for the offeree shareholder to determine if his shares were likely to be accepted. The tender of the offeree shareholder's securities represents, in a sense, a "call" for the offeror, who has a claim on those shares during the bid. With elaborate and broad conditions in the bid, the shareholder's uncertainty is increased.

72. Proposal: Permit the offeror to put certain specified conditions in its bid. For example, an offeror in Ontario may state that it is bound to accept only a limited number of securities, i.e., in a partial bid the offeror sets its upper limit. The offeror may state that it is not bound to take up and pay for the securities unless a specified minimum are tendered. If so few securities are tendered that the offeror cannot achieve its objective (usually control), then it does not have to accept the tendered securities. The offeror may also refuse to take up and pay for securities if the action of another person, including the offeree corporation or a governmental or regulatory authority, causes a material adverse change in the affairs of the offeree corporation. In this case, the substance of what the offeror has bid for has changed in some important and negative way and the target securities may be worth less to it or no longer be desired. The offeror may also make its bid conditional on its obtaining a required approval from a governmental or regulatory authority. The final condition that is permitted in provincial acts is that the offeror may refuse to take up and pay for shares if, at the time for doing so, there exists an enforceable prohibition by law against taking up and paying.

d) Time Extensions for Regulatory Approval

73. Background: Since the CBCA does not explicitly deal with the question of whether an offeror may include the obtainment of a regulatory approval as a condition in its offer, the Act does not treat the question of time extensions to obtain approvals.

74. Issue: If a condition based upon the need to obtain regulatory approval is permitted, it is necessary to recognize the reality of the length of time that this may require. The time limits for taking up and paying for securities (discussed below) may be extended for some period of time such as 90 days under provincial acts.

75. Proposal: Permit a time extension of up to 90 days to obtain a regulatory approval if such an approval is a condition in the offer. This time extension extends the offeror's "call" on tendered shares. On the other hand, the offeror does not have to decide whether to waive the condition and take up shares that might later have to be divested or refuse to waive the condition and, in effect, cancel a bid that would have been acceptable to both the regulators and the offeree shareholders. The Act would not make the offeree corporation "takeover proof" simply because a regulatory approval is required. Thus the neutrality between the offeror and the offeree corporation is maintained. The regulatory authority can also make its decision without the extraneous pressure of knowing that a relatively complicated divestiture of shares may be the result of a negative ruling.

e) Time Limits/Withdrawal Rights

76. Background: There are certain terms that apply to every bid (issuer and takeover, partial and bid for all the shares) that relate to the timing of bids and are intended to ensure that shareholders have sufficient time to assess information and make their decision. The date of the bid, from which other time limits are calculated, is the date on which the bid is made and the information circulars sent. The minimum time period prevents the old "Saturday night special" in which the offeror made a surprise bid that was open only for a short time, possibly only a couple of days. For the first ten days of the bid, any offeree shareholder who has deposited his shares has the right to withdraw his shares if he changes his mind. Most offeree shareholders, especially sophisticated ones, wait until the last day or two of the bid to deposit their shares. In this way, they can take advantage of a competing bid on better terms if one is made and they prefer it. The unsophisticated shareholder is the one most likely to accept the offer quickly. The withdrawal period, which is a sort of consumer "cooling off" period, allows the shareholder to change his mind or to accept a competing bid if it is made within those first ten days.

77. Issue: The present CBCA does not provide a mechanism for the shareholder to withdraw his shares and there is the potential for dispute, particularly if there is a competing bid that the shareholder wants to accept but the offeror wants to keep every share tendered.

78. Proposal: Provide requirements for acceptable withdrawal of tendered shares by the offeree shareholder. A requirement that the offeree shareholder must notify the offeror's depositary in writing, including by electronic communication that produces a

copy, and that the notice must actually be received by the depositary to effect the withdrawal would create certainty in this area.

5) Bids-For-All

a) Time Limits

79. Background: Where the bid, both issuer and take-over bids, is a bid for all the securities of a given class, the offeror is subject to certain requirements. The offeror is not permitted to take up and pay for any securities until ten days after the commencement of the bid. The ten day period matches the time in which an offeree shareholder may withdraw his securities. Under the present Act, the offeror in a bid-for-all is not required to take up and pay for the deposited shares at any point during the course of the bid. If the offeror does not begin to take up the shares, however, the offeree shareholder may withdraw his shares after 60 days. Thus 60 days is the maximum time for which the offeror may be considered to have a "call" on the shares.

80. Issue: Since there is no time limit on a bid for all the shares, indeed some stay open for many months since the offeror may hope for more shares to trickle in, the offeror may control the tendered shares for a long time, subject only to the 60-day withdrawal right.

81. Proposal: Require the offeror to take up and pay for deposited shares after 35 days. The offeror would also take up subsequently deposited shares within 14 days of their deposit on rolling basis. The post 60-day withdrawal right would be eliminated. If the minimum number of shares in the offeror's condition of acceptance had not yet been deposited and the offeror had not waived that condition, it could wait until the minimum had been met but must then proceed with taking up and paying for the securities on a rolling basis. The knowledge that the offeror was prepared to take up the securities would likely provide an incentive for shareholders to deposit.

b) Conversion of Bid-For-All

82. Background: The present Act permits an offeror to convert a bid for all the shares of a given class to a partial bid, which would then be subject to the rules governing partial bids.

83. Issue: There is little justification for this provision and, indeed, there is some question as to whether it has ever been used. Presumably it exists to protect an offeror who has miscalculated its resources and changes its mind about the holdings it wishes to acquire. Possibly an offeror may be faced with a competing offer, either for all the shares or for a portion of them, that offers such an attractive premium that the offeror cannot match it while bidding for all the shares. In this case, it is always open to the offeror to withdraw its bid and make another one if desired. The existing provision creates an inequity between different offeree shareholders if the offeror has already taken up and paid for some securities, which it may do after ten days. When the bid becomes a

partial bid, the shareholders whose securities have not yet been paid for will be subject to possible prorationing. If, because the offeror is now seeking only a portion of the total shares, it increases the consideration for the bid, and if this is deemed to be the same bid, is the increased consideration paid to the shareholders whose shares were already taken up and not prorationed? The principle of paying all offeree shareholders the same consideration would seem to require this.

84. Proposal: Prohibit the conversion of a bid-for-all to a partial bid. This would require the offeror to make a new bid under different terms if desired.

6) Partial Bids

a) Time Limits/Pro Rata

85. Background: Where a bid is for less than all the shares, a partial bid, other specific requirements apply under the existing CBCA. There is a minimum and maximum time length for a partial bid; a minimum of 21 days to ensure the offeree shareholders have sufficient time to be informed of and decide on the offer and a maximum because it is only at the end of the bid in a partial bid that the shares can be taken up and paid for. The CBCA maximum time is 35 days. This can be related to the proposed 35-day period after which the offeror must take up and pay for shares in a bid-for-all. This is considered a reasonable length of time for the offeree shareholder's securities to be tied up by the tender at the discretion of the offeror. The offeror must take up and pay for the shares at one time in a partial bid because if more shares have been tendered than the offeror bid for, the shares are taken up on a pro rata basis. In simple terms, if the bid were for 40 percent of the class of shares and 80 percent were tendered, each tendering shareholder would have half his shares taken up. In this way, all the offeree shareholders are treated equally and the pressure to tender early that would exist in a first-tendered, first-taken-up basis is eliminated.

86. Issue: The CBCA presently requires that, for all bids, the deposited shares must be taken up and paid for within 14 days of the termination of the bid. If the offeror in a bid for all of a class of securities is required to take up and pay for deposited securities after 35 days and continue to take up and pay on a rolling basis (see paragraph 81), then the requirement to take up and pay within 14 days of the termination of the bid should now be applied only to partial bids.

87. Proposal: Limit to partial bids the requirement to take up and pay for deposited shares within 14 days of the termination of the bid.

7) Disclosure: Information Circulars

a) Amendments of Circulars

88. Background: Certain information must be given to offeree shareholders by the offeror in both takeover and issuer bids. In addition the directors of the offeree corporation in a takeover bid are required to

send the offeree shareholders a directors' circular, which may recommend either an acceptance or rejection of the bid. The contents of the offeror's and directors' circulars are prescribed by regulation. A take-over bid circular, for example, must include such information as the identity and business of the offeror; details of the conditions of the bid; the method and time of payment; the existing beneficial ownership of the subject securities by the offeror, its affiliates and associates, their directors and officers; details of any arrangement made or proposed between the offeror and any directors or officers of the offeree corporation; and arrangements between the offeror and any offeree shareholder with respect to the bid. The Act does not require the amendment of circulars when new circumstances or changes occur that affect the accuracy of the circulars.

89. Issue: The responsibilities of offerors and offeree directors to amend their disclosure documents when circumstances change in the course of the bid or when the circulars are misleading or have become misleading because of subsequent events should be expanded and clarified. Since disclosure of information is also tied to the issue of sufficient time to assess the information, the question of when disclosure should require extension of time limits or renewal of the offeree shareholders' withdrawal rights should be considered.

90. Proposal: Require amendment of offeror's circulars when a material change has occurred; tailor the time extensions and renewal of withdrawal rights to the type of information being disclosed. Where an adverse material change has occurred in the offeror's circumstances affecting its business or affairs, the offeror must disclose that change by amending its circular. In this case, the date of the amendment would be deemed to be the new date of the bid and new time limits and withdrawal rights would be created. Because the material change is adverse, the offeree shareholder needs time to reassess the new facts and may wish to change his mind about accepting the bid. If the material change or fact has a positive effect on the offeror's business or affairs, it should also be required to disclose the new information to the offeree shareholders. In this case, however, the amended circular should not affect the date of the bid, the time limits or the existing withdrawal rights.

91. Proposal: Require amendment of directors' circulars if a material change in the business or affairs of the offeree corporation has occurred. A disclosure or amendment by the offeree corporation would not affect the date of the bid, although the material change may have affected the value of the target securities and thus the relative value of the offer.

92. Proposal: Require the offeree directors to respond if they have made a recommendation to their shareholders about the bid and the offeror's circular has been amended. A significant change in the offeror's circumstances or a change in the terms of the bid may also have an effect on the subsequent accuracy of the response of the directors of the offeree corporation to the offer. The directors should send a notice to the

offeree shareholders indicating their recommendation in the light of the changed circumstances and giving reasons why the recommendation has changed or remained the same. If no recommendation has been made in the original circular, then the directors would not be required to send a notice responding to offeree amendments. A response by directors is required because of the strong influence of their recommendation on the offeree shareholders' decision on the bid.

b) Duty to Correct Misrepresentations

93. Background: Regulations pursuant to the CBCA require an amendment to a takeover bid circular if it is discovered to be misleading or if subsequent events have made it misleading.

94. Issue: The duty to correct any misrepresentation in a bid circular or a director's circular, or in any amendments to these documents, should be explicitly stated in the Act itself. The relationship of the deeming of a new bid date and concommittant time extensions and withdrawal rights should parallel the requirements imposed when disclosing because of a change in a material fact or circumstances.

95. Proposal: Require amendment of offeror's and directors' circulars to correct misrepresentations; tailor time extensions and renewal of withdrawal rights to parallel material change requirements. For example, if a correction of a misrepresentation in an offeror's circular has an adverse effect on the offeror's situation or the consideration being offered, then the bid date is deemed to be the date of the correction and the offeree shareholders can reassess their decision. A correction by the offeree corporation would not affect the timing of the offeror's bid. A parallel structure is not only logical, but also it eliminates any incentive to characterize an amendment as a correction of a past misrepresentation rather than a change in circumstances.

c) Definition of Materiality

96. Background: In assessing whether a statement is a misrepresentation or whether a change in circumstances or a new fact should be disclosed, the criterion is materiality. A material fact or change is generally defined as one that would be reasonably expected to have a significant effect on the market price or the value of the securities of the company in question.

97. Issue: In the context of a bid a material fact is broader than the common definition. The offeree shareholder, for example, may be interested in knowing about the defensive tactics of the target corporation that may affect the success of the bid.

98. Proposal: Define "materiality" in the context of a bid. Essentially a fact or change is material if a prudent offeree shareholder would find it important in determining his course of action, i.e., to tender, hold, or sell his securities in the market. This would include, but not be limited to, the traditional concept of information affecting the value of securities.

d) Variation in Terms of Offer

99. Background: The CBCA does not deal with the issue of disclosure or the need for renewal of withdrawal rights and extension of time limits when the terms of an offer are varied.

100. Issue: Changing the terms of a bid may in some cases mean that the offeree shareholder should be able to reconsider his decision to tender and may require additional time to assess the new information. In effect, the changes are significant enough that a new bid may have been deemed to have been made.

101. Proposal: Require that notice be given to offeree shareholders of any variation in the terms of the offer, which, with certain exceptions, would be a new bid. In most cases, the date of the notice should be considered the date of the bid and the time limits and withdrawal rights extended. Certain changes in terms, however, are simple for the offeree shareholder to assess, such as an increase in price; or create time for shareholder assessment, such as an extension of the length of the bid; or are unlikely to affect the shareholder's decision, such as the waiver of a condition in the offer. These changes in terms, or a combination of them, should not affect the date of the bid or time limits and withdrawal rights. Notice of these specific changes would be required, however.

8) Acquisition From Dissenting Shareholders: "Squeezeout"

102. The offeror that acquires 90 percent (excluding its own holdings) of the securities sought in the bid is entitled under the CBCA to require the nontendering shareholders, the dissenting offerees, to sell their securities to it. This manoeuvre is often called a "squeezeout". The offeror can only exercise the squeeze right if it complies strictly with the Act. The dissenting shareholder who is squeezed out is entitled to receive either the same consideration offered in the bid or, alternatively, the "fair value" of his shares set by a court.

103. The 90 percent squeezeout provision has been a feature of corporation law in many common law jurisdictions since its first enactment in the United Kingdom in 1929. The purpose of this provision is to prevent the "oppression of the majority by the minority". It permits business combinations and rationalizations to take place that otherwise might be blocked by a relatively insignificant minority of shareholders.

a) Warrants, Options and Other Rights to Securities

104. Background: In recent years, numerous financial instruments have been developed such as rights to acquire participating shares (options or warrants) and convertible debt or convertible preferred shares that can be exchanged for participating shares. The object of the squeeze is to acquire all the shares of a class of securities. The continued existence of these instruments, however, results in the likelihood or

possibility that the rights will be exercised and that more shares of the class that has been squeezed must be issued. This may well defeat the business purposes of the combination or rationalization.

105. Issue: An attempt was made in the present CBCA to deal with this matter. The definition of "share" in Part XVI includes securities currently convertible into the target shares and currently exercisable rights and options to those shares. In the context of the bid itself, this is workable and means that persons holding convertible securities or rights receive the offer and can accept it, usually by converting or exercising the right and then tendering the target shares. The precise conditions of how this is done are usually found in the terms of the offer itself. This treatment of convertible securities and rights, however, is less satisfactory in a squeezeout. The inter-relationships between the target shares and the right to the shares create considerable confusion, particularly for practitioners, in determining how to develop the terms of a bid with a view to later exercising the right to squeeze dissenting shareholders.

106. Proposal: Permit an offeror to make an offer for a conversion feature or other right, separated from its accompanying security, if any. The offeror would be in a position to squeeze the rightholders if the basic conditions of the squeeze were met. Thus, if the offeror bid for all and acquired 90 percent of the warrants attached to a debenture, it could squeeze the warrant feature from the remaining debenture holders. The debenture itself would be untouched. The value of the debenture alone would be less after the squeeze, but the consideration paid for the warrant would compensate for this. The requirement for a 90 percent acceptance and the potential for a valuation by a court ensures that the compensation is adequate.

107. Proposal: Treat each class of rights to acquire shares explicitly as a separate class of shares. A right or an option or a privilege to a share must be the subject of a bid with specific terms before the offeror can exercise its acquisition right. While an offeree who holds a share convertible into the target voting share could still convert and accept the bid, the convertible feature could be considered a separate security for which an offer must be made if its holders are to be squeezed. Alternatively, of course, a bid could be made for the security with the convertible feature attached.

9) The Dissenting Shareholder's Right to "Put" his Shares to the Offeror

a) The Dissenting Shareholder in a "Squeeze"

108. Background: In order to exercise its squeeze right, the offeror in a bid-for-all must disclose its intent to offeree shareholders in the bid and obtain and pay for at least 90 percent of the target securities. The shareholder is thus aware of the risk of compulsory acquisition. Most discussions of squeezes centre on the desire of the offeror for a 100 percent holding and the assurance that the dissenting shareholders receive adequate compensation for their shares.

109. Issue: The Act does not focus on the situation of the shareholder who is left in an extreme minority position if the offeror later decides not to exercise its acquisition right as it stated it would do. The minority shareholder finds himself as an owner of shares that are no longer listed (if they ever were) and that are, in any event, thinly traded. He receives some protection from oppressive or unfair conduct by the directors of the corporation and may have the right to dissent and require the acquisition of his shares if certain fundamental changes are made in the corporation. The concept of a fiduciary duty of the majority shareholders to the minority is not yet well developed in Canada, although this is a changing area in the law. The extreme minority shareholder's position may not be a comfortable one.

110. Proposal: Permit the dissenting offeree shareholder to require the offeror to purchase his shares at either the bid price or fair value if the acquisition right is not exercised. The minority shareholder should be able to "put" his shares to the offeror and require that they be bought on the same terms that the offeror had promised. In effect, this requires the offeror to do what it stated it would do in the disclosure documents. If the offeror decides not to exercise its squeeze right, it should notify all dissenting offeree shareholders of their right to put their shares. The actual mechanics of the transactions would then be the same as if the offeror had required the shareholders to sell their shares.

b) The Minority Shareholders Where no "Squeeze" Right is Available

111. Background: If an offeror in a partial bid has bid for and taken up 90 percent of the shares or if an offeror in a bid-for-all has acquired 90 percent of the shares but has not declared its intent to acquire shares from the dissenting minority, there is no squeeze right. The offeror does not have the right to acquire shares from the minority. Nonetheless, the minority shareholders may be in the uncomfortable position noted above.

112. Issue: The question to be considered in this situation is whether these minority shareholders should have the right to "put" their shares to the offeror. It is not a question of requiring the offeror to purchase shares it had already declared its intent to acquire. There is the analogy to the right of the minority to require acquisition of their shares when certain fundamental changes are made in the corporation (CBCA, s. 184), such as an amalgamation or the extraordinary sale of substantially all the property of the corporation. A new majority shareholding of at least 90 percent of the shares could be viewed as a fundamental change in the nature of the corporation, although the actual business of the corporation continues as before. Following this reasoning, even an offeror in a partial bid might be required to purchase minority holdings if the offeror obtained 90 percent of the shares. An offeror could not avoid, therefore, purchasing the dissenting minority's holding by making a partial bid for, say, 92 percent. A similar provision has been found in the U.K. Companies Act since 1948.

113. Proposal: Permit the dissenting offeree shareholder to require the offeror to purchase his shares at the price offered in the bid. This inclusion of offerors in partial bids in a "put" requirement would indicate that the two "put" rights be treated separately so that it could not be avoided by a high partial bid or a failure to state an intent to squeeze in a bid-for-all. In a compulsory acquisition, the dissenting offeree has the right to require a fair valuation by a court because of the compulsory nature of the sale. It seems reasonable to also give him this right when he puts his shares where the offeror has stated its intent to squeeze but has not done so. Where no such intent has been stated, however, the put right should be a right to sell at the bid price. The right is exercised at the shareholder's discretion and providing consideration identical to the terms of the bid permits him, in effect, to accept the bid after evaluating its outcome.

c) Limitation on the Compulsory Transfer Right in Issuer Bids

114. Background: Under the present Act, an issuer cannot repurchase its shares if its cash flow or asset position is endangered by the purchase.

115. Issue: The dissenting securityholder should not be able to exercise his put right if the expenditures to purchase his securities would jeopardize the financial standing of the offeror in an issuer bid. Similarly, the issuer should not be able to exercise its acquisition right in such circumstances.

116. Proposal: Limit the compulsory transfer right in an issuer bid if the purchase would jeopardize the issuer's financial position. The issuer should be required to notify the securityholders if this limitation applies, leaving the securityholder to elect either to be reinstated in his full rights as a securityholder or to retain a status as a claimant against the offeror, to be paid as soon as legally possible. In the event of liquidation, the securityholder/claimant would rank below creditors but ahead of shareholders.

10. Exemption Orders

a) Exemption for Bid-For-All and Non-Canadians

117. Background: The compulsory acquisition or squeezeout right is available in a bid-for-all, which means that the offer must be made available to all the holders of the target securities.

118. Issue: In some cases, particularly with large widely held corporations, some of the securityholders may be resident outside of Canada. If the consideration in the bid is cash, the offer can be made to foreign shareholders. If the consideration, in whole or in part, is securities that are to be exchanged for the target securities, the offeror faces certain obstacles in making an offer to foreign offerees. In the United States, for example, such an offer would be considered a distribution of the securities being offered as consideration. The offeror would have to qualify these securities before the Securities and Exchange Commission, prepare and issue a prospectus and may have to meet requirements in the different states in which the American offeree shareholders reside. This is both time-consuming and expensive.

119. Proposal: Authorize the Director of Corporations to exempt an offeror from certain requirements of a bid-for-all so the compulsory acquisition right is maintained. The Director of Corporations could be given the power to rule that a securities exchange bid that is not made to foreign shareholders is a bid-for-all and meets that requirement with respect to the compulsory acquisition provisions if the Director is satisfied that the holdings by foreigners are relatively insignificant and that it is reasonably likely that the foreign shareholders will be made aware of the bid prior to its expiry. Although the offeror cannot make a direct offer to foreign shareholders, if they know of the bid through financial newspapers, for example, they can instruct their brokers to tender through Canadian brokers. They are not totally excluded from accepting the bid. Alternatively, the Director could rule that a cash equivalent offer could be made to the foreign shareholders, thus exempting the offeror from the requirement that the same consideration be offered to all shareholders.

b) General Exemption Power of the Director

120. Background: The present Act permits any interested person to apply to a court for an order exempting a bid from the provisions of Part XVI of the Act. If the court is satisfied that such an exemption would not unfairly prejudice an offeree shareholder, it may make such an order, which may be retrospective.

121. Issue: This is only part of the Act for which the Director is not given the exemption power. For example, the Director has the power to grant exemptions from requirements relating to insider trading, financial disclosure, appointments of auditors, trust indentures, and proxy solicitations. Furthermore, a given judge may or may not have experience in the practicalities of corporate law and takeovers. Court applications are likely to be lengthy processes. The realities of bids often demand speed. Practitioners would appear to prefer to deal quickly with an expert when requesting exemptions.

122. Proposal: Authorize the Director of Corporations to grant exemptions from the application of any provision of Part XVI to a bid. The power of the courts to order remedies for noncompliance with the Act or the regulations would remain unaltered. The Director's new exemption power would, like his other powers, be specifically reviewable by the courts.