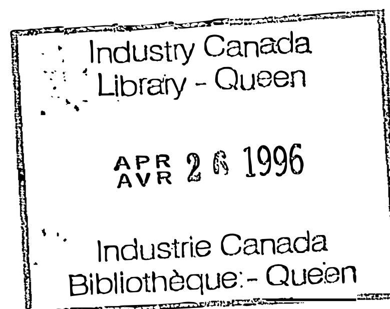
CANADA BUSINESS CORPORATIONS ACT

DISCUSSION PAPER

UNANIMOUS SHAREHOLDER AGREEMENTS



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RELEASED: APRIL 1996

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EXECUTIVE SUMMARY

UNANIMOUS SHAREHOLDER AGREEMENTS

A unanimous shareholders agreement is an agreement among all the shareholders of the corporation concerning the management of the corporation. It is not simply a private contract between shareholders. This special type of agreement becomes part of the internal constitution of the corporation, along with the articles and by-laws.

Adopted into Canada in 1975 by the Canada Business Corporations Act (CBCA), the provisions on unanimous shareholder agreements were designed to give shareholders of closely-held corporations more flexibility in arranging the internal affairs of the corporation to suit the needs of that corporation and its investors. While the CBCA rules on unanimous shareholder agreements were innovative when adopted in 1975, a number of problems have arisen with both the wording and the approach of the provisions. These problems appear to have restricted the use and benefit of these agreements under the CBCA regime for closely-held corporations. Moreover, other jurisdictions in Canada and the United States, have updated their rules to provide more certainty and, in the United States, much greater flexibility to shareholders.

The discussion paper reviews the problems with the current CBCA provisions, examines other regimes and explores ways to improve the law for CBCA corporations and their shareholders. In particular, this paper considers means to improve federal business corporate law for Canadian small businesses through the modernization of the unanimous shareholder agreement rules. The federal government is committed to improving the marketplace climate for small businesses to help them grow and create jobs. An improved unanimous shareholder agreement regime could benefit smaller CBCA corporations by reducing the paper-burden imposed on them and by allowing corporations to choose a corporate governance structure more reflective of their needs.

There are many complex questions surrounding unanimous shareholder agreements, the legal rules and their reform. The questions relate to many of the key elements of corporate law -- management of the corporation, limited liability, corporate accountability, the relations among investors and management and the overall purpose of corporate laws.

Some corporate governance rules have been developed to accommodate the larger, more "traditional" corporations, where there is a separation of ownership and management (that is, where the shareholder owners, or some of them, do not manage the corporation). For closely-held corporations, where the owners themselves manage the corporation, it can be argued that a more facilitative regime should be adopted to allow the shareholders to dispense with the rules (or some of the rules) designed to protect the passive investor.

However, many corporate law rules appear to respond to concerns about corporate accountability to third parties. The fact that corporations have limited liability is a key determinant. The law usually imposes responsibility on persons for their actions. Limited liability for the principals of a business (or any endeavour) is an exception to the normal rules of responsibility. It can be argued that, in return for their limited liability, shareholders leave the management of the corporation to the directors and officers whose duties are owed to the corporation to protect the corporation's interests. This basic structure has largely remained unchanged for centuries. By transferring powers from the directors to shareholders, the unanimous shareholder agreements regime impacts on this traditional balance.

Specific issues

The discussion paper examines fifteen specific issues, along with a wide range of options for possible amendments to the CBCA. The paper however makes no recommendations as to the most appropriate options.

The first issue is whether the current definition of "unanimous shareholder agreement" needs to be clarified. For some shareholders, the current definition may be too narrow whereas for others it may be too inclusive. The paper reviews problems that have been raised with the current definition and lists possible options to respond to these concerns.

The paper then examines whether the statute should be amended to impose any eligibility requirements beyond the current requirement of unanimity. Eligibility requirements based on the numbers of shareholders, the type of shareholder (that is, whether the shareholder is a natural or corporate person), or the type of corporation (for example, non-distributing versus distributing) are explored.

The paper considers a number of issues concerning the shareholders and their powers and duties under a unanimous shareholder agreement, followed by a discussion of issues related to the board of directors. Some of these issues involve merely a clarification of the language of the statute. Other issues are extremely complex, such as whether shareholders are, through the operation of a unanimous shareholder agreement, subject to the same legal duties and principles applicable to directors, such as the rule against the fettering of directors' discretion.

Another difficult issue is whether a board of directors whose powers have all been transferred to shareholders can, or should, be eliminated. Currently, the shareholders of any CBCA corporation are entitled to enter into a unanimous shareholder agreement to transfer all the rights, powers, duties and liabilities of the directors to the shareholders. However, the CBCA does not permit the board to be eliminated even though it has no powers.

Some commentators have argued that given the identity of management and ownership in a closely-held corporation and the right of shareholders to restrict "in whole" the powers of the board, maintaining even one director is superfluous. If the goal of directors' liability is to impose duties and liabilities on the real decision-makers, the retention of a board of directors without any powers seems to make little sense. Directors' liability is predicated upon the principle that the threat of potential liability will influence the actions of corporate decision-makers.

Accountability to third parties, including in the broad sense to communities and governments, is presumably a key consideration. When shareholders of a small closely-held corporation assume the directors' rights, powers, duties and liabilities under a unanimous shareholder agreement, corporate accountability does not appear to be at issue since the real decision-makers, who are natural persons, do not change.

Different considerations may apply when a larger closely-held corporation uses a unanimous shareholder agreement to transfer the rights, powers, duties and liabilities from the directors to shareholders. Shareholders are often corporations themselves, the parent corporation or some intermediate corporation in a corporate group. By shifting all rights, powers, duties and liabilities to a corporate shareholder, the goal of directors' liability to reach real decision-makers who influence corporate conduct through direct personal accountability may be defeated. Moreover, concerns about the appropriateness of "directorless" larger corporations having perhaps thousands of employees and creditors could be raised.

The CBCA requirement that a majority of directors be resident Canadians adds to the complexity of this analysis, particularly in the case of foreign subsidiaries for whom the requirement was largely adopted. A full consideration of the current CBCA directors' residency requirements is the subject of the CBCA Discussion Paper, "Directors' and Other Corporate Residency Issues", released August 1995. The ultimate approach taken with respect to the directors' residency requirements will impact on the options set out in this discussion paper.

The paper continues with a discussion of the impact of unanimous shareholder agreements on transferees and third parties and the termination of unanimous shareholder agreements. For example, the paper considers whether a notification requirement should be imposed on the use of a unanimous shareholder agreement to permit third parties to readily and accurately identify the decision-makers.

The paper concludes by considering what provisions of the CBCA could be opted out of by a unanimous shareholder agreement. Presently, the CBCA allows a corporation to opt-out of certain provisions concerning corporate governance issues and internal corporate relationships. However, not all corporate governance provisions may presently be opted-out of through a unanimous shareholder agreement. The purposes of a corporate framework law

are many including appropriate allocation of responsibility, predictability, efficiency and public policy. The decision to allow a corporation to opt-out of an aspect of the corporate law framework may depend on what purpose the provision is meant to fulfil. One difficulty here, however, is that provisions may exist for overlapping considerations.

The paper considers various approaches for structuring CBCA opting out rules in the context of unanimous shareholder agreements and also discusses in general terms various parts of the CBCA to determine whether they should be subject to unanimous shareholder agreements.

Background and options are presented in the paper simply to help focus discussion. No final determination of the most appropriate options will be made by Industry Canada until the completion of consultations. This paper is intended to solicit from those who use the CBCA and others new ideas on how the unanimous shareholder agreement provisions of the CBCA can be improved.

CANADA BUSINESS CORPORATIONS ACT

UNANIMOUS SHAREHOLDER AGREEMENTS

I. INTRODUCTION

[1] A unanimous shareholders agreement is an agreement among all the shareholders of the corporation concerning the management of the corporation. It is not simply a private contract between shareholders.[1] Rather, it is a statutorily sanctioned instrument that can be used to structure the internal governance of the corporation and the relationships among its owners and managers. This special type of agreement becomes part of the internal constitution of the corporation, along with the articles and by-laws.[2]

[2] Adopted into Canada in 1975 by the Canada Business Corporations Act[3] (CBCA) as "one of the most interesting reforms of the 1970s and 1980s,"[4] the provisions on unanimous shareholder agreements were designed to give shareholders of closely-held corporations[5] more flexibility in arranging the internal affairs of the corporation to suit the needs of that corporation and its investors.

[3] While the CBCA rules on unanimous shareholder agreements were innovative when adopted in 1975, a number of problems have arisen with both the wording[6] and the

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[1] For example, a contract about how shareholders will vote their shares.

[2] For a discussion on the nature of the unanimous shareholder agreements, see Institute of Law Research and Reform, Proposals for a New Alberta Business Corporations Act (Edmonton, 1980) at 21-22 ("1980 Alberta Report").

It should also be noted that the agreement, unlike a normal contract, binds future shareholders (even though they were not parties to the original agreement), in accordance with the rules set out in the statutory scheme (see for example, CBCA subs. 146(4)). The issue of the transferees is discussed in detail in Issue 11.

[3] Currently, R.S.C. 1985, c. C-44, as amended. The CBCA provisions on unanimous shareholder agreements are found in s. 146.

[4] B. Welling, Corporate Law in Canada [:] The Governing Principles, 2d ed. (Toronto: Butterworths, 1991) at 481.

[5] By closely-held, the paper is in general referring to corporations that have not distributed their shares to the public, although this term is not defined in the CBCA. (CBCA subs. 2(7) does define a distributing corporation, as one that has distributed any of its securities to the public, etc.) Other expressions used to describe closely-held corporations include "privately-held" and "private". United States jurisdictions often use the term "close corporation": see Section IV below.

[6] For example, subs. 146(5) expressly refers to the transfer of the directors' "rights, powers and duties" to the shareholders, but the provision seems to be ambiguous as to the transfer of the directors' liabilities. See Issue 4 for a more detailed discussion.

approach[7] of the provisions. These problems appear to have restricted the use and benefit of these agreements under the CBCA regime for closely-held corporations.[8] Moreover, other jurisdictions in Canada and the United States, have updated their rules to provide more certainty and, in the United States, much greater flexibility to shareholders.

[4] The purpose of this paper is to review the problems with the CBCA rules, to examine other regimes and to explore ways to improve the law for CBCA corporations and their shareholders.[9] In particular, this paper considers means to improve federal business corporate law for Canadian small businesses[10] through the modernization of the unanimous shareholder agreements rules.

[5] Background and options are given in the paper simply to help focus discussion. No final determination of the most appropriate options will be made by Industry Canada until the completion of consultations.

II. BACKGROUND

[6] There are many complex questions surrounding unanimous shareholder agreements, the legal rules and their reform. The questions relate to many of the key elements of corporate law -- management of the corporation, limited liability, corporate accountability, the relations among investors and management and the purpose of corporate laws. In this section, the paper canvasses a number of broader questions to facilitate the review of the current CBCA rules (set out below in Section III), other regimes (Sections IV and V) and specific reform issues (Section VI).

A. Corporate Governance, Limited Liability and Accountability

[7] The CBCA is the product of a long historical development of corporate law in Canada, the United Kingdom, the United States and elsewhere. By comparison to the limited

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[7] For example, the CBCA is not completely clear on what aspects of the CBCA can be contracted out of by shareholders in a unanimous shareholder agreement. This issue is discussed in more detail in Issue 15.

[8] See discussion below under Section III.

[9] This paper relies on research and analysis found in a background paper prepared for Industry Canada by John Kazanjian, Thomas Ferns and Robert Scavone of McMillan Binch, Barristers and Solicitors, entitled Unanimous Shareholder Agreements : Issues and Options for Reform and completed November, 1994.

[10] The federal government is committed to improving the marketplace climate for small businesses to help them grow and create jobs. This issue is discussed in detail in Section II(C) of the paper.

governance rules applicable to sole proprietorship[11] and partnership,[12] corporate law has developed extensive rules concerning the internal governance of the corporate form of business organization.

[8] Some of these rules have been developed to accommodate the larger, more "traditional" corporations, where there is a separation of ownership and management (that is, where the shareholder owners do not manage the corporation).[13] For example, one can view the extensive rules on election of directors, the holding of shareholder meetings and the delivery of information to shareholders (for example, through the notice of annual meeting and the financial statements) as responding to concerns that the owners and managers are separate. For closely-held corporations, where the owners themselves manage the corporation, it can be argued that a unanimous shareholder agreement should be able to dispense with the rules (or some of the rules) designed to protect the passive owner.

[9] However, some corporate law rules appear to respond to concerns about the protection of third parties. The fact that corporations have limited liability is a key determinant. The law usually imposes responsibility on persons for their actions. Limited liability for the principals of a business (or any endeavour) is an exception to the normal rules of responsibility.[14]

[10] It can be argued that, in return for their limited liability, shareholders leave management of the corporation to the directors and officers whose duties are owed to the

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[11] In most provinces, there is no specific statute regulating sole proprietorships. Rather, general business legislation in limited areas, such as business name registration, may apply to such enterprises.

[12] Partnership legislation, found in provincial and territorial jurisdictions, applies to the partnership form of business organization. However, the majority of governance rules for the organization are found in the partnership agreement executed by partners.

[13] See Schedule "A" which provides a comparison of attributes of public and closely-held corporations.

[14] In fact, some authors have suggested that limited liability for closely-held corporations should be eliminated:

> . . . in the case of small, tightly held companies, a limited liability regime will, in many cases, create incentives for owners to exploit a moral hazard and transfer uncompensated business risks to creditors, thus inducing costly attempts by creditors to reduce these risks. An unlimited liability regime for this class of enterprise (perhaps the private company, recognized by many corporation statutes with respect to financial disclosure and securities regulation exemptions, having fewer than, say, fifty shareholders, restriction on share transfers, and no right to make public offerings) would seem to be the most efficient regime.

Halpern, Trebilock and Turnball, "An Economic Analysis of Limited Liability in Corporation Law" (1980) 30 U.T.L.J. 148. See also Ziegel, "Is Incorporation (with limited liability) too easily available?" (1990) 31 Les Cahiers de Droit 1080.

corporation[15] to protect the corporation's interests. This basic structure has largely remained unchanged for centuries. By transferring powers from the directors to shareholders, the unanimous shareholder agreements regime may impact on this traditional balance.

[11] The current CBCA unanimous shareholder agreements rules only refer to the transfer of powers, rights, obligations and liabilities from directors to shareholders. As will be seen below, the unanimous shareholder agreement provisions of some corporate laws in the United States go much further. They expressly permit shareholders to contract out of any provisions in the statute governing the management of the business and affairs of the corporation, except where it would be contrary to public policy.

[12] One difficulty with the analysis of what rules, if any, shareholders should be able to contract out is that many corporate governance rules have overlapping objectives. For instance, the financial statements are clearly important in protecting shareholders not involved in the management of the company, in order that these passive investors know where the corporation's money is being spent.[16] However, financial statements, which monitor the financial performance of the corporation, may also help protect employees, creditors and other corporate stakeholders by requiring the financial affairs of the corporation to be analyzed in a coherent and structured way. The needs of shareholders and the needs of third parties must therefore be considered when reviewing, and considering amendments to the law applicable to a unanimous shareholder agreement regime.

B. Alternative Objectives of Corporate Law

[13] A fundamental purpose of a business corporate law is to provide an organizational framework for businesses to arrange their affairs in ways they believe to be most effective for achieving their commercial objectives. Balanced against this objective is the need to protect various interests and promote predictability by imposing standards to govern the relationship among the corporation, its owners, managers and others.

[14] The CBCA, like other Canadian "articles of incorporation" type of corporate laws, grants broad discretion to the directors and officers to manage the business of the corporation. However, the CBCA provides more mandatory rules on corporate governance than many corporate laws in the United States and the "memorandum of association" type

[15] Traditionally, at least, directors and officers do not owe duties directly to shareholders. See discussion of this issue in another CBCA Discussion Paper, "Directors' Liability", released November 1995 (page 19).

[16] The financial statements must be prepared annually and the directors must place the financial statements before the shareholders at every annual meeting (CBCA, s. 155). The financial statements of a closely-held corporation need not be audited but they must be prepared in accordance with the standards set out in the CICA Handbook (CBCA Regulations, ss. 44-46).

corporate laws found in British Columbia, Nova Scotia and the United Kingdom. Many state corporate laws in the United States[17] allow the shareholders to contract out of a number of the rules in the statute.[18] "Memorandum of association" corporate laws often provide a standard form of articles of association[19] prescribing regulations for the internal governance of the company, but these rules may be varied by the incorporators or subsequently by the shareholders.

[15] The "memorandum of association" type of corporate law is often described as a "contractarian model" whereas the CBCA form of corporate law is described as a "statutory division of powers model."[20] The contractarian models

> often leave the division of powers between shareholders and the board of directors to be determined by the corporate constitution, although some of them have been reformed to set the division of powers in the Act. The unique feature of this model is that the statute invariably contains a section explicitly designating the corporate constitution a contract among the shareholders and between each shareholder and the corporation.[21]

[16] The "statutory division of powers" model of corporate law instead

> imposes a division of powers upon the participants -- directors, officers, shareholders, and to a limited extent creditors -- the internal workings of the corporation. Each category of person, every person attaining the status of director, officer, shareholder or creditor, is assigned by statute certain powers and certain obligations. These statutory powers and obligations will be clarified, sometimes modified, but only rarely

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[17] There is no federal corporate law in the United States.

[18] For example, 1986 amendments to the Delaware General Corporations Law added section 102(b)(7) which permits the shareholders to amend the corporation's articles to eliminate or limit personal liability of its directors to the corporation and its shareholders for breach of fiduciary duty. However, liability will not be excused for wrongful conduct in the form of: (i) a breach of duty of loyalty; (ii) acts not in good faith or involving intentional misconduct; (iii) declaration of unlawful dividends, stock repurchases or redemptions; and (iv) transactions where a director or another person receives an improper benefit. Shareholders may choose to fix any amount they want as a cap on liability and they may determine each particular cap according to the particular transaction at issue: see James B. Behrens, "Delaware Section 102(b)(7): A Statutory Response to the Director and Officer Liability Insurance Crisis", (1987) 65 Wash. U. L. Quarterly. 481, 484. See also the discussion in Section IV(D) below.

[19] The equivalent instrument under the CBCA is the "by-laws". See, for example, Schedule A of the Nova Scotia Companies Act, R.S.N.S. 1989, c. 81 and the First Schedule of the British Columbia Company Act, R.S.B.C. 1979, c. 59, as amended.

[20] See Welling, note 4, at 54.

[21] Ibid., 55.

removed by the articles of incorporation and subordinate constitutional documents. The corporate constitution is *not* a contract among participating individuals.[22]

[17] Thus, philosophically, permitting shareholders to contract out of the corporate governance rules is more consistent with the "contractarian" type of corporate law than with the "statutory division of powers" type of corporate law. On the other hand, the comparatively less flexible approach of the "statutory division of powers" type of corporate law might suggest that the CBCA has a greater need for a broad unanimous shareholder agreement regime in order to make the statute more accommodating to the vast range of business that use its form.

[18] A further consideration is that a very permissive unanimous shareholder agreement regime could dilute the value of the corporate law form. The CBCA rules are reasonably well-known across Canada among business people and their advisors. Persons who deal with CBCA corporations, invest in them, contract with them and provide goods or services to them, know what the rules are. Allowing each corporation to establish its own corporate governance structure could reduce predictability and increase costs for businesses.

[19] On the other hand, a more flexible regime could reduce governance costs for businesses by allowing them to tailor the rules to fit their needs and by reducing formalities inapplicable to that enterprise.

[20] Some regimes have adopted or proposed adopting permissive unanimous shareholder agreements regimes in completely separate statutes[23] or in special supplements to the statutes.[24] This approach might allow flexibility while not affecting the certainty provided by the existing corporate law regime.[25]

C. Small Businesses

[21] In 1975, federal business corporate law was changed with the enactment of the CBCA to expressly allow the "one person corporation" by doing away with certain formalistic

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[22] Ibid., 54.

[23] See discussion of the Australian close corporation legislation in Section V below.

[24] See discussion of the American Bar Association's Statutory Close Corporation Supplement to the Model Business Corporation Act, discussed below in Sections IV(B) and (C).

[25] A further consideration is that some special legal designation for such corporations could be required. Instead of "ABC Limited", "ABC Inc." etc., new legislation or a separate supplement could require a new legal identifier such as "ABC Close Corporation."

rules.[26] These changes made corporate law a more attractive vehicle for small business. The vast majority of the approximately 178,000 CBCA corporations are small and closely-held, similar to the general make-up and characteristics of most Canadian corporations.[27] One manner in which the CBCA tried to adopt a more facilitative approach for closely-held corporations was to recognize in the statute the use of unanimous shareholder agreements.

[22] The federal government is committed to improving the marketplace climate for small businesses to help them grow and create jobs;[28] modernization of the unanimous shareholder agreement provisions is one of the ways in which the federal government can do this. An improved unanimous shareholder agreement regime could benefit smaller CBCA corporations by reducing the paper-burden imposed on them and by allowing corporations to choose a corporate governance structure more reflective of their needs. An improved corporate law regime for these enterprises can translate into improved corporate performance which in turn assists the national economy as a whole.

[23] For example, many closely-held corporations currently are said not to observe the CBCA requirements in respect of annual meetings or election of directors. In respect of statutory compliance, therefore, these corporations are delinquent notwithstanding the fact that the business of the corporation is thriving. After several years of successful operations, the corporation may need to borrow money or sell shares only to find that obtaining the necessary legal opinion on the status of the corporation requires a re-construction of the corporate records which were overlooked. What could have been a simple financial transaction becomes an exercise in both paper and expense. Depending on how difficult and therefore expensive the reconstruction is, the transaction may be abandoned. If small businesses could opt out of inapplicable statutory formalities, certain transactions might be completed far more efficiently and costs to small businesses could be reduced.

[24] However, benefits arising from the discipline imposed by the CBCA corporate governance regime must also be considered. One study on small business commented that:

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[26] R.W. Dickerson, J.L. Howard and L. Getz, Proposals for a New Business Corporations Law for Canada, Vols. 1 and 2 (Ottawa: Information Canada, 1971) ("Dickerson Report") at vol. 1, 5.

[27] Ziegel, note 14, remarked at p. 1080 that "all but a few thousand of the more than half a million active corporations in Canada are closely held and, it is safe to assume, have only a small number of employees or none other than the owner-shareholder."

[28] Government of Canada, Building a More Innovative Economy, produced by Industry Canada (Released December 5, 1994), at 3:

> To grow and prosper, business needs an efficient marketplace -- an environment that encourages innovation and expansion, free of unnecessary barriers. The government will work to support a healthier, more dynamic marketplace, freeing up the energies of business and workers to create jobs. We will do this by helping small business grow, by regulating smarter, and by helping business and labour build more innovative workplaces.

> [I]ncorporated firms are more ambitious, invest more, plan more, investigate their business start-up more, have more experience, and are more meticulous in their paperwork. Inevitably, their results are better. Their sales are higher, they have more employees and they expect more growth.
>
> Generally, people who incorporate their new businesses are more likely to stay the course than those who do not incorporate. [A] study of start-ups found that incorporated businesses accounted for 34% of all firms in the study, but only 17% of those no longer operating in 1988 and 17% of those not yet operating. Sole proprietorships, by contrast, accounted for 44% of the firms in the study, but 63% of the firms not yet operating and 56% of those no longer operating.[29]

[25] It does not appear possible, from the studies available, to definitively say whether better organized businesses choose incorporation (and therefore more incorporated businesses succeed) or incorporation fosters better firms (by encouraging business planning, etc.). However, whatever the connection, the rigours of the corporate form, while imposing costs, may contribute to the success of small businesses.

D. Foreign Subsidiaries and Corporate Groups

[26] In addition to small and medium-sized enterprises, the current CBCA provisions are also available to large closely-held CBCA corporations. This category includes both Canadian subsidiaries of foreign corporations and subsidiaries in Canadian corporate groups. Tax, liability and other considerations have led many corporations to incorporate subsidiaries to carry on business activities in certain fields. The availability of an enhanced unanimous shareholder agreement regime might also benefit the corporate shareholder of these subsidiaries.

[27] Many of the same problems experienced by small CBCA corporations with the CBCA unanimous shareholder agreement provisions are shared by larger corporations. For instance, ambiguous wording may limit the usefulness of the provisions for both large and small corporations. However, while a corner gas station and a large manufacturer may be both closely-held corporations, the policy considerations, such as the interests of third

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[29] Ministry of Industry, Trade and Technology, The State of Small Business [:] 1989 Annual Report on Small Business in Ontario (Toronto: Queen's Printer, 1990) at 17-18. The report also commented at p. 4:

> About half of all new ventures are incorporated. One-third of them incorporate immediately on start-up and the rest do so within three years. There is an important distinction between the two classes of businesses. Owners of incorporated firms are generally more serious about making their businesses grow. They invest more, they have higher expectations of growth and they employ more people. They are also more professional in their preparation for the start-up. It shows in their results. Their companies grow much faster than unincorporated businesses and generate much higher earnings for their owners, who take home a third more than owners of unincorporated businesses.

parties, may be different. One corporation may have only a few employees and creditors, the other thousands of employees and creditors. Whole communities may be dependent on decisions made by large closely-held corporations. Governments may be affected particularly by decisions of some larger corporations. Revised rules on unanimous shareholder agreements must be examined with these considerations in mind.

[28] An additional accountability consideration with respect to many large, closely-held CBCA corporations is that the shareholders may be corporations themselves. One objective of directors' liability, particularly in the penal liability area,[30] is to target real persons within the organization to influence corporate conduct through direct accountability (as opposed to simply targeting the corporation itself). By shifting all the rights, powers, duties and liabilities to a corporate shareholder, the goal of reaching into the corporation to get at the real decision-makers may be defeated.

[29] Currently, the shareholders of CBCA closely-held corporations, including corporate parents of CBCA subsidiaries, are entitled to restrict all the powers of the directors by using a unanimous shareholder agreement. However, the board of directors remains in place even though it has no powers. If directors' liability is intended to reach the real decision-maker, the retention of a board of directors without any powers makes little sense.

[30] The notion of corporate transparency to third parties is also important. Creditors, suppliers, consumers and others may prefer to have direct access to the true corporate decision-makers, either the shareholders or the management of parent corporations. Indeed, in the civil liability setting, a plaintiff may benefit from being able to sue the shareholder, who has assumed the powers of director through a unanimous shareholder agreement and who may have more resources in comparison with a director in name only.

[31] Finally, the current CBCA requirement that a majority of directors be resident Canadians is relevant, particularly in the case of foreign subsidiaries for whom the residency requirement was originally largely adopted. Under the current CBCA rules on unanimous shareholder agreements, the residency requirement can be largely avoided through the use of a unanimous shareholder agreement. A board of directors is still required but the director(s) may have no rights, powers, duties or liabilities, at least as arising under the CBCA.

[32] A full consideration of whether the directors' residency requirements are still required is the subject of another CBCA Discussion Paper.[31] The complex interplay between the

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[30] Penal liabilities (offences) are punitive remedies imposed for the breach of a statutory or regulatory provision. By contrast, civil liability is imposed to compensate persons or the Government for losses or damages.

[31] See CBCA Discussion Paper, "Directors' and other Corporate Residency Issues", released August 1995.

residency requirement and unanimous shareholder agreements is briefly discussed below.[32] The policy approach taken with respect to the directors' residency requirement will impact on the options set out in this discussion paper.

III. UNANIMOUS SHAREHOLDER AGREEMENTS IN CANADA

A. Shareholder Agreements at Common Law

[33] Before the enactment of the CBCA in 1975, the ability of shareholders to enter into agreements affecting governance was clouded by the common law rule that an agreement which purported to fetter the discretion of the directors was void.[33] Agreements among shareholders as to the manner in which they could vote their shares were lawful,[34] as were arrangements covering several other matters, provided the agreements were for a "lawful purpose." The courts however applied the "lawful purpose" test to invalidate agreements among shareholders purporting to constrain decisions by the directors. Although the principle may not have been clearly or consistently articulated, the courts' approach was generally to allow agreements that supplemented the corporate law but not those that were thought to conflict with or override it.

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[32] See discussion in Issue 3.

[33] Automatic Self-Cleansing Filter Syndicate Co. v. Cunningham, [1906] 2 Ch. 34 (Eng. C.A.) and Re Hydro-Electric Power Commission of Ontario and Thorold & Pelham (Townships) (1924), 55 O.L.R. 431. In this case Mulock C.J.O. states at 435:

> The powers of a shareholder in a company and of its board of directors are distinct. The shareholders elect the board, but the board alone has executive authority over the management of the company's affairs; it is accountable to the shareholders, but is not subject to their orders; they have no power to engage or to dismiss employees or to direct them in the performance of their duties or to create any contract binding upon the company.

In the leading case of Motherwell v. Schoof [1949] 2 W.W.E. 529, 4 D.L.R. 812, the Alberta Supreme Court struck down provisions of a shareholder agreement providing for the arbitration of directors' differences of opinion and for the appointment of the defendant as president and general manager of the corporation on the grounds that such provisions fettered the discretion of the directors "to administer the affairs of the company in all things" under s. 92 of the Dominion Companies Act, 1934.

[34] Ringuet v. Bergeron, [1960] S.R.C. 72, 24 D.L.R. (2d) 449. In this case, the majority of the Supreme Court of Canada, speaking through Judson J., stated at 684:

> Shareholders have the right to combine their interests and voting powers to secure... control of a company and to ensure that the company will be managed by certain persons in a certain manner. This is a well-known, normal and legal contract and one which is frequently encountered in current practice and it makes no difference whether the objects sought are to be achieved by means of an agreement such as this or a voting trust. Such an agreement is not prohibited either by law, by good morals or public order.

B. The Dickerson Report

[34] The 1971 Dickerson Report which led to the enactment of the CBCA in 1975 considered the needs of shareholders of closely-held corporations through the adoption of a unanimous shareholder agreement regime:

> [W]e have improved the position of those who may wish to have a truly 'private' corporation. By expressly legitimating the device of a unanimous shareholder agreement . . . we allow the closely-held corporation to avoid much of the formalism that is not appropriate to it, and operate, in effect, as a partnership with limited liability.[35]

[35] According to the authors of the Dickerson Report, the common law rule that shareholders may not fetter the directors' discretion, while "doubtless a sound principle in a case where all shareholders are not parties to the agreement," is "unnecessarily rigid" where all the shareholders are parties to the agreement.[36] "There is some doubt as to how far directors may go in divesting themselves of management powers under existing law, and [the draft] provision[37] is designed to clarify the law on the point."[38]

C. CBCA Provisions

[36] In 1975, the CBCA followed the recommendation in the Dickerson Report and adopted provisions on unanimous shareholder agreements.[39] In general, the provisions confirm the validity of agreements among shareholders on the exercise of their voting rights (called "pooling agreements"), override the common law rule prohibiting shareholders from restricting the directors powers and allow the transfer of the directors' rights, powers and duties to the shareholders.

[37] Two problems with the wording and approach of the 1975 unanimous shareholder agreement provisions were addressed in 1978. First, the provision was amended to clarify that a shareholder owning all the shares of a corporation, including parent corporations of wholly-owned subsidiaries, could make use of a unanimous shareholder agreement. The

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[35] Dickerson Report, note 26, vol. 1, at 11.

[36] Ibid., 99-100.

[37] The draft unanimous shareholder agreement provision is section 11.14 of the Draft Act set out in the Dickerson Report, vol. 2, note 26, at 90.

[38] Ibid., vol. 1, at 100.

[39] S.C. 1974-74, c. 33, s. 140.

materials prepared for Parliament explaining the policy rationale for the amendments (the 1978 briefing book) gave the following rationale for the change:

> Addition of a new provision to legitimate a unilateral declaration by a holding corporation in respect of a wholly-owned subsidiary that it seeks to control directly rather than indirectly through nominee directors, thus obviating the useless formality of issuing a share to a nominee in trust to create a party with capacity to enter into a bilateral agreement.

[38] A second change to the unanimous shareholder agreement provision clarified to some extent directors' liabilities under a unanimous shareholder agreement by expressly providing that the directors could be relieved of their liability for employee wages.[40] A commentator has argued that expressly stating that directors may be relieved from their liability under subs. 119 for unpaid wages, but not referencing any other liabilities, created confusion.[41]

[39] The current CBCA unanimous shareholder agreement provision, s. 146, now provides:

> (1) **Pooling agreement**. — A written agreement between two or more shareholders may provide that in exercising voting rights the shares held by them shall be voted as therein provided.
>
> (2) **Unanimous shareholder agreement**. — An otherwise lawful written agreement among all the shareholders of a corporation, or among all the shareholders and a person who is not a shareholder, that restricts, in whole or in part, the powers of the directors to manage the business and affairs of the corporation is valid.
>
> (3) **Declaration by single shareholder**. — Where a person who is the beneficial owner of all the issued shares of a corporation makes a written declaration that restricts in whole or in part the powers of the directors to manage the business and affairs of a corporation, the declaration is deemed to be a unanimous shareholder agreement.
>
> (4) **Constructive party**. — Subject to subsection 49(8), a transferee of shares subject to a unanimous shareholder agreement is deemed to be a party to the agreement.

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[40] S.C. 1978, c. 9, s. 42 amending s. 140 [now s. 146]. Subsection 42(1) added a new subsection, subs. 140(2.1) [now subs. 146(3)]. Subsection 42(2) amended the CBCA by replacing subs. 140(4) [now subs. 146(5)] with a reworded provision.

[41] M. Disney, "Unanimous Shareholder Agreement: A Promise Unfulfilled?", Corporate Structure, Finance and Operations, ed. by Lazar Sarna (Toronto: Carswell, 1995) at 93-4.

(5) **Rights of shareholder**. — A shareholder who is a party to a unanimous shareholder agreement has all the rights, powers and duties of a director of the corporation to which the agreement relates to the extent that the agreement restricts the powers of the directors to manage the business and affairs of the corporation, and the directors are thereby relieved of their duties and liabilities, including any liabilities under section 119, to the same extent.[42]

[40] Some problems with the wording and approach of the current unanimous shareholder agreement provisions have been raised. For example, the provision includes both pooling agreements and unanimous shareholder agreements, and the precise or appropriate line between the two agreements may be uncertain. The wording on the transfer of liabilities to shareholders also appears to be unclear. Subsection 146(5) expressly refers to the transfer of "rights, powers and duties" of directors but not their liabilities. These and other problems with the section are discussed in detail in Section VI below.

D. Provincial Statutes

[41] The business corporation laws of Québec, Ontario, Saskatchewan, Alberta, Manitoba, Newfoundland, New Brunswick and the Yukon Territory all include unanimous shareholder agreement provisions modeled on section 146.[43] The Québec, Ontario, Alberta and Yukon Territory provisions differ materially from the CBCA, with the Yukon Territory provisions resembling the Alberta provisions. The British Columbia, Nova Scotia, Prince Edward Island and Northwest Territories statutes have no comparable provisions.

(i) Québec

[42] The Québec Companies Act[44] (Québec CA) provides for a more restrictive approach with respect to unanimous shareholder agreements than its CBCA counterpart. Under the CBCA, restriction of the directors' powers can be effected in different ways. For example, under the CBCA, the agreement may order directors to act, or prohibit them from acting, in a certain manner,[45] in addition to providing for the transfer of some or all directors' power

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[42] The CBCA also contains a number of consequential provisions in which the general statutory norms are expressly made subject to variation by a unanimous shareholders agreement. They are: subs. 6(3) — special majorities; subs. 25(1) — issue of shares; subs. 102(1) — directors' power to manage; subs. 103(5) — passing of by-laws by directors; s. 121 — appointment of officers and delegation of powers to them; s. 125 — the directors' power to fix remuneration of directors, officers and employees; subs. 189(1) — the directors' deemed power to borrow and give security; par. 214(1)(b) — shareholder requests for dissolution.

[43] R.S.Q., c. C-38, R.S.O. 1990, c. B-16; S.S. c. B-10; S.A. 1981, c. B-15; R.S.M.. 1987, c. C-225; R.S.N. 1990, c. C-36; S.N.B. 1981, c. B-91; R.S.Y. 1986, c. C-15.

[44] The Québec CA provisions are included as Schedule "B" to this paper.

[45] CBCA, subss. 102(1), 122(2), 146(2).

to the shareholders.[46] However, it appears that the unanimous shareholder agreement under the Québec CA permits only the transfer of the directors' powers to the shareholders and not other forms of restriction. However, the Québec CA provides a definite rule concerning the transfer of shares. Under the CBCA, it is not clear whether the unanimous shareholder agreement is still in force if there is no notation on the share certificates concerning the existence of the agreement. Section 123.93 of the Québec CA provides that "a person who becomes a shareholder while a unanimous agreement of the shareholders is in force is deemed to be a party to the agreement." There is then no possibility that an agreement ceases to be "unanimous."

(ii) Ontario

[43] Subsection 108(2) of the Ontario Business Corporations Act[47] (Ontario BCA) is the counterpart of subs. 146(2) of the CBCA. While the Ontario BCA contains provisions similar to those in the CBCA with respect to single shareholder declarations, and with respect to deemed parties to a unanimous shareholder agreement,[48] the Ontario BCA expands on the CBCA provisions in some areas. Subsection 108(5) of the Ontario BCA, for example, does not repeat the ambiguities in subs. 146(5) of the CBCA relating to directors' liability. In addition, the Ontario BCA contains an illustrative provision as to matters that a unanimous shareholder agreement may include such as amendment of the agreement and arbitration of shareholder disputes arising under the unanimous shareholder agreement.

(iii) Alberta

[44] The provisions of the Alberta Business Corporations Act (Alberta BCA) with respect to unanimous shareholder agreements are more extensive than those of either the Ontario BCA or the CBCA.[49] The Alberta BCA provisions are based upon a study undertaken for the provincial Institute of Law Research and Reform[50] which identified the weaknesses of the unanimous shareholder agreement provisions along with a list of matters that an ideal unanimous shareholder agreement should cover. The list of matters requiring attention included:

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[46] CBCA, subs. 146(2).

[47] The Ontario BCA provisions are included as Schedule "C" to this paper.

[48] Single shareholder declarations: Compare CBCA subs. 146(3) with Ontario BCA subs. 108(3). Deemed parties: Compare CBCA subs. 146(4) with Ontario BCA subs. 108(4).

[49] The Alberta BCA provisions are included as Schedule "D" to this paper.

[50] 1980 Alberta Report, note 2.

(i) the regulation of the rights and liabilities of the shareholders, as shareholders, among themselves or between themselves and any other party to the agreement;

(ii) the regulation of the election of directors; and

(iii) the management of the business and affairs of the corporation, including the restriction or abrogation, in whole or in part, of the powers of the directors.

[45] The Alberta BCA provisions permit a unanimous shareholder agreement to cover these matters and also deal at some length with the binding effect of a unanimous shareholder agreement on transferees of the corporation's shares. They also provide an opting out provision.

IV. THE AMERICAN EXPERIENCE AND THE MODEL BUSINESS CORPORATION ACT (Model BCA) §7.32

A. Early American Cases

[46] Early American cases exhibited a measure of judicial hostility towards permitting contractual arrangements to govern relationships among shareholders in close corporations.[51] American judges often regarded such agreements as offensive to the "statutory norms" of corporate law and tended to favour a "concessionary" or constitutional, rather than a "contractual," vision of that law.[52] According to the "concessionary" theory, a corporation is purely a creature of statute whose nature should not be varied by contract. Other American cases, however, have demonstrated a more permissive approach.[53]

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[51] In Bostwick v. Chapman, 60 Conn. 553, 24 A. 32 (1890) and Warren v. Pim, 66 N.J. Eq. 353, 59 A. 773 (1904), for example, voting trusts were held to be void as contrary to public policy; similarly, in McQuade v. Stoneham, 263 N.Y. 323, 189 N.E. 234 (1934) and Manson v. Curtis, 223 N.Y. 313, 119 N.E. 559 (1918) agreements between shareholders which limited the discretion of the directors were held to be illegal and void.

[52] On the "contractual" vision of corporate law, see generally F.H. Easterbrook and D. Fischel, The Economic Structure of Corporate Law (Cambridge, MA: Harvard UP, 1991), especially chapter 1, "The Corporate Contract."

[53] In Clark v. Dodge, the Court of Appeals of New York, held that an agreement between all the shareholders as to who should be elected director and manager was not objectionable (269 N.Y. 410, 199 N.E. 641 (1936). In Galler v. Galler, the Supreme Court of Illinois upheld a shareholder agreement that gave the widow of a close corporation shareholder the right to nominate a director in place of the decedent and to receive a salary from the corporation, noting that "courts have . . . relaxed their attitudes concerning statutory compliance when dealing with close corporate behaviour, permitting 'slight deviations' from corporate 'norms' in order to give legal efficacy to common business practice" (32 Ill. 2d 16, 203 N.E. 2d 577 (1964) at 584).

[47] The uncertain position of the American common law on shareholder agreements and the risk that they might be judicially invalidated provided a poor backdrop against which shareholders could arrange their affairs with reasonable certainty. Legislative attention to close corporation problems had been urged by several commentators in the United States since the 1920s[54] and eventually a number of states passed legislation to address the issue — New York (1948), North Carolina (1955), South Carolina (1962) and Florida (1963). Delaware and Maryland enacted comprehensive close corporation provisions in 1967 with several other states following suit during the 1970s.

B. The Close Corporation Supplement

[48] In 1969, the American Bar Association's Committee on Corporate Laws (ABA Committee) included a number of liberalizing provisions for close corporations in the revised Model BCA and in 1981 went further to adopt a Statutory Close Corporation Supplement (Supplement) to the Model BCA. Derived from similar provisions in the Maryland and Texas Close Corporation Statutes,[55] section 11 (now section 20) of the Supplement dealt with "Agreements among Shareholders." The current version of this section of the Supplement is attached as Schedule "E."

[49] The objectives of the ABA Committee in drafting the Supplement were to create a flexible and useful statutory framework for close corporations, to codify some of the customary practices used by practitioners to meet the expectations of investors in close corporations while at the same time to provide adequate basic protection against oppression of minority shareholders.[56] Many American states adopted the Supplement; many still retain it in their corporate legislation.

[50] In 1985, Professor Edwin J. Bradley published an extensive critique of the Supplement,[57] based in part on an empirical study revealing the lack of use of these provisions by American practitioners. Among Professor Bradley's more significant criticisms were:

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[54] J.L. Weiner, "Legislative Recognition of the Close Corporation" (1929) 27 Mich. L. Rev. 273. In this article, Weiner pointed out the difficulties faced by incorporators seeking the benefits of limited liability, but without the resources to service, or the business reality to require, the many corporate formalities required by then contemporary corporation statutes. It should be noted, however, that many of these formalities have been eliminated from general corporation laws in the decades after the article was written. See also Norman Winer, "Proposing a New York 'Close Corporation Law'" (1943) 28 Cornell L.Q. 313.

[55] See Md. Corp and Ass'ns Code Ann. §4-41 and Tex. Bux. Corp Act art.2.30-2 (West) as at November 1981.

[56] ABA Committee on Corporate Laws, "Proposed Statutory Close Corporation Supplement to the Model Business Corporations Act" (1982) 37 Bus. Law. 269.

[57] "An Analysis of the Model Close Corporation Act and a Proposed Legislative Strategy" (1985) 10 J. Corp. L. 817.

(i) most practitioners found the Supplement, or other special close corporation provisions too cumbersome to use;

(ii) the need to opt into the provisions greatly reduced their utility; and

(iii) despite provisions in state codes validating shareholder agreements, such agreements were still subject to inconsistent judicial interpretation.

C. Model BCA §7.32

[51] Acknowledging the work of Professor Bradley and after extensive study and consultation, the ABA Committee concluded in 1990 that changes should be made to the Model BCA in order to provide both greater certainty and the additional flexibility required by the typical close corporation.[58] The result was the development and recommendation by the ABA Committee in April, 1991 of §7.32 as an amendment to the revised Model BCA.

[52] Section 7.32 validates seven general types of provisions that may be included in unanimous shareholder agreements (with an eighth "basket" provision), even though such agreements might otherwise be inconsistent with other provisions of the statute. Section 7.32(a) provides as follows:

> An agreement among the shareholders of a corporation that complies with this section is effective among the shareholders and the corporation even though it is inconsistent with one or more other provisions of this Act in that it:
>
> (1) eliminates the board of directors or restricts the discretion or powers of the board of directors;
>
> (2) governs the authorization or making of distributions whether or not in proportion to ownership of shares, subject to the limitations in section 6.40;
>
> (3) establishes who shall be directors or officers of the corporation, or their terms of office or manner of selection or removal;
>
> (4) governs, in general or in regard to specific matters, the exercise or division of voting power by or between the shareholders and directors or by or among any of them, including use of weighted voting rights or director proxies;

[58] ABA Committee on Corporate Laws, "Changes in the Revised Model Business Corporation Act – Changes Pertaining to Closely Held Corporations" (1990) 46 Bus. Law. 297. Schedule "F" includes the full text of §7.32.

(5) establishes the terms and conditions of any agreement for the transfer or use of property or the provision of services between the corporation and any shareholder, director, officer or employee of the corporation or among any of them;

(6) transfers to one or more shareholders or other persons all or part of the authority to exercise the corporate powers or to manage the business and affairs of the corporation, including the resolution of any issue about which there exists a deadlock among directors and shareholders;

(7) requires dissolution of the corporation at the request of one or more of the shareholders or upon the occurrence of a specified event or contingency; or

(8) otherwise governs the exercise of the corporate powers or the management of the business and affairs of the corporation or the relationship among the shareholders, the directors and the corporation, or among any of them, and is not contrary to public policy.

[53] To date, Mississippi, New Hampshire and Utah have included provisions in their state business corporation laws that are virtually identical to §7.32.[59] Washington adopted the provisions but added the requirement that unanimous shareholder agreement must be in writing and must be signed by all the shareholders.[60] Florida and Virginia, in enacting §7.32, made several significant modifications.[61] Because these state corporate law

[59] See Mississippi Business Corporation Act, §79-4-7.32; New Hampshire Business Corporation Act, §293-A-7.32; Utah Business Corporation Act, §16-10a-732 (the Utah provisions contain two minor wording differences).

[60] See Washington Business Corporation Act, §23B.07.320.

[61] Florida Business Corporation Act, §607.0732. There are four material differences between §7.32 and the Florida provisions:

(i) the Florida provisions are limited to corporations with 100 or fewer shareholders at the time of the agreement. Section 7.32 has no limitation beyond that the company's shares cannot be publicly traded;

(ii) there is no "basket" provision similar to §7.32(a)(8);

(iii) under the Florida legislation, the agreement must be in the articles or by-laws, not in a side agreement, must be "signed" by all the shareholders and cannot be amended or terminated by less than a majority of the shareholders; and

(iv) unlike §7.32, there is no specific 10-year "sunset" provision.

Virginia Stock Corporation Act, §13.1-671.1; the Virginia provisions came into effect on July 1, 1990, before the ABA Committee on Corporate Laws had formally adopted §7.32. There are two substantive differences between §7.32 and the Virginia provisions:

(a) under the Virginia legislation, the shareholder agreement terminates "when the corporation has more than thirty-five shareholders of record"; and

(b) similarly, in the Virginia legislation, there is an express provision that "no action taken pursuant to this section shall change any requirement to file articles or other documents

provisions were adopted relatively recently, however, it is too early to assess their impact on how they will be interpreted by the courts.

D. Delaware

[54] The corporate laws of Delaware differ from the §7.32 approach. Subchapter XIV of the Delaware General Corporation Law (Delaware GCL) requires a corporation wishing to take advantage of the provisions specifically designed for close corporations to elect status as a statutory close corporation. In order to qualify as a statutory close corporation, a corporation must:

(i) have no more than 30 shareholders;

(ii) impose restrictions on the transfer of its shares in its certificate of incorporation; and

(iii) make no offering of its shares to the public.[62]

[55] The shareholders of a Delaware close corporation may by written agreement restrict the powers of the directors; in this respect, the Delaware provisions are similar to the provisions of subsections 146(2) and 146(5) of the CBCA. But, while both the CBCA and §7.32 require unanimous shareholder approval for a unanimous shareholder agreement to take effect, the Delaware provisions require only a majority and the contractual provisions therefore only apply to signatories to the agreement.[63]

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with the State Corporation Commission or affect the rights of any creditors or other third parties."

Only one reported American case has considered provisions based on §7.32. In Boyd P.C. v. Payne P.C. (244 Va. 418, 422 S.E.2d 784), the Supreme Court of Virginia held in obiter that, because the statute recognized the validity of a shareholder agreement that treated the corporation as if it were a partnership, a dispute between the shareholders of a professional law corporation who had validly conducted the internal affairs of the corporation as a partnership was properly settled according to partnership law.

This conclusion may not be technically correct given that the clause in question merely exempted shareholders from liability as partners even though the corporation was operated as a partnership. It is rather more likely that courts will look to §7.32 agreements to determine what particular partnership rules should and should not apply to the corporation based upon what the parties have set out in their agreement.

[62] Section 342.

[63] Section 350 provides as follows:

A written agreement among the stockholders of a close corporation holding a majority of the outstanding stock entitled to vote, whether solely or among themselves or with a party not a stockholder, is not invalid, as between the parties to the agreement, on the ground that it so relates to the conduct of the business and affairs of the corporation as to restrict or interfere with the discretion or powers of the board of directors. The effect of any such agreement shall be to relieve the directors and impose upon the stockholders who are parties to the agreement the liability for managerial acts or omissions which is imposed on directors to the extent and so long

[56] In addition, shareholders of a Delaware close corporation may, in the certificate of incorporation, provide that the business of the corporation shall be managed by the shareholders instead of by a board of directors. In such circumstances, no shareholder meetings need be called to elect directors, the shareholders are deemed to be directors and, unless the context clearly requires otherwise, the shareholders are subject to all liabilities of directors.[64]

[57] Other provisions of the Delaware GCL with respect to close corporations permit the corporation to be operated to a certain extent as a partnership. For instance, any shareholder may dissolve the corporation. Automatic dissolution of the corporation upon the occurrence of a specified event or contingency is also a possibility.[65]

V. AUSTRALIAN CLOSE CORPORATION LEGISLATION

[58] In 1989 the Australian Parliament passed the Close Corporations Act (Australian CCA)[66] on the basis of recommendations made by the Companies and Securities Law Review Committee to provide more protection and flexibility for close corporations. Although the Australian CCA has since been set aside on constitutional grounds,[67] its text provides for an interesting comparative analysis.

[59] Rather than focusing on the unanimous shareholder agreement as a tool to help close corporations, the Australian CCA takes a broader approach which intertwines aspects of partnership law with the law governing close corporations. Some of the defining features of an Australian CCA corporation are that:

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as the discretion or powers of the board in its management of corporate affairs is controlled by such agreement.

[64] Section 351.

[65] Sections 354, 355.

[66] Close Corporations Act 1989 (No. 120) (Cth). For a good discussion of the genesis and policy of the Australian CCA, see Jennifer Hill, "Close Corporations in Australia - The Close Corporations Bill 1988" (1989), 15 Can. Bus. Law. Jour. 43. It is interesting to note, as Hill points out, that the "blurring of boundaries between the partnership and corporate form" is consistent with traditional Australian corporate norms.

[67] The Australian CCA was part of a package of corporate law reform designed to bring uniformity to the company laws of the several Australian States. Three of the Australian states challenged the constitutional ability of the Commonwealth government to pass legislation of this kind. In 1990, the High Court of Australia held that many aspects of the legislation were ultra vires the Commonwealth parliament. Although the High Court did not explicitly invalidate the Australian CCA, it has not been proclaimed into force despite having received royal assent on July 14, 1989.

(i) it may have no more than ten "members" (i.e., shareholders), all of whom must be natural persons and a majority of whom must be Australian citizens;

(ii) shares may not be indirectly owned by trustees or subsidiaries;

(iii) securities may not be offered to the public;

(iv) formal shareholder-director distinctions are eliminated;

(v) a partnership form of regulation governs internal affairs; members may participate in the management of the corporation but have partner-like duties towards other members (such as the duty to account for profits, to exercise due diligence, etc.);

(vi) external affairs are governed by the common law of agency as it applies to partnerships with each member an agent of the corporation and having the power to bind it; and

(vii) all of the shareholders may enter into "association agreements" similar in many respects to partnership agreements.[68]

[60] Offering some of the flexibility of the partnership form without its joint and several liability (unless the numerical threshold is breached or public filings are neglected), the Australian CCA presents a hybrid form of organization. Without a formal board of directors, it validates the absence of formalism that characterizes many "incorporated partnerships."

[61] By applying the partnership and agency doctrines of apparent authority to acts done by any member in the ordinary course of business, the Australian CCA also affords some protection to third parties who might otherwise be misled by the absence of a conventional management structure.

[62] With the absence of formalism comes a degree of responsibility on members higher than that usually imposed on shareholders. The Australian CCA expressly fixes members with many of the same fiduciary duties required of partners: accountability for benefits, a duty not to compete, liability for a failure to exercise due diligence or to act honestly and in good faith. Moreover, the ten-member threshold, itself somewhat arbitrary, may pose a trap for the unwary since exceeding the threshold results in loss of limited liability. And while

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[68] The Australian CCA contemplated that a model "association agreement" would be included in the regulations. See Paul Latimer, Australian Business Law (CCH Canadian Limited: 1994).

some commentators criticize the Australian approach as being unduly restrictive, that restrictiveness could be seen as nothing more than a trade-off for the flexible corporate form offered by the statute.

VI. THE ISSUES

[63] This section of the discussion paper examines specific issues and possible amendments to the CBCA. The first issue discussed is whether the current definition of "unanimous shareholder agreement" needs to be clarified. The second issue is whether the statute should impose any eligibility requirements beyond the current requirement of unanimity.

[64] The paper then considers a number of issues concerning shareholders and their powers and duties under a unanimous shareholder agreement, followed by a discussion of issues related to the board of directors, including whether the board can, or should, be eliminated. The paper then discusses the impact of unanimous shareholder agreements on third parties and the termination of unanimous shareholder agreements. The paper concludes by considering what provisions of the CBCA could be opted out of through the use of a unanimous shareholder agreement.

A. DEFINITION OF UNANIMOUS SHAREHOLDER AGREEMENT

Issue 1: Whether the CBCA definition of "unanimous shareholder agreement" should be amended.

a) Background

[65] Currently, "unanimous shareholder agreement" is defined in subs. 2(1) to mean "an agreement described in subsection 146(2) or a declaration of a shareholder described in subsection 146(3)." Under both subs. 146(2) and subs. 146(3), the written agreement or declaration must "restrict" the powers of the directors to manage the corporation. Therefore, if an agreement "restricts" the directors' powers and is entered into by all shareholders of a corporation, it is a unanimous shareholder agreement. If it does not restrict the board powers, even in part, it is not a unanimous shareholder agreement regardless of who is a party to the agreement. For some shareholders, this definition may be too narrow whereas for others it may be too inclusive.

[66] Shareholders may enter into private contracts governing different aspects of their relationship (for example pooling agreements providing for the exercise of voting rights[69] and buy-sell agreements) that do not restrict the powers of the board. Under the law of contract, such an agreement takes effect only as personal contracts and consequently, the rules of privity of contract apply and such an agreement does not bind a transferee of shares.

[67] By contrast, under corporate legislation, a unanimous shareholder agreement has a direct effect on the internal constitution of the corporation (as well as upon the personal rights of the shareholders among themselves). Unanimous shareholder agreements "are constitutional documents akin to the company's articles of incorporation and by-laws."[70] These agreements, like a corporation's articles or by-laws, can bind future shareholders without their consent, thereby overriding the tradition contractual rules.

[68] Some shareholders may wish to have an agreement, which governs some aspects of their relationship (for example, the exercise of voting rights) but does not affect the powers of the directors, designated as a unanimous shareholder agreement. As such, the agreement could bind future shareholders without the time and expense of assignments/new contracts having to be executed. This is not possible under the current unanimous shareholder agreement regime.

[69] Other shareholders may enter into agreements that could be seen to restrict in some ways the powers of the board and the agreement therefore becomes automatically a unanimous shareholder agreement. However, there may be occasions when shareholders will prefer to be working with a simple contract as compared with a unanimous shareholder agreement. For example shareholders, perhaps motivated by the concerns of a financial institution, may contractually agree to approve certain fundamental transactions with an extraordinary shareholder's resolution. They may not want their agreement to be labelled a unanimous shareholder agreement. The fact that directors' and shareholders' duties and liabilities may be made unclear as a result of a unanimous shareholder agreement could complicate an otherwise straight-forward transaction.

[70] The Alberta BCA takes a different approach. Its definition of unanimous shareholder agreement is broader than the CBCA in that it include agreements which regulate (i) rights and liabilities of shareholders and other parties to the agreement, (ii) the election of directors, (iii) management of the corporation including restriction or abrogation of the directors' powers and (iv) other matters which a unanimous shareholder agreement may contain as stipulated by the Alberta BCA.

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[69] Subsections 146(2) through (5) of the CBCA refer to unanimous shareholder agreements whereas subsection 146(1) speaks of pooling agreements, agreements by which shareholders set out the manner in which their shares will be voted in the circumstances described therein.

[70] F. Iacobucci, J.S. Ziegel, R.J. Daniels, D.L. Johnston, J.G. MacIntosh, Cases and Materials on Partnerships and Canadian Business Corporations, 2d ed., vol. 2 (Toronto: Carswell, 1989) at 1012.

[71] Moreover, shareholders of corporations under the Alberta BCA by virtue of subs. 140(9) have the ability to designate what would otherwise be a unanimous shareholder agreement as a private agreement. The Alberta BCA permits subs. 140(9) to be opted out of entirely, although not partially. In such case, the statutory benefits of a unanimous shareholder agreement are presumably not available but some of the less attractive aspects of unanimous shareholder agreement requirements might be avoided.[71]

[72] From a policy perspective, there do not appear to be strong reasons to prohibit shareholders from entrenching in a unanimous shareholder agreement "any provision which they want to make about the internal affairs and organization of the corporation."[72] However, some concerns may be raised about agreements which seek to restrict the powers of the boards but are not designated as unanimous shareholder agreements.

b) Options

(i) Status quo. To qualify as a unanimous shareholder agreement, the agreement must restrict the power of the directors to manage the corporation.[73]

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[71] See Alberta Corporations Law Guide (CCH Canadian Limited) at pp. 5302 to 5303 where it is stated:

> While it is clear that the exclusion of the application of section 140 to a Shareholders' Agreement will have the effect of leaving the Agreement as a mere personal agreement among the parties to it, it is not clear what other consequences flow from such exclusion. Section 140(9) of the Act provides as follows:
>
> > A unanimous shareholder agreement may exclude the application to the agreement of all but not part of this section.
>
> At issue is whether or not a Shareholders Agreement to which section 140 does not apply remains a Unanimous Shareholder Agreement for other purposes under the Act. The Institute of Law Research and Reform chose not to utilize the definition of a unanimous shareholder agreement under the Canada Business Corporations Act (CBCA). The principal element in such definition under the CBCA, apart from the requirement of unanimity, is that a unanimous shareholder agreement restricts the power of the directors to manage the corporation. Instead, the Institute of Law Research and Reform chose to expand the CBCA's definition of unanimous shareholder agreement by providing that the Unanimous Shareholder Agreement was an agreement that provided for any of the matters enumerated in section 140(1) of the Act.

[72] This was the conclusion of the 1980 Alberta Report, note 2, page 24:

> Many of the things which shareholders will want to deal with will restrict the directors' powers to manage, but some will do so only incidentally and indirectly or not at all (e.g., a provision that all the shareholders are to be directors, which would not affect their powers once elected) and some may be doubtful (e.g., options to acquire shares, which may or may not be regarded as affecting the directors' powers to determine the validity of share transfers).

[73] The pooling agreement provision (currently CBCA subs. 146(1)) could however be moved to a separate section in order to clarify the CBCA.

(ii) Alberta BCA approach. Adopt the broad Alberta BCA definition of a unanimous shareholder agreement, as well as make available the ability to designate an agreement which would otherwise be a unanimous shareholder agreement as a purely private agreement.

(iii) Adopt the Alberta approach in (ii) above, but further clarify that only a unanimous shareholder agreement may restrict the powers of the directors.

B. ELIGIBILITY REQUIREMENTS

Issue 2: Whether the CBCA should expressly impose further eligibility requirements on the use of a unanimous shareholder agreement based on the number of shareholders or the status of the corporation.

a) Background

[73] Based on the overall language of section 146, it appears that a unanimous shareholder agreement must be written, must be otherwise lawful[74] and, as the name implies, must be unanimous. If these three elements are satisfied, section 146 applies to the agreement. Currently, there is no direct restriction based on the number of shareholders or the type of corporation (for example, non-distributing versus distributing).[75]

[74] Since use of a unanimous shareholder agreement could lead to the "override" of some corporate law requirements, some jurisdictions have taken the approach of limiting the use of these agreements to corporations which do not exceed a specified number of shareholders. This may help ensure that all shareholders are knowledgeable of and in full agreement with the relaxation of statutory requirements.

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[74] See Welling, note 4, at 483, where he states:

> The section requires that the unanimous shareholder agreement be an 'otherwise lawful written agreement'. This restriction does not appear to cause any problem, as it will be recalled that shareholders, unlike directors, are not prevented from 'fettering their discretion' as to how they will vote in future matters involving corporate decisions. The cautionary note that the agreement must be 'otherwise lawful' is probably an example of statutory prolixity, though it may provide grounds for lawyerly ingenuity in a future dispute.

[75] However, it should be noted that, where a unanimous shareholders agreement seeks to restrict the issue, transfer or ownership of shares, something which many if not most unanimous shareholder agreements seek to do (through buy-sell agreements), then the corporation must be non-distributing. CBCA subs. 49 prohibits any restrictions on the issue, transfer and ownership of shares of a distributing corporation.

[75] Numerical limits on shareholders are used in the Delaware, Florida and Virginia statutes, but not in §7.32 of the Model BCA. The Australian CCA limits eligible corporations to those with ten or fewer shareholders, each of whom must be natural persons.

[76] The open-ended approach of the current CBCA and the revised Model BCA is based on the view that the number of parties to a unanimous shareholder agreement will be self-limiting. Securing unanimity for all but the simplest agreement is likely to be difficult once a certain number of shareholders is surpassed. If a certain number of shareholders can come to a consensus on the terms of the agreement, why should the legislation interfere? Specific problems with the current eligibility requirements have not been raised.

[77] An alternate approach would be to adopt eligibility requirements based on the status of the corporation. The CBCA imposes certain requirements on corporations that distribute securities, including debt obligations, to the public,[76] and restricting such corporations from using section 146 agreements may be in keeping with this distinction. While there may be only a few shareholders, a corporation that has distributed debt securities to the public may have a large number of bond holders who would not necessary be aware of, or have agreed to, the use of a unanimous shareholder agreement, and yet who have an interest in the corporation and its management. A distinction based solely on the number of shareholders may not protect the interests of such persons.

[78] Alternatively, an eligibility requirement based on the definition of "private company" in the provincial securities legislation[77] could be adopted. Use of the traditional "private company" definition would impose a numerical limit of 50 shareholders on the use of section 146 agreements.

b) Options

(i) Status quo. No additional eligibility requirements be added.

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[76] For example, CBCA subs. 2(7) and subs. 102(2) impose special rules on the number and type of directors.

[77] For example, the Ontario Securities Act, R.S.O. 1990, c. S. 5, subs. 1(1) provides:

"private company" means a company in whose constating document,

(a) the right to transfer its shares is restricted
(b) the number of its shareholders, exclusive of persons who are in its employment and exclusive of persons who, having been formerly in the employment of the company, were, while in that employment, and have continued after termination of that employment to be, shareholders of the company, is limited to not more than fifty, two or more persons who are the joint registered owners of one or more shares being counted as one shareholder, and
(c) any invitation to the public to subscribe for its securities is prohibited.

(ii) Limit the use of unanimous shareholder agreements to non-distributing corporations.

(iii) Limit the use of unanimous shareholder agreements to "private corporations" as defined in provincial securities laws (that is, the corporation is not a distributing corporation for the purpose of the CBCA,[78] the right to transfer shares is restricted and the corporation has no more than fifty shareholders, exclusive of employees or former employees).

(iv) Limit the use of unanimous shareholder agreements to corporations with 15 or fewer shareholders, including employees.

Issue 3: Whether any restrictions on the use of a unanimous shareholder agreement should be imposed on shareholders that are corporations.

a) Background

[79] In addition to eligibility requirements based on the nature of the corporation or the number of shareholders, a limitation could also be imposed on the basis of whether the shareholder is a natural or corporate person. The CBCA currently does not differentiate between corporate or natural person shareholders for the purpose of subs. 146(2) agreements. Indeed, as noted above, the CBCA was specifically amended in 1978 to expressly permit a parent corporation to use a unanimous shareholder agreement. Anecdotal evidence suggests that unanimous shareholder agreements are frequently used by parent shareholders of subsidiary corporations to limit at least some of the board powers.

[80] From an efficiency perspective, a unanimous shareholder agreement may benefit a corporation and its parent corporation by permitting streamlined decision-making (for example, by the parent's board of directors where the subsidiary's directors' powers have been transferred) and by avoiding some of the costs associated with a board of directors.[79] Similarly, corporations often establish a number of subsidiaries for tax, liability or other reasons, and these corporate groups may benefit from reduced corporate governance costs

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[78] The CBCA definition of "distributing corporation" located in subs. 2(7) and subs. 126(1) and the prohibition of any invitation to the public to subscribe for the corporation's securities found in the securities legislation may not be completely symmetrical. The CBCA definition includes a situation where shares were, but no longer are, in the hands of the public. The private company definition in tandem with most securities legislation, allows for a "privatized" company to claim private company status.

[79] The CBCA does not permit the elimination of the board, so certain costs remain. However, where all the directors powers have been restricted, the fees payable to the directors and the costs of holding board meetings, etc. are presumably reduced or eliminated.

available through unanimous shareholder agreements. The flexibility currently afforded to corporate shareholders could be further enhanced by an improved unanimous shareholder agreement regime, as discussed in this paper.

[81] On the other hand, from an accountability perspective, there may be some concerns raised about corporate shareholders using unanimous shareholder agreements, particularly in conjunction with the issue of whether the board can or should be entirely eliminated where all of the powers of the directors have been reserved to the shareholders under a unanimous shareholder agreement.[80] The CBCA and other corporate laws require directors to be natural persons. It could therefore be questioned whether it is incongruous to allow the transfer of directors' responsibilities to corporate entities.

[82] A key accountability consideration is whether the powers or responsibilities imposed on the director can/should be transferred to a corporate entity. If the purpose of the liability (for example, penal environmental liability) is to encourage key decision-makers, through the imposition of personal liability, to monitor the corporation's actions and change its conduct where required, the transfer of powers to a corporate entity could undermine this purpose.

[83] If the purpose of the liability is to ensure adequate compensation for injured parties (for example, directors' liability for employee wages), a plaintiff may benefit from being able to sue the shareholder, which may have large resources. However, a corporate structure might be designed to see that liability is transferred to an under-capitalized corporate entity. Again, the purpose of the directors' liability might be defeated.

[84] One option might be to permit corporate shareholders to enter into a unanimous shareholder agreement but require that one or more natural persons (for example, one or more members of the parent board) also be parties to the agreement and that all the rights, powers, duties and liabilities of the directors be transferred to them. However, one might question whether such a unanimous shareholder agreement regime would provide any benefits to parent corporations or corporate groups.

[85] Another related consideration is the CBCA requirement that a majority of directors be resident Canadians, particularly in the case of foreign subsidiaries for whom the requirement was largely adopted. A full consideration of whether the directors' residency requirements are still required is the subject of another CBCA Discussion Paper and any final decision, made in respect to the residency requirement, may impact on the options discussed below.[81]

[86] Under the current CBCA rules on unanimous shareholder agreements, the residency requirement can be largely avoided through the use of a unanimous shareholder agreement.

[80] See discussion in Issue 9.

[81] See CBCA Discussion Paper, "Directors' and other Corporate Residency Issues", released August 1995.

A board of directors is still required but the director(s) may have no rights, powers, duties or liabilities, at least arising under the CBCA. However, responsibilities and liabilities relating thereto arising under other statutes (for example, under tax laws for the corporation's sources deductions, etc.) may still be imposed on the directors, a majority of whom must be resident Canadians. As noted in the paper, the impact of the North American Free Trade Agreement and the General Agreement on Trade in Services on residency requirements will also have to be carefully considered.

[87] The only unanimous shareholder agreement regime that currently requires natural persons is the Australian CCA. As discussed above, the Australian CCA requires that the members (shareholders) be natural persons and that a majority must be Australian citizens.

b) Options

(i) Status quo. Place no limits on the use of unanimous shareholder agreement by corporate shareholders.

(ii) Permit some but not all powers of a board of directors to be transferred to a corporate shareholder.

(iii) Permit corporate shareholders to enter into a unanimous shareholder agreement but require that one or more natural persons (for example, one or more member(s) of the parent board) also be parties to the agreement and that all the rights, powers, duties and liabilities of the directors be transferred to them.

(iv) Limit the use of unanimous shareholder agreement to natural persons.

C. SHAREHOLDERS' DUTIES

Issue 4: Whether the language used in subs. 146(5) regarding the transfer of liability should be clarified.

a) Background

[88] An ambiguity in the wording of the CBCA unanimous shareholder agreement provisions is the failure of subs. 146(5) to expressly state that the shareholders assume the liabilities of which the directors are relieved, as well as their "rights, powers and duties." It may not be clear under the CBCA whether shareholders who take on the directors' powers

under a unanimous shareholder agreement inherit related statutory liabilities as well, nor whether the directors continue to be exposed to them. As a matter of practice, directors whose duties have been restricted pursuant to a unanimous shareholder agreement continue to generally ask for and receive commitments that they be indemnified against such liabilities.

[89] In contrast, subs. 108(5) of the Ontario BCA, like the corresponding provisions in most other provinces, directly addresses the transfer of liabilities by providing:

> A shareholder who is a party to a unanimous shareholder agreement has all the rights, powers, duties and liabilities[82] of a director of the corporation, whether arising under this Act or otherwise, to which the agreement relates to the extent that the agreement restricts the discretion or powers of the directors to manage or supervise the management of the business and affairs of the corporation and the directors are thereby relieved of their duties and liabilities . . . to the same extent. [emphasis added].

[90] The Ontario BCA provision makes it clear that the shareholders take on the directors' liabilities as well as their duties and that the directors are relieved of their liabilities to the same extent. It also provides that common-law as well as other statutory duties and liabilities of directors pass to the shareholders,[83] although depending on the nature of the liability and the wording of the statute imposing the liability, it is possible that the directors may continue to be liable.

[91] Section 7.32(e) of the Model BCA provides as follows:

> An agreement authorized by this section that limits the discretion or powers of the board of directors shall relieve the directors of, and impose upon the person or persons in whom such discretion or powers are vested, liability for acts and omissions imposed by law on directors to the extent that the discretion or powers of the directors are limited by the agreement.

[92] The Official Comment to §7.32 states that the "transfer of liability provided by subsection (e) covers liabilities imposed on directors by law which is intended to include liabilities arising under the Act, the common law, and statutory liability outside the Act." The Official Comment goes on to add that "there could be cases where subsection (e) is ineffective and where a director is exposed to liability qua director, even though under a shareholder agreement he may have given up some or all of the powers normally exercised by directors."

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[82] The corresponding provisions of the Manitoba, Newfoundland, Yukon and Alberta legislation read: . . . has all the rights, powers and duties and incurs the liabilities . . .

[83] F. Iacobucci, "Canadian Corporation Law: Some Recent Developments", in N. Eastham and B. Krivy, eds., The Cambridge Lectures 1981 (Toronto, 1992) 88 at 93.

b) Options[84]

(i) Status quo.

(ii) Amend subs. 146 to clarify that

(a) the shareholders take on the directors' liabilities as well as their rights, powers and duties and that the directors are relieved of their liabilities to the same extent,

(b) common-law as well as other statutory duties and liabilities of directors pass to the shareholders, and

(c) defences to liabilities which would have been available to the directors are available to the shareholders.

Issue 5: Whether shareholders who succeed to all the duties of directors are bound by the common law and statutory rules regarding these duties.

a) Background

[93] Based on the current statutory language, there may be uncertainty regarding the extent to which a shareholder who enters into a unanimous shareholder agreement is bound by common law and statutory rules regarding the duties of directors. For instance, at common law, directors who owe a fiduciary duty cannot fetter their discretion; they are required to remain free to make their decisions in the best interests of the corporation. Directors cannot agree in advance as to how a particular issue will be decided and an agreement among shareholders could not bind them.[85] The purpose of this rule is to ensure that directors can act in the best interests of the corporation.

[94] Some commentators have argued that a unanimous shareholder agreement may be unable to fetter the directors' discretion and shareholders assume the fiduciary duties normally imposed on the board. A shareholder acting as a director (exercising directors' rights or powers reserved to them under a unanimous shareholder agreement) would not be

[84] The issue of a broader definition of director discussed in Issue 7 may also impact on the appropriate transfer of liabilities.

[85] Motherwell v. Schoof, [1949] 2 W.W.R. 529.

able to agree in advance in a unanimous shareholder agreement as to how he or she will decide each new problem within the scope of the agreement; to do so would be to fetter his or her own discretion.[86]

[95] Other commentators maintain that it is reasonably clear that the Dickerson Report wanted to change the law so as to permit shareholders to agree unanimously to fetter their discretion when acting as directors, precisely what was prohibited by the common law. Applying the principle against fettering of discretion to shareholders acting under a unanimous shareholder agreement would make the agreement less useful.[87]

[96] For example, one key area where shareholders have wanted to control the discretion of the directors is the declaring of dividends. At common law, shareholders were not entitled to interfere with this area of directors' discretion. The Model BCA expressly provides that a unanimous shareholder agreement can authorize dividends. Similarly, the Model BCA provides that a unanimous shareholder agreement can establish "the terms and conditions of any agreement for the transfer or use of property or the provision of services between the corporation and any shareholder, director, officer or employee of the corporation or among any of them," matters which would otherwise be for the discretion of the directors.[88]

[97] A related issue is whether shareholders in exercising the powers of the directors should be subject to the full fiduciary and care duties imposed on directors. Traditionally, shareholders are entitled to act in their own self-interest and imposing the full directors' responsibilities on them may be onerous.

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[86] Welling, note 4, at 483-84, where it is stated that,

> If each shareholder then owes the corporation the same types of equitable duties as a director would, then each shareholder _qua_ acting director will be obliged to make up his mind afresh as he is confronted by each new problem within the scope of the agreement. He cannot agree in advance as to how he will decide because he will have inherited the director's obligation to decide each issue as _then_ appears to be to the corporate advantage. Far from being free, as a shareholder, to contract, sell, or give away his precious vote, each shareholder _qua_ acting director will be caught by the rule in _Motherwell_ v. _Schoof_: he who owes a fiduciary obligation (here, each shareholder, because of the unanimous shareholder agreement) cannot fetter his discretion; he is required to remain free to vary his opinion as seems to him to suit the occasion and the person (here, the corporation) to whom the duty is owed.

[87] "Does a shareholder thereby lose the relative freedom normally possessed by shareholders to act in their own interests, delegate their powers and otherwise behave in ways that would not necessarily satisfy the standard of care of directors? For example, would shareholders thereby become subject to the common law principle that the discretion of directors cannot be fettered, even though the entire purpose of creating unanimous shareholder agreements was to provide an escape route from this principle?" See M. Disney, note 41, at 119. Mr. Disney provides a long and careful analysis of the problems with limiting the shareholders with all the directors' responsibilities (pp. 116-124). Also, Paul Martel has stated that shareholders acting as directors can agree in advance as to how they will vote. See _Les aspects juridiques de la compagnie au Québec_, vol. 1, Wilson & Lafleur Martel ltée, Montréal, at 658.1.

[88] Model BCA, sections 7.32(a)(2) and (5).

[98] On the other hand, shareholders are perhaps now entitled to act in their own self-interest in electing directors and deciding on fundamental changes to the corporation's constitution because there is a board of directors which must act in the best interests of the corporation. As discussed above,[89] the shareholders enjoy a privileged position of limited liability for the responsibilities of the business. The traditional common law approach to meet concerns about accountability (for example, the corporation's obligations to creditors) is that the directors have strict fiduciary and care duties, owed to the corporation, to act in its best interest. Allowing shareholders to assume the powers of directors without these duties, which are not owed to them but the corporation, may raise concerns. Shareholders could then act in their own interest and yet not be liable for the enterprise's debts or other responsibilities.

[99] As the unanimous shareholder agreement regime appears to allow corporate law to reflect the needs of a partnership situation, partnership duties could be imposed on shareholders in place of directorial duties. This may make sense from the point of view of inter-shareholder responsibility. However, the partnership analogy is inappropriate from the perspective of obligations owed to third parties because partners are liable for the debts of the partnership and shareholders incorporate their business to limit their liability.

b) Options

(i) Status quo. Shareholders who succeed to all the duties of directors are bound by the common law and statutory rules regarding these duties.

(ii) Amend s. 146 to permit a unanimous shareholder agreement to fetter the shareholders' discretion when exercising the powers of the directors.

(iii) Adopt the Model BCA approach of allowing a unanimous shareholder agreement to set out a policy on dividends and the terms and conditions of any agreement for the transfer or use of property or the provision of services.

(iv) The CBCA could impose traditional partnership duties, in respect of the responsibilities of shareholders amongst themselves, unless the shareholders expressly contract out of such duties.

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[89] Section II(A) above.

Issue 6: Whether any special procedural or process rules should be added in the CBCA in respect of decision-making by shareholders exercising the powers of the directors under a unanimous shareholder agreement.

a) Background

[100] In addition to the substantive duties that may apply to shareholders when they transfer to themselves some or all of the powers of the directors, a secondary question is what rules and process should shareholders follow in exercising those powers. Currently, s. 146 of the CBCA is silent on how the shareholder group is to function in exercising their directors' powers.

[101] Is it expected that shareholders will meet regularly as directors in accordance with the by-laws and make decisions by resolutions of the board? Would meetings of shareholders of directors be held separately from meetings of shareholders? Would shareholders have to comply with procedural rules in the statute in terms of directors' dissent rights?[90] Since shareholders take directors' liabilities, they should have available to them those statutory and common law defences which would have been otherwise available to the directors. What procedure would they have to follow to benefit from such defences?

[102] Section 120 of the CBCA requires directors or officers to disclose material interests in contracts made with the corporation.[91] Would these provisions apply to shareholders to whom the directors' powers to approve the contract have been transferred? The Alberta BCA specifically provides that the directors and officers' disclosure requirement is subject to a unanimous shareholder agreement.[92]

[103] Another issue is that directors votes are held on the basis of one director, one vote. Shareholders' meetings are conducted on the basis of one share, one vote. What rule applies to shareholders exercising the directors' powers? Some legal authors have concluded that a unanimous shareholder agreement confers some (or all) directors' powers, duties and

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[90] CBCA s. 123 provides for the process by which directors can dissent to resolutions or actions of the directors and avoid liability under CBCA s. 118 for wrongful payments made by the corporation.

[91] The up-dating of CBCA s. 120 is the subject of the CBCA Discussion Paper, "Financial Assistance and Related Provisions," released April 1996, Section VIII.

[92] Alberta BCA, subs. 115(9). The 1980 Alberta Report, note 2, at 64-5, gives the rationale for this provision only in terms of allowing shareholders to alter the more onerous disclosure requirements found in the Alberta BCA to alleviate these requirements. The report does not discuss the issue from the perspective of what obligations should fall on the shareholders who exercise directorial powers under a unanimous shareholder agreement.

liabilities on shareholders without making them directors. They are not designated as a replacement board.[93] If shareholders still prefer to follow rules for directors' meetings, they can elect themselves as directors and use the traditional corporate form.

[104] A further issue is whether shareholders should still be required to have annual shareholder meetings or resolutions in lieu thereof. If the only purpose of the meeting is to appoint directors (who may or may not have any powers) and to table financial statements, is this required in the context of a closely-held corporation that has entered into a unanimous shareholder agreement?

[105] What should be the rules where only some of the powers are transferred?

b) Options

(i) Status quo.

(ii) Where shareholders exercise directors' powers, procedural rules for shareholders' meetings would apply, but the directors' statutory and common law defences should still be available to the shareholders.

(iii) Adopt option (ii) above, but the procedural rules would apply unless derogated from in the unanimous shareholder agreement.

(iv) Permit a unanimous shareholder agreement to establish rules and procedures for, or eliminate altogether the need for, shareholder and director meetings or resolutions in lieu of meetings.

(v) Adopt Alberta BCA approach and make directors' and officers' conflict of interest disclosure requirement subject to any unanimous shareholder agreement.

Issue 7: Whether the definition of "director" should be amended.

a) Background

[106] Subsection 2(1) of the CBCA defines a director as "a person occupying the position of director by whatever name called." Most provincial corporate laws use the same definition

[93] The distinction between directors and shareholders remains unchanged; only the division of powers between these two levels is modified (Martel, note 87, at 658.1.). Also, see Welling, note 4, at 486.

as the CBCA. This definition of director may be intended to import the common law rule that anyone who guides or controls any functions of the corporation can be subject to directors' liability.

[107] Few of the other statutes imposing directors' liability, however, define the terms "director" or "officer" at all. For example, the Income Tax Act (Canada)[94] (ITA) does not define the term "director" even though it imposes liability (section 227.1) on directors of a corporation which fails to remit withholding tax pursuant to Parts VII and VIII of the ITA. In connection with the exposure of directors and shareholders to liabilities arising under other federal or provincial legislation, it should be noted that paragraph 15(2)(b) of the Interpretation Act (Canada),[95] provides:

> Where an enactment contains an interpretation section or provision, it shall be read and construed . . . as being applicable to all other enactments relating to the same subject-matter unless a contrary intention appears.

[108] It seems, therefore, that the definition of "director" as a "person occupying the position of director by whatever name called" in subs. 2(1) of the CBCA may apply to other federal statutes imposing liabilities on directors which do not otherwise define "director."

[109] A more complex issue is whether a provincial legislature has the authority, under its corporate laws, to relieve directors of liabilities imposed upon them by federal laws, or whether Parliament has the same authority concerning liabilities imposing by provincial laws. The Alberta Institute of Law Research and Reform stated that "the [Alberta] BCA, as provincial legislation, would not be able to affect duties imposed upon directors by valid federal legislation."[96]

[110] One commentator suggests that, in defining the term "director", the jurisdiction of incorporation is not "purporting to eliminate a statutory liability created pursuant to the laws of another jurisdiction, but merely to identify the persons by whom such liabilities should be borne."[97]

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[94] R.S.C. 1985 (5th Supp.), c. 1, as amended.

[95] R.S.C. 1985, c. I-21.

[96] See 1980 Alberta Report, note 2, at 29.

[97] M. Disney, note 41, at 127. The author also notes that:

> The status of a director is created by the incorporating statute, just like the status of the corporation itself. In effect, the corporate statute is merely providing that where shareholders have assumed the role of directors, they should be treated as having the status of directors for purposes of all liabilities which normally attach to such status. This in no way interferes with or is inconsistent with any other law which imposes a liability upon directors, since it may be presumed that such liabilities are intended to imposed upon persons because they are responsible for managing the business and affairs of

[111] Most legislation imposing liability on directors requires some degree of active participation in the wrong, or at least a failure to exercise "due diligence" to prevent its occurrence.[98] For example, section 118 of the CBCA imposes liability for certain corporate acts only on directors who voted for or consented to a resolution authorizing such acts. The directors can avoid liability under the current CBCA rules if they relied in good faith on the financial statements or a report of an expert.[99] The Canadian Environmental Protection Act[100] imposes liability for an environmental offence committed by a corporation or "any officer, director or agent of the corporation who directed, authorized, assented to, acquiesced in or participated in the commission of the offence."

[112] It might defeat the purpose of the statute imposing the liability on a director if the shareholders were not effectively subject to such liability where they had entered into a unanimous shareholder agreement removing the powers of the directors, since only the shareholders would then have the necessary degree of involvement in the conduct constituting the offence to attract the statutory liability. Therefore, even if subs. 146(5) of the CBCA is not interpreted as effectively relieving the directors of all liabilities where all of their powers have been transferred by a unanimous shareholder agreement, the nominal directors might not be held liable for most statutory liabilities, since they would not have the necessary degree of involvement in the prohibited conduct by the corporation to attract liability under such statutory liabilities.[101]

[113] The Official Comment to §7.32 of the Model BCA states that the "transfer of liability provided by subsection (e) covers liabilities imposed on directors by law which is intended to include liabilities arising under the Act, the common law, and statutory liability outside the Act." The Official Comment goes on to add that "there could be cases where subsection (e) is ineffective and where a director is exposed to liability *qua* director, even though under a shareholder agreement he may have given up some or all of the powers normally exercised by director."

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a corporation, not because they bear the title "director."

[98] Tortious liability generally does not attach to directors and officers unless they are found to have acted as the "directing minds" of the corporation and have "that degree or kind of personal involvement by which the officer or director makes the tortious act his own." A director having no authority to take any action on behalf of the corporation could hardly be said to make any of its acts "his own." (Mentmore Manufacturing Co. Ltd. et all. v. National Merchandising Manufacturing Co. Inc. et all. (1978), 89 D.L.R. (3d) 195 at 203 (Fed. C.A.), per Le Dain J.).

[99] The CBCA Discussion Paper, "Directors' Liability," released in November 1995, proposes replacing the good faith reliance defence with a broader full due diligence defence (page 23).

[100] R.S.C. 1985 (4th Supp.), c. 16, s. 122.

[101] See discussion in Disney, note 41, at 128.

b) Options[102]

(i) Status Quo. Maintain the current definition of director in CBCA subs. 2(1).

(ii) Amend CBCA subs. 2(1) to expressly provide that the term "directors" includes shareholders for the purposes of any powers, duties, responsibilities or liabilities, whether arising under the CBCA or any other legislation, which have been transferred to them.

(iii) Adopt Option (ii), but limit the definition to include shareholders only where all the board's powers have been transferred.

D. THE BOARD OF DIRECTORS

Issue 8: Whether the word "restricts" in subs. 146(2) should be replaced with the term "transfer."

a) Background

[114] There may be some ambiguity concerning the extent to which a unanimous shareholder agreement under the CBCA can entirely remove the board's power to manage the business and affairs of the corporation. It can be argued that the word "restricts" in subs. 146(2) may not allow a unanimous shareholder agreement to take all powers away from the directors.[103] On the other hand, the section expressly provides that the restriction may be "in whole or in part."[104]

[115] However, while "restricts . . . in whole" may be equivalent to "excludes" or "removes," some clarification of the language might be desirable. These words do not contain the notion of "transfer" of the powers from directors to shareholders. Subsection 146(5) makes it clear that the directors' powers are not simply removed, they are also transferred.

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[102] A related issue is the extent of disclosure so that a third party may identify with accuracy the individual(s) to whom he or she should look for compensation. The appropriate disclosure is discussed in Issue 13.

[103] 1980 Alberta Report, note 2, at 27.

[104] Michael Disney, "Key Questions: Why, When, How and for Whom" in The Shareholder Agreement; Unprecedented Challenges, L.S.U.C. September 30, 1994, p. A - 25.

b) Options

(i) Status Quo. Maintain current term "restricts."

(ii) Replace the word "restricts" in subs. 146(2) with the term "transfers."

Issue 9: Whether the board of directors <u>can</u> or <u>must</u> be eliminated when all of its powers have been transferred to shareholders.

a) Background

[116] Currently, the shareholders of any CBCA corporation are entitled to transfer, by unanimous agreement, all the rights, powers, duties and liabilities of the directors to the shareholders. However, the CBCA does not permit the board to be eliminated even though it has no powers. Subsection 102(2) continues to require that a corporation have at least one director.[105]

[117] Any proposal to allow for the total elimination of the board may be quite controversial, as it would represent a departure from convention and tradition. One legal article has commented that:

> Companies will always require parties who perform at least some of the administrative and managerial functions that directors currently discharge. To allow parties to remove directors entirely would require fundamental revisions to corporations Acts with the inevitable result of replacing the director with someone performing very similar functions. A great deal of accumulated jurisprudence on the role of corporate managers would have to be re-litigated with little tangible gain. Although a company runs the risk that a director, devoid of powers, may exploit his authority to bind the company, that is a normal risk which principals invariably assume when relying upon an agent. Commercial convenience and good sense suggest that companies should continue to remain subject to the requirement to appoint at least one director.[106]

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[105] A distributing corporation must have at least three directors: CBCA, subs. 102(2).

[106] See Ray and Smith, "The Unanimous Shareholder Agreement: A New Device for Shareholder Control", [1985] Vol. 10 Can. Bus. L. J. at 447-8. The authors also note in a reference that:

> A standing committee of the Canadian Bar Association (Ontario Branch) has considered whether there is a need for a board of directors in the case where all the directors' powers have been removed. The committee rejected the view that the board should be dispensed with on the grounds that fundamental restructuring of the Act would be required. The committee did, however, suggest that public filing of unanimous shareholder agreements would be appropriate.

[118] Some commentators, however, have argued that given the identity of management and ownership in a closely-held corporation and the right of shareholders to restrict "in whole" the powers of the board, maintaining even one director is superfluous.[107] Requiring a board of directors which has no powers appears to impose a regulatory burden without any benefit.

[119] Moreover, if the goal of corporate accountability and directors' liability is to impose duties and liabilities on the real decision-makers, the retention of a board of directors without any powers seems to make little sense. Directors' liability is predicated upon the principle that the threat of potential liability will influence the actions of corporate decision-makers.

[120] Accountability to third parties, including in the broad sense to communities and governments, is presumably a key consideration. Small family-run businesses, which often start out as sole proprietorships or partnerships, adopt the corporate form primarily for liability, income tax or succession reasons. The main characteristic of this type of corporation is that the roles of shareholders, directors, and day-to-day managers are all filled by the same people. The corporate founders or members of their families tend to hold all the shares of the corporation and elect themselves to the board of directors. All, or nearly all, of them participate on a daily basis in the running of the corporation.[108]

[121] When shareholders of a small[109] closely-held corporation assume the directors' rights, powers, duties and liabilities under a unanimous shareholder agreement, corporate

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This strikes a reasonable balance between the desirability of maintaining an important institution (the board) and the right of a member of the public to be reasonably informed about the nature of the entity with which he is dealing. See Gary M. Girvan, of the firm McCarthy & McCarthy, Background Material On OBCA Issues (1984) [Comments on selected issued under OBCA 1982, prepared by OBCA Committee, CBAO (1985).]

[107] Disney, note 41, at 122.

[108] Welling, note 4, at 302-303.

[109] Various delineations of a "small business" are possible. It can be argued that these types of closely-held corporations have generally less than 50 employees and generate less than $5 million in annual revenues. According to the Small Business Loans Act, R.S.C. 1985, c. S-11, as amended, subs. 3(2), a small business with revenues of $5 million or less can obtain a loan under the Act. A manufacturing firm with fewer than 100 employees is also considered to be a small corporation: see D. Crane, The Canadian Dictionary of Business and Economics (Toronto: Stoddart, 1993) at 576.

Recently, the Ontario Securities Commission Task Force on Small Business Financing adopted a definition of small and medium-sized business enterprises (SMEs) (for the purposes of proposals for a new small business prospectus form and continuous disclosure waivers) "as enterprises with not more than $10 million in gross revenues in the most recently completed financial year. The selection of the $10 million in revenues ceiling in defining SMEs reflect the Task Force's view that gross revenues are the best vehicle for measurement of the appropriate size of enterprise in this context because, among other reasons, of the simplicity of having a single measure and because figures such as income and equity may be minimal even for entities of considerable size." See Ontario Securities Commission, Proposal of The Task Force on Small Business Financing, printed in Securities Forum '96 (Insight Conferences, January 25-26, 1996, Toronto), Tab. 4, at 3.

accountability does not appear to be at issue since the real decision-makers, who are natural persons, do not change. Corporate accountability might in fact be enhanced by recognizing a more realistic corporate governance structure for these smaller corporations. Further, elimination of the board in a "small" corporate setting may be an extremely direct way of prompting the growth of such corporations by greatly reducing regulatory burdens and providing greater ease of regulatory compliance.

[122] Even if there are no directors to manage or supervise the corporate affairs, it can be argued that shareholders of such corporations would still be well-protected because they themselves or their family members are generally active in the management of the corporation on a day-to-day basis. Moreover, creditors of these corporations would continue to negotiate directly with the real decision-makers.

[123] It can be argued that different considerations may apply when a larger closely-held corporation uses a unanimous shareholder agreement to transfer the rights, powers, duties and liabilities from the directors to shareholders. Shareholders are often corporations themselves, the parent corporation or some intermediate corporation in a corporate group. By shifting all rights, powers, duties and liabilities to a corporate shareholder, the directors' liability goal to reach real decision-makers who influence corporate conduct through direct personal accountability may be defeated. Moreover, concerns about the appropriateness of "directorless" larger corporations having perhaps thousands of employees and creditors could be raised.

[124] One of the options canvassed above[110] would be to permit corporate shareholders to use unanimous shareholder agreement but require that one or more natural persons (for example, directors from the parent board) also be parties to the agreement and that all the rights, powers, duties and liabilities of the directors be transferred to them. Concerns about reaching the real decision-makers (natural persons) might be alleviated. It can be argued that if, realistically, decisions are actually made by the parent corporation and its board, then corporate transparency and directors' liabilities concerns could be better served.

[125] Another problem with "directorless" corporations may be that persons dealing with them might be reluctant to dispense with traditional requirements. Forms issued by lenders and government institutions, for example, often call for the names of "directors." Answering "none" to such a query could cause confusion and delay in routine transactions. In 1980, the Alberta Institute of Law Research and Reform's report on proposals for a new Alberta BCA concluded:

> So far as the corporation and its shareholders are concerned, we see no valid reason why the shareholders should not, if they wish, manage the corporation without directors, and it is quite arguable that no harm would be done to other by such course

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[110] See Issue 3 above.

of action. . . . However, we are reluctant to suggest that change. Despite the literal wording of . . . the draft Act, we think that the protection to a third party who deals with a corporation comes down to his right to rely upon an appearance of regularity created by the corporation; and we think also that the corporation should be required to provide the foundation for that appearance by naming one or more functionaries with the traditional appellation of director. Internally the directors might be deprived of powers to whatever extent the shareholders unanimously desire, but externally they would provide an apparent source of authority to which outsiders could turn.[111] [Emphasis added]

[126] Compelling an individual to assume a director's label in order to give the "appearance of regularity" may be misleading and hence have an unintended negative rather than positive effect. This is true where the individual's actual authority has been stripped by a unanimous shareholder agreement. A lender may not be doing itself any service if out of deference to tradition it insists on having the name of a powerless figurehead in order to fill in a blank on a standard form where the real authority lies elsewhere.

[127] Eliminating the board is not without precedent. The Model BCA, for example, allows for the elimination of the board if the shareholders so choose.[112] The Delaware GCL, too, allows for a corporation to be managed by shareholders of a closely-held corporation without the need for a board of directors.[113]

[128] This leads back to the issue of establishing eligibility requirements to determine when a corporation with a unanimous shareholder agreement can or should eliminate its board. As mentioned above, it may be appropriate to distinguish between "small" and "large" corporations, and appropriate thresholds for making such a distinction would have to be examined.

b) Options

(i) Status quo. Maintain requirement of a board of directors.

(ii) Permit shareholders of smaller corporations (for example, closely-held corporations with less than $5 million in revenues, or as defined by some other specified threshold) to enter into unanimous shareholder agreements which transfer all the directors' rights, powers, duties and liabilities to the

[111] 1980 Alberta Report, note 2, at 25.

[112] Section 7.32(a)(1) of the Model BCA.

[113] Section 351 of the Delaware GCL.

shareholders and eliminate the board. Shareholders of larger corporations could transfer some, but not all, of the directors' powers and would have to maintain a board of directors.

(iii) Prohibit corporate shareholders from entering into unanimous shareholder agreements which transfer all the directors' powers and eliminate the board, (while allowing shareholders who are natural persons to do so).

(iv) Permit corporate shareholders to enter into unanimous shareholder agreements which transfer all the directors' powers and eliminate the board but require that one or more natural persons (for example, directors from the parent board) also be parties to the agreement and that all the directors' powers, etc. be transferred to the natural persons.

(v) Permit shareholders of all CBCA corporations to enter into unanimous shareholder agreements which transfer all the directors' powers and eliminate the board.

(vi) Require the elimination of the board where a unanimous shareholder agreement transfers all the directors' powers.

Issue 10: Whether the apportionment of liability between directors and shareholders should be clarified when only some board's powers have been removed.

a) Background

[129] Where only some powers of the board have been transferred, the apportionment of liability between shareholders and directors may be an issue. Subsection 146(5) provides that the directors be relieved of liability (and presumably the shareholders assume the liability) "to the extent" of the restriction of the directors' powers. In some circumstances the apportionment would present no difficulty. For example, if a decision to declare a dividend had been made by the shareholders rather than the directors in accordance with a unanimous shareholder agreements, liability resulting from a contravention of the applicable statutory solvency test[114] would clearly fall upon the shareholders rather than the directors.

[130] However, some directors' liabilities may be based more generally upon the conduct of management in supervising the business and affairs of the corporation. It may be more difficult to allocate this type of liability between directors and shareholders where some, but not all, of the directors' powers have been transferred.

[114] CBCA, s. 42.

[131] One possibility, depending upon the manner in which the agreement divided powers between the directors and shareholders, is that a particular liability might not necessary fall entirely on the directors or the shareholders, but might be apportioned between them in accordance with what a court considered to be their respective degrees of fault. Another approach could be to hold shareholders and directors jointly and severally liable to third parties for directors' liability, especially when the agreement does not provide for a clear division of powers. This approach may offer more potential defendants to third parties and therefore fulfil the "compensation" objective of liability.

b) Options

(i) Status quo. Maintain the current wording of the statute and leave it to courts to determine appropriate division of liability among shareholders and directors where some but not all the directors' powers have been transferred.

(ii) Amend the CBCA to provide that, where a unanimous shareholder agreement transfers some but not all of directors' powers, liability attaches: (a) in accordance with the clear terms of the unanimous shareholder agreement, to the directors or shareholders; or (b) if the agreement does not provide for a clear division of powers, to both shareholders and directors jointly and severally.

E. UNANIMOUS SHAREHOLDER AGREEMENTS AND THIRD PARTIES

Issue 11: Whether the rules relating to a transfer of shares subject to a unanimous shareholder agreement should be clarified.

a) Background

[132] Under principles of contract law, transferees of shares with or without notice would not be bound by a unanimous shareholder agreement to which they are not a party because there would be no privity of contract between the original parties and the transferees. In contrast, under subs. 146(4) of the CBCA, a transferee of shares subject to a unanimous shareholder agreement is deemed to be a party to the agreement provided that the transferee has actual notice of the unanimous shareholder agreement or a reference to it is noted conspicuously on the share certificate (subs. 49(8)). The requirement for a note on the stock certificate is likely to be fairly effective as most shareholders in closely-held corporations, as opposed to publicly-traded corporations, do receive actual share certificates. However, subs. 146(4) leaves unresolved, or at least unsatisfactorily resolved, the status and effect of the

unanimous shareholder agreement if neither a note was used nor actual knowledge existed. In this situation, it is not clear whether the unanimous shareholder agreement is still in force since the agreement is no longer "unanimous" and whether transferees without notice have any recourse. Subsection 146(4) also only expressly refers to "transferees" of shares and not to shareholders (subscribers) who purchased shares directly issued by the corporation.

[133] The Alberta BCA addresses transfer issues by providing a fairly elaborate code.

(i) All persons who acquire shares subject to a unanimous shareholder agreement are deemed to be a party to it;

(ii) a *bona fide* purchaser or transferee of shares (from treasury or another shareholder) without actual knowledge of the existence of a unanimous shareholder agreement is entitled to rescission (in the case of shares issued from treasury) or to have the shares purchased by the corporation at fair value (in the case of a transfer), provided certain notice and objection requirements are met, and to recover any shortfall from the transferor; and

(iii) the issue or transfer of a share certificate to a purchaser without notice does not operate to terminate the unanimous shareholder agreement.[115]

[134] Section 123.93 of the Québec CA provides the following:

> A person who becomes a shareholder while a unanimous agreement of the shareholders is in force is deemed to be a party to the agreement.
>
> However, the person may, within six months after the contract by virtue of which he became a shareholder, have it annulled if, at the time it was entered into, he was not aware of the agreement.
>
> The person is presumed not to have been aware of the unanimous agreement of the shareholders if the share certificates held by him do not mention the existence of such an agreement.

[135] This provision expands the persons deemed to be parties of a unanimous shareholder agreement to include subscribers to shares as well as transferees and permits the annulment of any contract for the purchase of shares, but would not impose an obligation on the corporation to repurchase the shares. It can be argued that such an obligation on the corporation to repurchase shares imposes an unfair burden on it.

[115] See Alberta BCA subsections 140(2), (3), (4), (5) and (6).

[136] Subsection 67(5) of the Australian CCA provides more simply, but less adequately, that "an association agreement is binding on every person who is from time to time a member, including a person who became a member after the agreement was entered into," leaving unanswered the question of whether members without notice of the agreement have any recourse.

[137] Section 7.32(c) of the Model BCA also takes a more comprehensive approach to the question of transferees. Section 7.32(c) provides that:

(i) the existence of the agreement must be noted on the share certificate or in a publicly-filed information statement;

(ii) at the time of the agreement the corporation must recall all outstanding share certificates and amend them so as to note on them the existence of the agreement;

(iii) failure to note the existence of the agreement on the certificate does not affect the validity of the agreement, even against transferees without notice; and

(iv) a purchaser without notice of the existence of the agreement is entitled to rescission.

[138] These approaches taken by other legislation point to solutions for the problems raised by subs. 146(4) of the CBCA. Giving a purchaser without notice a right of rescission or repayment avoids the practical awkwardness of having a unanimous shareholder agreement apply only to transferees who have notice of its existence. Thus, a unanimous shareholder agreement binds all shareholders, both the original parties and any transferees, regardless of their knowledge. A purchaser of shares, however, who learns of a unanimous shareholder agreement after the transfer or share issuance, but does not wish to be bound by it, may have the purchase rescinded. If that purchaser does not, he or she has in effect signified his or her acceptance of its terms.

[139] One issue not fully addressed by the above approaches is whether involuntary transferees (such as beneficiaries under a will of shares subject to a shareholder agreement) are bound by the agreement. However, the Official Comment to the Model BCA points out:

> Section 7.32(c) affirms the continued validity of the shareholder agreement against all transferees, whether by purchase, gift, operation of law or otherwise. . . . One who inherits shares subject to a shareholder agreement must continue to abide by the agreement. If that is not the desired result, care must be taken at the initiation of the agreement to ensure a different outcome, such as providing for a buy-back upon death.

b) Options

(i) Status quo.

(ii) Deem all subscribers for or transferees of shares (including involuntary transferees) in a corporation where a unanimous shareholder agreement exists to be parties to a unanimous shareholder agreement. Where notice cannot be established by the corporation or transferor, the subscriber or transferee shall be entitled to rescind the subscription agreement or to demand that the transferor repurchases the shares. Where a demand for rescission or repurchase has not occurred within a specified period of time, for example thirty days from the date on which the subscriber or transferee receives notice of the unanimous shareholder agreement, the subscriber or transferee is deemed to be a party to the agreement. Continue to require that the existence of a unanimous shareholder agreement be noted on all share certificates.

(iii) In addition to option (ii), where a right of recision or repurchase lies, in addition to the original purchase price, permit the subscriber or transferee to claim for any fees reasonably incurred in the transaction including those of a professional advisor.

Issue 12: Whether directors can or should be permitted to bind the corporation vis-a-vis third parties even where their powers have been transferred to shareholders by virtue of a unanimous shareholder agreement.

a) Background

[140] Another question left unanswered by section 146 is whether directors whose powers and duties have shifted to the shareholders through a unanimous shareholder agreement can or should still be able to bind the corporation. If it is intended that liability pass from the directors to the shareholders, then presumably, the ability to bind the corporation should also pass.

[141] Well-established principles of agency law under common law principles indicate that a natural principal is liable for the acts of an agent if the agent had actual, usual or apparent authority to commit the principal. "Apparent" means the authority with which the agent has been clothed as a result of the principal's express or implied representations.

[142] Under the Civil Code of Québec, a mandator is liable for the acts performed by the mandatary in the performance and within the limits of his/her mandate.[116] If the mandatary acted outside the scope of his/her mandate, the mandator is not liable except if a third party has contracted with the mandatary, believing in good faith that he/she was the mandatary of the mandator.[117]

[143] These basic agency/mandate rules apply to corporations. Consequently, directors whose powers have been transferred by a unanimous shareholder agreement still have apparent authority to act for the corporation and can bind the corporation. Furthermore, in corporate law, the indoor management rule relieves third parties from the obligation to verify if all internal formalities have been followed by the corporation (for example, whether the agent has been properly authorized to represent the corporation). This rule would presumably apply regardless of the existence of a unanimous shareholder agreement which has the effect of precluding the director from acting as agent.

[144] This view is confirmed both by provisions of the CBCA and by case law. Section 18 of the CBCA, the codification of the "indoor management rule", precludes a corporation from asserting against a third party without knowledge of the agreement that a unanimous shareholder agreement has not been complied with. It also precludes a corporation from asserting that the persons named in the most recent notice filed with the CBCA Director are not the directors of the corporation. In Cicco v. 609940 Ontario Inc.,[118] the court held that while a unanimous shareholder agreement may limit the authority of the directors, such limitation is entirely an internal matter between the directors and the shareholders; it binds directors, but not third parties dealing with the corporation. Accordingly, the court held that a trustee in bankruptcy was entitled to rely on an assignment made by a director, even if the assignment was made in contravention of a valid unanimous shareholder agreement.

[145] Issue 13, discussed below, is relevant to this consideration, as the application of the indoor management rule can be related to the state of knowledge of the third party. If the legislation requires public disclosure of the existence of a unanimous shareholder agreement, a further issue may be whether such notice can or should be sufficient to deem third parties to have acquired knowledge that the authority of the directors has been transferred. However, the value of the indoor management rule is to reduce transaction costs by eliminating the need for third parties to review internal management rules governing delegation of authority.

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[116] Article 2160.

[117] Article 2163.

[118] (1985), 57 C.B.R. (N.S.) 137 (Ont. H.C.J.).

b) Options

(i) Status quo. Directors may be precluded by the unanimous shareholder agreement from binding the corporation, but the indoor management rule would continue to apply to entitle third parties to rely on actions taken by directors.

(ii) Restrict the application of the indoor management rule in respect of unanimous shareholder agreements where there has been public disclosure thereof.

Issue 13: Whether a notification requirement should be imposed on use of a unanimous shareholder agreement.

a) Background

[146] When a unanimous shareholder agreement is in place, it can be argued that third parties should be able to identify decision-makers who can be, depending if the agreement restricts all or in part the powers of the board, the directors and/or shareholders.

[147] Currently, directors' names must be disclosed in the annual return, and a timely notification is required for a change of directors.[119] A similar procedure could be put in place in order to ensure that third parties known the identities of the decision-makers pursuant to a unanimous shareholder agreement.

[148] Some Canadian corporate law regimes currently require notification of the existence and/or termination of unanimous shareholder agreements.[120]

[149] A corporation governed by a unanimous shareholder agreement restricting the whole or in part the powers of the board of directors could be required to provide a simple notice that such an agreement exists. The CBCA and its regulations could be amended to require mandatory notification of the existence of a unanimous shareholder agreement and a list of parties to the agreement.[121] It could be argued that in this manner third parties could be

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[119] Annual return and notice of directors (Forms 22 and 6), s. 263; notice of change of directors (Form 6), s. 113.

[120] See the Manitoba Corporations Act, R.S.M. 1987, c. C-225 subs. 140(6) which indicates that "Where a unanimous shareholder agreement is executed or terminated, written notice of that fact together with the date of the execution or termination thereof shall be filed with the Director within 15 days." See also the Newfoundland Corporations Act, R.S.N. 1990, c. C-36, subs. 245(5) and The Business Corporations Act of Saskatchewan, R.S.S. 1978, c. B-10, subs. 140(5) for similar provisions.

[121] The CBCA regulations were recently amended to request the disclosure of the existence of a unanimous shareholder agreement.

better protected as they could take such measures as were necessary to insure that any agreement or action were properly authorized. Currently, subs. 21(1) of the CBCA grants access to any unanimous shareholder agreement to any creditor of the corporation and such access could allow the creditor to ascertain that the agreement or action has been properly authorized.

[150] Another option could be to require that the original of the unanimous shareholder agreement be filed as part of the articles of the corporation. It can be argued that mandatory disclosure of the agreement itself could be seen to conflict with the traditional level of disclosure required by the CBCA, which requires the articles, but not the by-laws, to be filed. We are not aware of any jurisdiction which places this level of disclosure obligation on corporations even in the context of unanimous shareholder regimes, and it may be argued that such a requirement is too intrusive. On the other hand, the nature of the shareholder arrangements may be of such sensitivity that the shareholders feel that the arrangements should not be made public.

b) Options

(i) Status quo. No notification requirement.

(ii) Require the filing of a notice with the CBCA Director disclosing the parties to, and the date of, the unanimous shareholder agreement. Timely disclosure requirements would apply at all times to update the names of the parties.

(iii) Require the filing of a notice listing directors' and shareholders' powers indicating whether these powers have been reserved to the directors or transferred to shareholders.

(iv) Require disclosure of the unanimous shareholder agreement itself.

F. AMENDMENT, TERMINATION

Issue 14: Whether rules concerning amendment and termination of a unanimous shareholder agreement should be clarified.

a) Background

[151] The level of consensus required to amend or terminate a unanimous shareholder agreement should also be addressed. The CBCA in section 146 makes no explicit reference to the termination or amendment of a unanimous shareholder agreement.

[152] Paragraph 108(6)(a) of the Ontario BCA indicates that

> . . . any amendment of the unanimous shareholder agreement may be effected in the manner specified therein.

[153] The Alberta BCA takes another approach. Subsection 140(8) provides that a unanimous shareholder agreement may not be amended without the written consent of all shareholders.

[154] It can be argued that proceeding in the absence of unanimity seems contrary to the philosophy of the unanimous shareholder agreement provisions which mandate, as an eligibility requirement, unanimity. However, requiring unanimity to amend the agreement may be too inflexible. Shareholders who are oppressed could seek relief under the oppression remedy where, for example, the court has the power to change circumstances that render an agreement oppressive or unfairly prejudicial.[122]

[155] In respect of the termination of a unanimous shareholder agreement, there are at least three possible options. First, the agreement itself may provide for the longevity of the arrangement and any renewals. Second, the legislation could impose a time period or sunset clause which would define the life of an agreement. Third, the legislation could be silent on the issue of timing but stipulate other triggers which cause the corporation to be generally ineligible to use a unanimous shareholder agreement. The example used in Model BCA §7.32 in this regard is the evolution of the corporation from a closely-held corporation to a publicly-held corporation. Additionally, judicial interventions, such as through the oppression remedy, could result in the abrogation of a unanimous shareholder agreement.

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[122] CBCA, 241.

b) Options

(i) Require unanimity for all amendments to a unanimous shareholder agreement.

(ii) Permit amendments to a unanimous shareholder agreement to be effected in the manner specified therein.

(iii) Impose no requirements for automatic termination or sunset clause. Rather, a unanimous shareholder agreement will end where the corporation ceases to be eligible under the conditions of the legislation, where the agreement otherwise cites conditions for its own termination or where a court compels termination under the oppression remedy.

G. OPTING-OUT OF CBCA PROVISIONS

Issue 15: Whether special rules on opting-out of CBCA provisions should be adopted.

a) Background

[156] Section 146 states that an agreement can restrict, in whole or in part, the powers of the directors to manage the business and affairs of the corporation. Presumably, this allows shareholders to override or "opt-out-of" some CBCA provisions. The CBCA expressly provides that a number of provisions may be opted-out of through the use of a unanimous shareholder agreement. These provisions are: s. 102 - the directors' general power to manage the corporation; subs. 6(3) - power to increase votes required for shareholder or director actions; s. 25 - director's power to issue shares; s. 103 - the power to make, amend or appeal by-laws; s. 121 - the appointment of officers; s. 125 - director's power to set remuneration; s. 189 - borrowing powers of the corporation; and par. 214(1)(b) - the dissolution of a company by request of a shareholder. What is not clear, however, is whether this list is, or should be, exhaustive.

[157] The provisions which the CBCA presently expressly allow a corporation to opt-out of deal with corporate governance issues or internal corporate relationships. However, not all corporate governance provisions may presently be opted-out of under clear statutory authority. This raises a number of questions: Should some corporate governance provisions be overridden while others may not? If so, why? Should the explicit ability to opt-out of statutory rules be expanded beyond the current provisions?

[158] The purposes of a corporate framework law are many including appropriate allocation of responsibility, predictability, efficiency and public policy. The decision to allow a corporation to opt-out of an aspect of the corporate law framework will depend on what purpose the provision is meant to fulfil. A difficulty here, however, is that many provisions may exist for overlapping considerations. Traditionally, the internal administrative affairs of the corporation and the relationship between shareholders have been two areas where corporations are expressly allowed to opt-out.

[159] It may be appropriate in a revised CBCA unanimous shareholder agreement regime to reconsider the question of what shareholders may "opt-out" of in the CBCA. There are three options which may be used to provide statutory clarity in this regard: (1) an exhaustive enumeration could be made of the statutory requirements which may be opted-out of, (2) an explicit identification of key statutory requirements that may not be opted-out of through a unanimous shareholder agreement could be made, and (3) a basket clause could be used to group either the statutory provisions that may not be opted-out of or the provisions which may be subject to override.

[160] Paragraph 7.32(a)(8) of the revised Model BCA lists a number of types of things a unanimous shareholder agreement may do and also includes a permissive basket clause. It indicates that a unanimous shareholder agreement may,

> . . . otherwise govern the exercise of corporate powers or the management of the business and affairs of the corporation or the relationship among the shareholders, the directors and the corporation, or among any of them, and is not contrary to public policy.[123]

[161] Although this provision is permissive, the content of a unanimous shareholder agreement under the Model BCA is subject to public policy limitations. It may be argued, however, that this approach fosters uncertainty, particularly given the generally narrow definition or application judicially provided to the term "public policy."

[162] The following is an analysis of whether certain CBCA provisions should be subject to unanimous shareholder agreements, and thus contractual override.

b) Overview of the CBCA

(i) Shareholder Remedies

[163] Permitting shareholders to establish and define their relationship, rights and obligations appears to be central to the nature and benefit of a unanimous shareholder

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[123] See Section IV(C) above.

regime. However, although the right of dissent and the derivative and oppression actions are in place primarily for shareholder protection, they may also be considered fundamental elements of corporate law and, it can be argued, should not be capable of being overridden by private agreement.

[164] Allowing broad unanimous shareholder agreements may mean that statutory remedies like the oppression remedy are even more important to prevent abuse. Minority shareholders may feel compelled to sign unanimous shareholder agreements simply to preserve their role in the corporation irrespective of the terms of that agreement. There is also some question as to whether the courts would grant relief from oppression even where shareholders could contract out of their oppression remedy rights.

[165] Further, par. 241(3)(c) of the CBCA which enumerates the relief under the oppression remedy specifically allows a court to make "an order to regulate a corporation's affairs by amending . . . a unanimous shareholder agreement."

(ii) Corporate Governance

[166] Governance, management and internal corporate relationships have traditionally been the subject of unanimous shareholder agreements. These provisions govern the interaction and relationship between the directors, officers and shareholders of a corporation and may not impact on third parties. As such, concerns about maintaining accountability do not usually arise in relation to corporate governance matters.

[167] A key corporate governance provision which is presently subject to unanimous shareholder agreements is the ability of shareholders to remove from the directors the power to manage the corporation. As noted above, the statute lists several other corporate governance rules that can be contracted out of. There may be additional corporate governance provisions which could also be made subject to unanimous shareholder agreements, particularly where the shareholders themselves are responsible for making the decision, for example, matters such as the election, appointment, and term of directors, as well as the manner of filling vacancies on the board.[124]

(iii) Corporate Finance

[168] Part V of the CBCA deals with corporate finance. Subsection 25(1) indicates that the manner of share issuances may be governed by a unanimous shareholder agreement. While stated capital amounts may not be the appropriate subject matter for a unanimous shareholder agreement (the rules in the CBCA should apply to allow third party review to be consistent), section 27 dealing with shares in series might be the subject of a contractual override because it deals with internal rights and distribution of profits based thereon. The timing and

[124] CBCA, ss. 106 and following.

consideration for share redemptions under section 36 might also be subject to a unanimous shareholder agreement. The solvency tests however are imposed to protect third parties, and therefore should continue to apply in respect of redemptions and all other matters in Part V where solvency tests are used.

(iv) Regulatory Matters

[169] Parts I through IX of the CBCA deal in part with regulation of the rights and obligations of a corporation in respect of third parties. Governance, management or internal corporate relationships, as opposed to third party relationships, are traditionally the concern of a unanimous shareholder agreement. For example, the rules in Part II having to do with corporate names seek to avoid confusion in the public marketplace and as such apply to all corporations. To allow them to be overridden could cause difficulties for third parties when, for instance, they are attempting to recover a debt.

[170] The point of intersection between the rights of shareholders to govern their own affairs and the obligations of that corporation to conform to corporate standards may vary depending on the purpose of the provision being examined. Some degree of commonality and conformity must exist to ensure the public, which interacts with a corporate entity, is protected.

[171] Part XIV dealing with annual financial disclosure to shareholders ensures that shareholders are guaranteed access to the financial statements of the corporation. In instances where capital and management are truly separated, this provision would likely be considered essential and fundamental to corporate law and therefore not traditionally the subject of a unanimous shareholder agreement. Financial statements, which monitor the financial performance of the corporation, may also help protect employees, creditors and other corporate stakeholders by requiring the financial affairs of the corporation to be analyzed in a coherent and structured way.

[172] Presently, shareholders of a non-distributing corporation may resolve (on an annual basis) not to appoint an auditor.[125] As such, it may be appropriate, in the case of closely-held corporations, to allow a unanimous shareholder agreement to specify that an auditor need not be appointed.

[173] Part XIX of the CBCA includes provisions which allow a security holder or the CBCA Director to apply to a court for an order directing an investigation to be made of a corporation. Grounds for such applications include that the business is being carried on with the intent to defraud any person and that these are acts which are oppressive or unfairly

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[125] CBCA, s. 163.

prejudicial. These provisions are in place to protect shareholders and third parties from fraudulent, dishonest or oppressive behaviour by the corporation. It would not seem appropriate to permit the role of the regulator or the courts to be contractually overridden.

(v) Offences

[174] As the offence provisions are in place for public policy reasons and the protection of shareholders and third parties, it seems that these provisions would not be subject to a unanimous shareholder agreement.

c) Options

(i) Status quo.

(ii) Amend the CBCA to provide an exhaustive enumeration of the statutory provisions which can be overridden.

(iii) Amend the CBCA to provide a listing of key statutory requirements not subject to the override.

(iv) Adopt a basket clause allowing a corporation to opt out of any provision in the statute governing the management of the business and affairs of the corporation, except where it would be contrary to public policy.

VII. CONCLUSION

[175] The purpose of this discussion paper, along with eight others dealing with CBCA reform,[126] is two-fold:

1) to address problems with the existing legislation that have been brought to the attention of Industry Canada, and

2) to provide, where possible, new approaches to advance the field of corporate law in Canada.

[176] The options outlined in the paper are not in any sense the final word on the subject. They are not government or even departmental policy. This paper is intended to solicit from those who use, or experience difficulty using, the current CBCA unanimous shareholder agreements provisions and others new ideas on how these provisions should be clarified and updated.

Contact: **Caroline P. Melia**
Senior Policy Analyst
Corporations Directorate
Industry Canada

Telephone: **(613) 941-5755**
Fax: **(613) 941-5781**
Internet: **cbca.review@ic.gc.ca**

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[126] The other eight discussion papers deal with:

- Shareholder Communications and Proxy Solicitation Rules;
- Directors' and Other Residency Requirements;
- Going-Private Transactions;
- Directors' Liability;
- Takeover Bids;
- Insider Trading;
- Financial Assistance and Other Related Provisions; and
- Technical Amendments.

SCHEDULE "A"

COMPARISON OF PUBLIC COMPANIES AND CLOSELY-HELD CORPORATIONS

Public Company	Close Corporation
• Separation between ownership and management	• Ownership and management often substantially identical
• Large number of shareholders with shares traded in the securities market	• One or limited number of shareholders with no public trading of shares
• Unrestricted transferability of shares	• Restrictions on transfer of shares
• Most shareholders are passive investors	• Shareholders often consider themselves partners
• Profits retained or paid out as dividends	• Profits distributed as salaries and dividends
• Most investors have diversified portfolio	• Most personal wealth invested in the enterprise
• No familial or personal relationships between shareholders	• Familial or other personal relationships among shareholders in addition to business dealings
• Financing through a mixture of debt and equity	• Debt most common form of financing
• Defined roles and high degree of formality in decision-making	• Loosely defined roles and informal decision-making

This chart originally appeared in the background paper prepared for Industry Canada by Kazanjian, Ferns and Scavone, note 9.

SCHEDULE "B"

QUÉBEC COMPANIES ACT PROVISIONS

123.90. [Single shareholder] A shareholder holding all the voting shares holds the powers of the shareholders' meeting by himself.

123.91. [Restriction of powers] The shareholders, if all of them consent thereto and make a written agreement to that effect, may restrict the powers of the directors.

[Sole shareholder] The sole shareholder may also restrict the powers of the directors if he makes a written statement to that effect.

123.92. [Management by shareholders] The shareholders or the sole shareholder, as the case may be, shall then manage the affairs of the company as if they, or he, were its directors; they, or he, shall exercise the rights that have been withdrawn from the directors and assume the obligations from which the directors have been discharged.

[Voting rights] The shareholders may, however, govern the exercise of their voting rights.

123.93. [Party] A person who becomes a shareholder while a unanimous agreement of the shareholders is in force is deemed to be a party to the agreement.

[Annulment] However, the person may, within six months after the contract by virtue of which he became a shareholder, have it annulled if, at the time it was entered into, he was not aware of the agreement.

[Presumption] The person is presumed not to have been aware of the unanimous agreement of the shareholders if the share certificate held by him do not mention the existence of such an agreement.

SCHEDULE "C"

ONTARIO BUSINESS CORPORATIONS ACT PROVISIONS

1. (1) **Definitions.**—In this Act,

"unanimous shareholder agreement" means an agreement described in subsection 108(2) or a declaration of a shareholder described in subsection 108(3).

• • •

115. (1) **Duties.**—Subject to any unanimous shareholder agreement, the directors shall manage or supervise the management of the business and affairs of a corporation.

• • •

108. (1) **Agreement between shareholders.**—A written agreement between two or more shareholders may provide that in exercising voting rights the shares held by them shall be voted as therein provided.

(2) **Idem.**—An otherwise lawful written agreement among all the shareholders of a corporation or among all the shareholders and one or more persons who are not shareholders may restrict in whole or in part the powers of the directors to manage or supervise the management of the business and affairs of the corporation.

(3) **Unanimous shareholder agreement.**—Where a person who is the beneficial owner of all the issued shares of a corporation makes a written declaration that restricts in whole or in part the powers of the directors to manage or supervise the management of the business and affairs of a corporation, the declaration shall be deemed to be a unanimous shareholder agreement.

(4) **Party to unanimous shareholder agreement.**—Subject to subsection 56(3), a transferee of shares subject to a unanimous shareholder agreement shall be deemed to be a party to the agreement.

(5) **Where shareholder has power, etc., of director.**—A shareholder who is a party to a unanimous shareholder agreement has all the rights, powers and duties and liabilities of a director of the corporation, whether arising under this Act or otherwise, to which the agreement relates to the extent that the agreement restricts the discretion or powers of the directors to manage or supervise the management of the business and affairs of the corporation and the directors are thereby relieved of their duties and liabilities, including any liabilities under section 131, to the same extent.

(6) **Matter that a unanimous shareholder agreement may provide.**—A unanimous shareholder agreement may, without restricting the generality of subsection (2), provide that,

(a) any amendment of the unanimous shareholder agreement may be effected in the manner specified therein; and

(b) in the event that shareholders who are parties to the unanimous shareholder agreement are unable to agree on or resolve any matter pertaining to the agreement, the matter may be referred to arbitration under such procedures and conditions as are specified in the unanimous shareholder agreement.

SCHEDULE "D"

ALBERTA BUSINESS CORPORATIONS ACT PROVISIONS

1. In this Act,

(z) "unanimous shareholder agreement" means

(i) a written agreement to which all the shareholders of a corporation are or are deemed to be parties, whether or not any other person is also a party, or

(ii) a written declaration by a person who is the beneficial owner of all the issued shares of a corporation,

that provides for any of the matters enumerated in section 140(1).

• • •

97. (1) Subject to any unanimous shareholder agreement, the directors shall manage the business and affairs of a corporation.

• • •

139.1. A written agreement between 2 or more shareholders may provide that in exercising voting rights the shares held by them shall be voted as provided in the agreement.

140. (1) A unanimous shareholder agreement may provide for any or all of the following:

(a) the regulation of the rights and liabilities of the shareholders, as shareholders, among themselves or between themselves and any other party to the agreement;

(b) the regulation of the election of directors;

(c) the management of the business and affairs of the corporation, including the restriction or abrogation, in whole or in part, of the powers of the directors;

(d) any other matter that may be contained in a unanimous shareholder agreement pursuant to any other provision of this Act.

(2) If a unanimous shareholder agreement is in effect at the time a share is issued by a corporation to a person other than an existing shareholder,

(a) that person is deemed to be a party to the agreement whether or not he had actual knowledge of it when the share certificate was issued,

(b) the issue of the share certificate does not operate to terminate the agreement, and

(c) if he is a bona fide purchaser without actual knowledge of the unanimous shareholder agreement, that person may rescind the contract under which the shares were acquired by giving a notice to that effect to the corporation within a reasonable time after the person receives actual knowledge of the unanimous shareholder agreement.

(3) Notwithstanding section 45(8), if a unanimous shareholder agreement is in effect when a person who is not a party to the agreement acquires a share of the corporation, other than under subsection (2),

(a) the person who acquired the share is deemed to be a party to the agreement whether or not he had actual knowledge of it when he acquired the share, and

(b) neither the acquisition of the share nor the registration of that person as a shareholder operates to terminate the agreement.

(4) If

(a) a person referred to in subsection (3) is a bona fide purchaser as defined in section 44(2) and did not have actual knowledge of the unanimous shareholder agreement, and

(b) his transferor's share certificate did not contain a reference to the unanimous shareholder agreement,

that person may, within 30 days after he acquires actual knowledge of the existence of the agreement, send to the corporation a notice of the objection to the agreement.

(5) If a person sends a notice of objection under subsection (4),

(a) he is entitled to be paid by the corporation the fair value of the shares held by him, determined as of the close of business on the day on which he became a shareholder, and

(b) section 184(4) and (6) to (20) applies, with the necessary changes, as if the notice of objection under subsection (4) were a written objection sent to the corporation under section 184(5).

(6) A transferee who is entitled to be paid the fair value of his shares under subsection (5) also has the right to recover from the transferor by action the amount by which the value of the consideration paid for his shares exceeds the fair value of those shares.

(7) A shareholder who is a party or is deemed to be a party to a unanimous shareholder agreement has all the rights, powers and duties and incurs all the liabilities of a director of the corporation to which the agreement relates to the extent that the agreement restricts the powers of the directors to manage the business and affairs of the corporation, and the directors are thereby relieved of their duties and liabilities, including any liabilities under section 114, to the same extent.

(8) A unanimous shareholder agreement may not be amended without the written consent of all those who are shareholders at the effective date of the amendment.

(9) A unanimous shareholder agreement may exclude the application to the agreement of all but not part of this section.

SCHEDULE "E"

CLOSE CORPORATION SUPPLEMENT PROVISIONS

§ 20. SHAREHOLDER AGREEMENTS

(a) All the shareholders of a statutory close corporation may agree in writing to regulate the exercise of corporate powers and the management of the business and affairs of the corporation or the relationship among the shareholders of the corporation.

(b) An agreement authorized by this section is effective although:

(1) it eliminates a board of directors;

(2) it restricts the discretion or powers of the board or authorizes director proxies or weighted voting rights;

(3) its effect is to treat the corporation as a partnership; or

(4) it creates a relationship among the shareholders or between the shareholders and the corporation that would otherwise be appropriate only among partners.

(c) If the corporation has a board of directors, an agreement authorized by this section restricting the discretion or powers of the board relieves directors of liability imposed by law, and imposes that liability on each person in whom the board's discretion or power is vested, to the extent that the discretion or powers of the board of directors are governed by the agreement.

(d) A provision eliminating a board of directors in an agreement authorized by this section is not effective unless the articles of incorporation contain a statement to that effect as required by section 21.

(e) A provision entitling one or more shareholders to dissolve the corporation under section 33 is effective only if a statement of this right is contained in the articles of incorporation.

(f) To amend an agreement authorized by this section, all the shareholders must approve the amendment in writing unless the agreement provides otherwise.

(g) Subscribers for shares may act as shareholders with respect to an agreement authorized by this section if shares are not issued when the agreement was made.

(h) This section does not prohibit any other agreement between or among shareholders in a statutory close corporation.

SCHEDULE "F"

<u>REVISED MODEL BUSINESS CORPORATION ACT</u> PROVISIONS

§ 7.32 SHAREHOLDER AGREEMENTS

(a) An agreement among the shareholders of a corporation that complies with this section is effective among the shareholders and the corporation even though it is inconsistent with one or more other provisions of this Act in that it:

(1) eliminates the board of directors or restricts the discretion or powers of the board of directors;

(2) governs the authorization or making of distributions whether or not in proportion to ownership of shares, subject to limitations in section 6.40;

(3) establishes who shall be directors or officers of the corporation, or their terms of office or manner of selection or removal;

(4) governs, in general or in regard to specific matters, the exercise or division of voting power by or between the shareholders and directors or by or among any of them, including use of weighted voting rights or director proxies;

(5) establishes the terms and conditions of any agreement for the transfer or use of property or the provision of services between the corporation and any shareholder, director, officer or employee of the corporation or among any of them;

(6) transfers to one or more shareholders or other persons all or part of the authority to exercise the corporate powers or to manage the business and affairs of the corporation, including the resolution of any issue about which there exists a deadlock among directors or shareholders;

(7) requires dissolution of the corporation at the request of one or more of the shareholders or upon the occurrence of a specified event or contingency; or

(8) otherwise governs the exercise of the corporate powers or the management of the business and affairs of the corporation or the relationship among the shareholders, the directors and the corporation, or among any of them, and is not contrary to public policy.

(b) An agreement authorized by this section shall be:

(1) set forth (A) in the articles of incorporation or bylaws and approved by all persons who are shareholders at the time of the agreement or (B) in a written agreement that is signed by all persons who are shareholders at the time of the agreement and is made known to the corporation;

(2) subject to amendment only by all persons who are shareholders at the time of the amendment, unless the agreement provides otherwise; and

(3) valid for 10 years, unless the agreement provides otherwise.

(c) The existence of an agreement authorized by this section shall be noted conspicuously on the front or back or each certificate for outstanding shares or on the information statement required by section 6.26(b). If at the time of the agreement the corporation has shares outstanding represented by certificates, the corporation shall recall the outstanding certificates and issue substitute certificates that comply with this subsection. The failure to note the existence of the agreement on the certificate or information statement shall not affect the validity of the agreement or any action taken pursuant to it. Any purchaser of shares who, at the time of purchase, did not have knowledge of the existence of the agreement shall be entitled to rescission of the purchase. A purchaser shall be deemed to have knowledge of the existence of the agreement if its existence is noted on the certificate or information statement for the shares in compliance with this subsection and, if the shares are not represented by a certificate, the information statement is delivered to the purchaser at or prior to the time of purchase of the shares. An action to enforce the right of rescission authorized by this subsection must be commenced within the earlier of 90 days after discovery of the existence of the agreement of two years after the time of purchase of the shares.

(d) An agreement authorized by this section shall cease to be effective when shares of the corporation are listed on a national securities exchange or regularly traded in a market maintained by one or more members of a national or affiliated securities association. If the agreement ceases to be effective for any reason, the board of directors may, if the agreement is contained or referred to in the corporation's articles of incorporation or bylaws, adopt an amendment to the articles of incorporation or bylaws, without shareholder action, to delete the agreement and any references to it.

(e) An agreement authorized by this section that limits the discretion or powers of the board of directors shall relieve the directors of, and impose upon the person or persons in whom such discretion or powers are vested, liability for acts or omissions imposed by law on directors to the extent that the discretion or powers of the directors are limited by the agreement.

(f) The existence or performance of an agreement authorized by this section shall not be a ground for imposing personal liability on any shareholder for the acts or debts of the corporation even if the agreement or its performance treats the corporation as if it were a partnership or results in failure to observe the corporate formalities otherwise applicable to the matters governed by the agreement.

(g) Incorporators or subscribers for shares may act as shareholders with respect to an agreement authorized by this section if no shares have been issued when the agreement is made.

BUSINESS IMPACT CONSULTATION

The federal government is committed to avoiding unintended and unnecessary economic burdens on Canadian business. In an effort to achieve this result, the Government would like to enlist your help.

Attached is a questionnaire based on the model behind the "Business Impact Test" (BIT). The BIT was developed by business in cooperation with the Canadian Manufacturers' Association, the Treasury Board of Canada and Industry Canada. It endeavours to ensure that legislative and regulatory changes do not hinder Canadian business competitiveness. It also solicits your preferred policy choices. In essence, the attached questionnaire provides you with an opportunity to influence the Government's policy making process by identifying how Government action could help or hinder Canadian businesses.

This questionnaire is voluntary and is only intended to facilitate the collection and analysis of comments on proposed regulatory and legislative changes. It is not intended to replace more detailed input. We would therefore encourage you to provide detailed comments and to attach them to the questionnaire.

We will use the information in aggregate form and will not refer to specific firms. However, it is important that you identify any business sensitive information that you specifically wish to be protected in accordance with section 20 of the Access to Information Act. Please simply so indicate in the margins with your response.

If you have any questions about this questionnaire, please contact Charles Hall at (613) 952-2118. If you have any specific questions concerning the Unanimous Shareholder Agreements paper and proposals, please call Caroline P. Melia at (613) 941-5755.

Please return the questionnaire in the attached envelope or by fax at (613) 952-2067.

PART 1 -- INFORMATION ABOUT RESPONDENT

Please provide us with some general information about yourself and the organization for which you work.

1- What is your name?

First name: ____________________

Last name: ____________________

What is your job title? ____________________

What is the name of the organization for which you work?

____

What is your Phone number: ( ) ____________

Fax number: ( ) ____________

Internet number: ____________

Please identify yourself using the groupings listed below:

- A CBCA corporation [ ]
- A legal advisor [ ]
- A financial advisor [ ]
- An institutional investor [ ]
- Other investor [ ]
- Creditor [ ]
- Other (specify): ____________________

UNANIMOUS SHAREHOLDER AGREEMENTS

2- If you responded above that you are a CBCA corporation, then please respond to the questions listed below. If you are not a CBCA corporation, please skip to **PART 2 -- Agreement with Proposals for Unanimous Shareholder Agreements** on Page 5.

- Are you a foreign- or domestically-owned corporation?

  [ ] Foreign-owned [ ] Domestically-owned

- Are you a subsidiary of another corporation?

  [ ] Yes [ ] No

- Are you a privately- or publicly-owned corporation?

  [ ] Privately [ ] Publicly

- What is your corporation's primary market focus?

  [ ] Local [ ] Provincial

  [ ] National [ ] International

- Please identify the industry or industries in which your company is primarily involved:

  [ ] Agriculture and related service industries;
  [ ] Fishing and trapping industries;
  [ ] Logging and forestry industry;
  [ ] Mining (including Milling), quarrying and oil well industries;
  [ ] Manufacturing;
  [ ] Construction industry;
  [ ] Transportation industry;
  [ ] Communication and other utility industries;
  [ ] Wholesale trade industry;
  [ ] Retail trade industry;
  [ ] Real estate and insurance industry;
  [ ] Government service industries;
  [ ] Accommodation, food and beverage industries;
  [ ] Other service industries.

- Please estimate the annual sales of your corporation:

  [ ] Less than $2 million
  [ ] $2 million - $10 million
  [ ] $10 million - $100 million
  [ ] $100 million - $500 million
  [ ] Over $500 million

- Please estimate the number of people your corporation employs:

  [ ] Less than 50 people
  [ ] 50 - 100 people
  [ ] 101 - 500 people
  [ ] 501 - 1000 people
  [ ] Over 1000 people

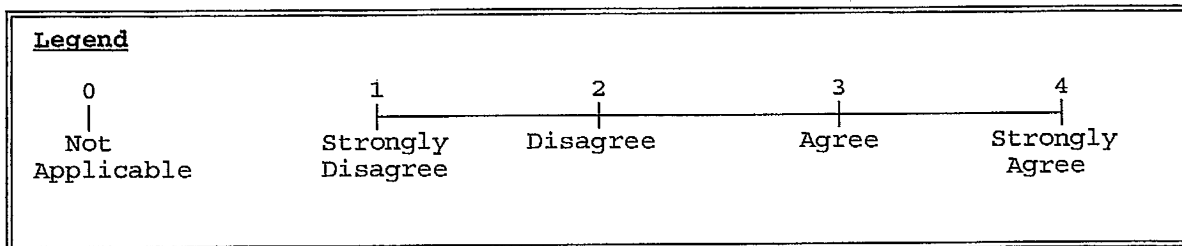
- Please estimate the percentage of your corporation's production that is exported:

  [ ] Less than 10% exported
  [ ] 10% - 25% exported
  [ ] 25% - 50% exported
  [ ] 50% - 75% exported
  [ ] Over 75% exported

PART 2 -- AGREEMENT WITH PROPOSALS FOR UNANIMOUS SHAREHOLDER AGREEMENTS

In this section please indicate whether you think the CBCA requires amendment and clarification in respect of unanimous shareholder agreements and your level of agreement with each proposal presented in the discussion paper. For each proposal, please specify the degree to which you agree or disagree with it. Please examine the legend below for possible responses. For instance, in the example listed below the respondent responded with a "1" to hypothetical proposal "XYZ". This indicates that the respondent strongly disagreed with proposal "XYZ". However, the respondent answered "3" to proposal "ABC". The respondent therefore agrees with proposal "ABC".

If you have any questions about how to use this table, please do not hesitate to contact Charles Hall at (613) 952-2118.



EXAMPLE

PROPOSAL	LEVEL OF AGREEMENT
Proposal XYZ - that the CBCA be amended to do "XYZ	1
Proposal ABC - that the CBCA be amended to do "ABC"	3

Please go to the next page and fill in the table as per the above example.

UNANIMOUS SHAREHOLDER AGREEMENTS

PROPOSAL	LEVEL OF AGREEMENT
General Question	
Do the unanimous shareholder agreement provisions need to be changed?	
Issue 1: Definition of "unanimous shareholder agreement"	
<u>Options</u>: (i) Status quo.	
(ii) Adopt the Alberta BCA approach.	
(iii) Adopt the Alberta approach, but further clarify that only a unanimous shareholder agreement may restrict the powers of the directors.	
Issue 2: Eligibility requirements on the use of a unanimous shareholder agreement	
<u>Options</u>: (i) Status quo.	
(ii) Limit the use of unanimous shareholder agreements to non-distributing corporations.	
(iii) Limit the use of unanimous shareholder agreements to "private corporations" as defined in provincial securities laws.	
(iv) Limit the use of unanimous shareholder agreements to corporations with 15 or fewer shareholders, including employees.	
Issue 3: Restrictions on the use of a unanimous shareholder agreement	
<u>Options</u>: (i) Status quo.	
(ii) Permit some but not all powers of a board of directors to be transferred to a corporate shareholder.	
(iii) Permit corporate shareholders to enter into a unanimous shareholder agreement but require that one or more natural persons also be parties to the agreement and that all the rights, powers, duties and liabilities of the directors be transferred to them.	
(iv) Limit the use of unanimous shareholder agreement to natural persons.	
Issue 4: Transfer of liability	
<u>Options</u>: (i) Status quo.	

PROPOSAL	LEVEL OF AGREEMENT
(ii) Amend subs. 146 to clarify that (a) the shareholders take on the directors' liabilities as well as their rights, powers and duties and that the directors are relieved of their liabilities to the same extent, (b) common-law as well as other statutory duties and liabilities of directors pass to the shareholders, and (c) defences to liabilities which would have been available to the directors are available to the shareholders.	
Issue 5: Duties of shareholders	
Options:	
(i) Status quo.	
(ii) Amend s. 146 to permit a unanimous shareholder agreement to fetter the shareholders' discretion when exercising the powers of the directors.	
(iii) Adopt the Model BCA approach.	
(iv) Impose traditional partnership duties, in respect of the responsibilities of shareholders amongst themselves, unless the shareholders expressly contract out of such duties.	
Issue 6: Procedural rules	
Options:	
(i) Status quo.	
(ii) Where shareholders exercise directors' powers, procedural rules for shareholders' meetings would apply, but the directors' statutory and common law defences should still be available to the shareholders.	
(iii) Adopt option (ii) above, but the procedural rules would apply unless derogated from in the unanimous shareholder agreement.	
(iv) Permit a unanimous shareholder agreement to establish rules and procedures for, or eliminate altogether the need for, shareholder and director meetings or resolutions in lieu of meetings.	
(v) Adopt Alberta BCA approach.	
Issue 7: Definition of "director"	
Options:	
(i) Status Quo.	
(ii) Amend CBCA subs. 2(1) to expressly provide that the term "directors" includes shareholders for the purposes of any powers, duties, responsibilities or liabilities, whether arising under the CBCA or any other legislation, which have been transferred to them.	

PROPOSAL	LEVEL OF AGREEMENT
(iii) Adopt Option (ii), but limit the definition to include shareholders only where all the board's powers have been transferred.	
Issue 8: Replacement of "restricts" by "transfer"	
Options: (i) Status Quo.	
(ii) Replace the word "restricts" in subs. 146(2) with the term "transfers."	
Issue 9: Elimination of the board of directors	
Options: (i) Status quo.	
(ii) Permit shareholders of smaller corporations to enter into unanimous shareholder agreements which transfer all the directors' rights, powers, duties and liabilities to the shareholders and eliminate the board. Shareholders of larger corporations could transfer some, but not all, of the directors' powers and would have to maintain a board of directors.	
(iii) Prohibit corporate shareholders from entering into unanimous shareholder agreements which transfer all the directors' powers and eliminate the board.	
(iv) Permit corporate shareholders to enter into unanimous shareholder agreements which transfer all the directors' powers and eliminate the board but require that one or more natural persons also be parties to the agreement and that all the directors' powers, etc. be transferred to the natural persons.	
(v) Permit shareholders of all CBCA corporations to enter into unanimous shareholder agreements which transfer all the directors' powers and eliminate the board.	
(vi) Require the elimination of the board where a unanimous shareholder agreement transfers all the directors' powers.	
Issue 10: Apportionment of liability between directors and shareholders	
Options: (i) Status quo.	
(ii) Amend the CBCA to provide that, where a unanimous shareholder agreement transfers some but not all of directors' powers, liability attaches: (a) in accordance with the clear terms of the unanimous shareholder agreement, to the directors or shareholders; or (b) if the agreement does not provide for a clear division of powers, to both shareholders and directors jointly and severally.	

PROPOSAL	LEVEL OF AGREEMENT
Issue 11: Transfer of shares	
Options: (i) Status quo.	
(ii) Deem all subscribers for or transferees of shares (including involuntary transferees) in a corporation where a unanimous shareholder agreement exists to be parties to a unanimous shareholder agreement. Where notice cannot be established by the corporation or transferor, the subscriber or transferee shall be entitled to rescind the subscription agreement or to demand that the transferor repurchases the shares.	
(iii) In addition to option (ii), permit the subscriber or transferee to claim for any fees reasonably incurred in the transaction.	
Issue 12: Directors vis-a-vis third parties	
Options: (i) Status quo.	
(ii) Restrict the application of the indoor management rule in respect of unanimous shareholder agreements.	
Issue 13: Notification requirement	
Options: (i) Status quo.	
(ii) Require the filing of a notice with the CBCA Director disclosing the parties to, and the date of, the unanimous shareholder agreement.	
(iii) Require the filing of a notice listing directors' and shareholders' powers indicating whether these powers have been reserved to the directors or transferred to shareholders.	
(iv) Require disclosure of the unanimous shareholder agreement itself.	
Issue 14: Amendment and termination	
Options: (i) Require unanimity for all amendments to a unanimous shareholder agreement.	
(ii) Permit amendments to a unanimous shareholder agreement to be effected in the manner specified therein.	
(iii) Impose no requirements for automatic termination or sunset clause.	

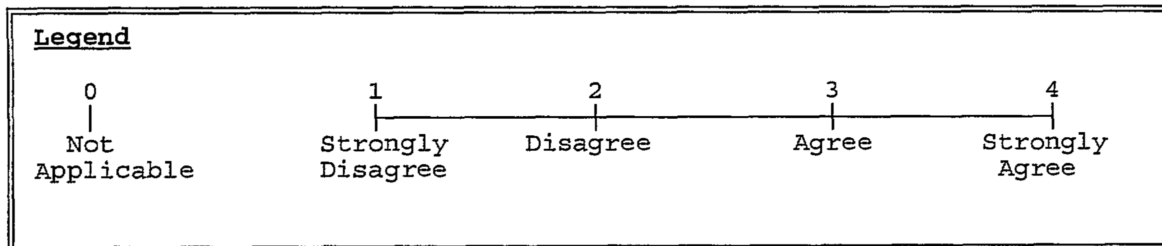
UNANIMOUS SHAREHOLDER AGREEMENTS

PROPOSAL	LEVEL OF AGREEMENT
Issue 15: Opting-out of CBCA provisions	
Options: (i) Status quo.	
(ii) Amend the CBCA to provide an exhaustive enumeration of the statutory provisions which can be overridden.	
(iii) Amend the CBCA to provide a listing of key statutory requirements not subject to the override.	
(iv) Adopt a basket clause allowing a corporation to opt out of any provision in the statute governing the management of the business and affairs of the corporation, except where it would be contrary to public policy.	

PART 3 -- COMMENTS ON PREFERRED RECOMMENDATION/OPTION

In this section you are given the opportunity to comment on the recommendations/options presented in the discussion paper. For each recommendation please specify the degree to which you agree or disagree with each statement. Please examine the legend below for possible responses. For instance, in the example listed below the respondent answered "1" to the question of whether this recommendation would clarify the CBCA. This indicates the respondent strongly disagreed with the statement that the recommendation would clarify the CBCA. However, the respondent answered "3" to the statement that the recommendation would reduce the cost of business. The respondent therefore agrees that business costs would be reduced if this recommendation were adopted.

If you have any questions about this table, please do not hesitate to contact Charles Hall at (613) 952-2118.



EXAMPLE

Recommendation/Option	This Recommendation/Option would							
	Clarify the CBCA	Reduce the Cost of Business	Reduce Paper Burden	Improve Harmoni-zation	Reduce Dupli-cation	Increase Competi-tiveness	Improve Decision Making	Improve Account-ability
1. Example recommendation	1	3	3	4	4	2	3	0

Please go to the next page and fill in the table as per the above example.

Recommendation/Option	This Recommendation/Option would: Clarify the CBCA	Reduce the Cost of Business	Reduce Paper Burden	Improve Harmonization	Reduce Duplication	Increase Competitiveness	Improve Decision Making	Improve Accountability
Issue 1: Definition of "unanimous shareholder agreement"								
Options: (i) Status quo.								
(ii) Adopt the Alberta BCA approach.								
(iii) Adopt the Alberta approach, but further clarify that only a unanimous shareholder agreement may restrict the powers of the directors.								
Issue 2: Eligibility requirements on the use of a unanimous shareholder agreement								
Options: (i) Status quo.								
(ii) Limit the use of unanimous shareholder agreements to non-distributing corporations.								
(iii) Limit the use of unanimous shareholder agreements to "private corporations" as defined in provincial securities laws.								
(iv) Limit the use of unanimous shareholder agreements to corporations with 15 or fewer shareholders, including employees.								

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Issue 3: Restrictions on the use of a unanimous shareholder agreement								
Options: (i) Status quo.								
(ii) Permit some but not all powers of a board of directors to be transferred to a corporate shareholder.								
(iii) Permit corporate shareholders to enter into a unanimous shareholder agreement but require that one or more natural persons also be parties to the agreement and that all the rights, powers, duties and liabilities of the directors be transferred to them.								
(iv) Limit the use of unanimous shareholder agreement to natural persons.								
Issue 4: Transfer of liability								
Options: (i) Status quo.								

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(ii) Amend subs. 146 to clarify that (a) the shareholders take on the directors' liabilities as well as their rights, powers and duties and that the directors are relieved of their liabilities to the same extent, (b) common-law as well as other statutory duties and liabilities of directors pass to the shareholders, and (c) defences to liabilities which would have been available to the directors are available to the shareholders.								
Issue 5: Duties of shareholders								
Options: (i) Status quo.								
(ii) Amend s. 146 to permit a unanimous shareholder agreement to fetter the shareholders' discretion when exercising the powers of the directors.								
(iii) Adopt the Model BCA approach.								

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(iv) Impose traditional partnership duties, in respect of the responsibilities of shareholders amongst themselves, unless the shareholders expressly contract out of such duties.								
Issue 6: Procedural rules								
Options: (i) Status quo.								
(ii) Where shareholders exercise directors' powers, procedural rules for shareholders' meetings would apply, but the directors' statutory and common law defences should still be available to the shareholders.								
(iii) Adopt option (ii) above, but the procedural rules would apply unless derogated from in the unanimous shareholder agreement.								
(iv) Permit a unanimous shareholder agreement to establish rules and procedures for, or eliminate altogether the need for, shareholder and director meetings or resolutions in lieu of meetings.								
(v) Adopt Alberta BCA approach.								

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Issue 7: Definition of "director"								
Options: (i) Status Quo.								
(ii) Amend CBCA subs. 2(1) to expressly provide that the term "directors" includes shareholders for the purposes of any powers, duties, responsibilities or liabilities, whether arising under the CBCA or any other legislation, which have been transferred to them.								
(iii) Adopt Option (ii), but limit the definition to include shareholders only where all the board's powers have been transferred.								
Issue 8: Replacement of "restricts" by "transfer"								
Options: (i) Status Quo.								
(ii) Replace the word "restricts" in subs. 146(2) with the term "transfers."								

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Issue 9: Elimination of the board of directors								
Options: (i) Status quo.								
(ii) Permit shareholders of <u>smaller corporations</u> to enter into unanimous shareholder agreements which transfer all the directors' rights, powers, duties and liabilities to the shareholders and eliminate the board. Shareholders of <u>larger corporations</u> could transfer some, but not all, of the directors' powers and would have to maintain a board of directors.								
(iii) Prohibit <u>corporate shareholders</u> from entering into unanimous shareholder agreements which transfer all the directors' powers and eliminate the board.								
(iv) Permit <u>corporate shareholders</u> to enter into unanimous shareholder agreements which transfer all the directors' powers and eliminate the board but require that one or more natural persons also be parties to the agreement and that all the directors' powers, etc. be transferred to the natural persons.								

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(v) Permit shareholders of all CBCA corporations to enter into unanimous shareholder agreements which transfer all the directors' powers and eliminate the board.								
(vi) Require the elimination of the board where a unanimous shareholder agreement transfers all the directors' powers.								
Issue 10: Apportionment of liability between directors and shareholders								
Options: (i) Status quo.								
(ii) Amend the CBCA to provide that, where a unanimous shareholder agreement transfers some but not all of directors' powers, liability attaches: (a) in accordance with the clear terms of the unanimous shareholder agreement, to the directors or shareholders; or (b) if the agreement does not provide for a clear division of powers, to both shareholders and directors jointly and severally.								

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Issue 11: Transfer of shares								
Options: (i) Status quo.								
(ii) Deem all subscribers for or transferees of shares (including involuntary transferees) in a corporation where a unanimous shareholder agreement exists to be parties to a unanimous shareholder agreement. Where notice cannot be established by the corporation or transferor, the subscriber or transferee shall be entitled to rescind the subscription agreement or to demand that the transferor repurchases the shares.								
(iii) In addition to option (ii), permit the subscriber or transferee to claim for any fees reasonably incurred in the transaction.								
Issue 12: Directors vis-a-vis third parties								
Options: (i) Status quo.								
(ii) Restrict the application of the indoor management rule in respect of unanimous shareholder agreements.								

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Issue 13: Notification requirement								
Options: (i) Status quo.								
(ii) Require the filing of a notice with the CBCA Director disclosing the parties to, and the date of, the unanimous shareholder agreement.								
(iii) Require the filing of a notice listing directors' and shareholders' powers indicating whether these powers have been reserved to the directors or transferred to shareholders.								
(iv) Require disclosure of the unanimous shareholder agreement itself.								
Issue 14: Amendment and termination								
Options: (i) Require unanimity for all amendments to a unanimous shareholder agreement.								
(ii) Permit amendments to a unanimous shareholder agreement to be effected in the manner specified therein.								

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(iii) Impose no requirements for automatic termination or sunset clause.								
Issue 15: Opting-out of CBCA provisions								
Options: (i) Status quo.								
(ii) Amend the CBCA to provide an exhaustive enumeration of the statutory provisions which can be overridden.								
(iii) Amend the CBCA to provide a listing of key statutory requirements not subject to the override.								
(iv) Adopt a basket clause allowing a corporation to opt out of any provision in the statute governing the management of the business and affairs of the corporation, except where it would be contrary to public policy.								