IC

# CANADA BUSINESS CORPORATIONS ACT

# SUPPLEMENT TO DISCUSSION PAPER

# PROPOSALS FOR TECHNICAL AMENDMENTS





**RELEASED: JULY 1996**

# CANADA BUSINESS CORPORATIONS ACT

# SUPPLEMENT TO DISCUSSION PAPER

# PROPOSALS FOR TECHNICAL AMENDMENTS





**RELEASED: JULY 1996**

## TABLE OF CONTENTS


INTRODUCTION . . . . . 1

PROPOSALS . . . . . 1

I. DEFINITION OF SEND (s. 2) . . . . . 1

II. DEFINITION OF "PERSON" AND "MANDATAIRE" (s. 2) . . . . . 3

III. DEFINITION OF DOCUMENT (s. 2) . . . . . 4

IV. DEFINITION OF "PROPERTY" (subs. 25(5)) . . . . . 6

V. SERIES OF SHARES DESIGNATED IN ARTICLES (subs. 27(5)) . . . . . 8

VI. REDEMPTION OF SHARES (subs. 36(1)) . . . . . 9

VII. DEBT OBLIGATIONS TERMINOLOGY (subss. 39(11), (12), s. 44 and subs. 189(1)) . . . . . 10

VIII. STATUS OF HOLDERS OF REDEEMABLE (RETRACTABLE) SHARES (ss. 40 and 36) . . . . . 11

IX. CONTENTS OF SHARE CERTIFICATE (par. 49(7)(b)) . . . . . 13

X. NOTICE OF PURCHASE OF OWN SHARES BY A CORPORATION (s. 128) . . . . . 14

XI. NOTICE OF RECORD DATE (subs. 134(4)) . . . . . 15

XII. SHAREHOLDER PROPOSALS (s. 137) . . . . . 17

XIII. SHAREHOLDER REQUISITION OF MEETING (subs. 143(5)) . . . . . 27

XIV. HOLDING BALLOT WHERE DISSENTING VOTES (subs. 152(3)) . . . . . 28

XV. AMENDMENT OF ARTICLES (s. 173) . . . . . 29

XVII. CLARIFICATION OF THE FRENCH AND ENGLISH VERSIONS (subs. 183(4)) . . . . . 31

XVIII. SHORT-FORM AMALGAMATION (s. 184) . . . . . 32

XIX. CLARIFICATION OF THE FRENCH VERSION (subs. 190(6)) . . . . . 33

XX. CLARIFICATION OF THE FRENCH VERSION (subss. 214(1) and 241(2)) . . . . . 34

XXI. FORFEITURE OF LAND (s. 228) . . . . . 35

XXII. NOTICE TO DIRECTORS RE COMMENCEMENT OF DERIVATIVE ACTION (par. 239(2)(a)) . . . . . 36

XXIII. REFERENCES TO REPEALED PROVISIONS (par. 246(c)) . . . . . 37

XXIV. UNDELIVERED NOTICES (subs. 253(4)) . . . . . 38

XXV. REGULATORY REFORM (subs. 261(1)) . . . . . 39

XXVI. PRE-PUBLICATION PERIOD FOR CBCA REGULATIONS (subs. 261(2)) . . . . . 44

XXVII. CERTIFICATE OF COMPLIANCE (subs. 263(2)) . . . . . 44

XXVIII. DIRECTOR'S CONSENT . . . . . 46

# CANADA BUSINESS CORPORATIONS ACT

# PROPOSALS FOR TECHNICAL AMENDMENTS

## INTRODUCTION

[1] This paper contains a second set of technical amendments which were raised either by experts or internally. In general, the proposals would clarify the French version of the Canada Business Corporations Act (CBCA), remove unnecessary provisions, simplify some procedures and improve the administration of the CBCA.

[2] Some of the proposals assess very complex issues such as whether to amend s. 137 on shareholder proposals. Differing submissions on this section have suggested, for instance, that, the list of exemptions for excluding shareholder proposals be either curtailed or expanded. A proposal examines whether to simplify and make more effective certain aspects of the regulatory process under the CBCA. Another studies whether to amend the CBCA to require persons to consent in writing to become directors of a corporation.

[3] This paper deals with the proposed amendments by chronological section reference as they would appear in the CBCA.

[4] Certain preferred positions or recommendations are made simply to help focus discussion and are not in any sense the final word on changes to the CBCA. They represent current thinking but are not government or even departmental policy.

## PROPOSALS

### I. DEFINITION OF SEND (s. 2)

Issue:

[5] Whether to amend the definition of "send" in s. 2 to include facsimile and electronic transmission.

Background:

[6] Section 2 presently defines "send" as: "'send' includes deliver". A number of stakeholders have suggested that this definition should be amended to contemplate the use of facsimile and other forms of electronic transmission.

[7] The Canada Business Corporations Act (CBCA) will allow for electronic transmission of documents to and by the CBCA Director when s. 258.1, adopted by Bill C-12, is brought into force. Some CBCA stakeholders have requested that the CBCA be amended to expressly permit electronic communication between the corporation, its directors, shareholders and other stakeholders in respect of documents required under the CBCA (for example, proxy solicitation materials).

[8] As technology advances, many new forms of communication are becoming accepted means of storing and transmitting information.[1] Some of these new forms include facsimile transmission, electronic mail, bulletin boards on the internet, computer networks, CD-ROM, diskettes, and magnetic storage tapes. The use of these technologies may result in quicker, more efficient and perhaps less costly communication.

[9] The time and cost efficiencies of these forms of information storage and communication must however be balanced against the right of corporate stakeholders to receive required notices and have access to information. The Securities and Exchange Commission (SEC) in Release No. 33-7233 encourages the use of electronic communications between the corporation, shareholders and other stakeholders. The SEC states that the focus of the debate surrounding the use of electronic media should be whether the required disclosure has been made as opposed to the medium used to disseminate the information. The SEC has set out a number of guidelines to determine whether there has been actual delivery of a document. There must be: (i) adequate notice given that information is available and where that information may be found; (ii) the information must be easily accessible,[2] and capable of being retained by the recipient; and (iii) if the recipient does not consent to receive the information by a particular electronic format, the information must be provided as a paper document.

---

[1] For instance, in Beatty v. First Exploration Fund 1987 & Company (1988), 40 B.L.R. 90 (B.C.S.C.) at 100, a case addressing the validity of faxed proxies, the B.C. Supreme Court held that:

> The conduct of business has for many years been enhanced by technological improvements in communication. Those improvements should not be rejected automatically when attempts are made to apply them to matters involving the law. They should be considered and, unless there are compelling reasons for rejection, they should be encouraged, applied and approved.

[2] ". . . the use of a particular medium should not be so burdensome that intended recipients cannot effectively access the information provided." (SEC Release No. 33-7233, p. 8).

Recommendation:

[10] Amend the CBCA to allow information to be "sent", "deposited", "submitted", "delivered" or "notice given" electronically or delivered in electronic format where:

(a) the bylaws or articles do not provide otherwise;
(b) the recipient consents to receive documents electronically and stipulates the format;
(c) if the agreed upon format is a bulletin board or other internet site, adequate notice that a document is available and where it is located is given to the recipient; and
(d) the recipient is capable of retaining the document in a permanent form.

## II. DEFINITION OF "PERSON" AND "MANDATAIRE" (s. 2)

Issue:

[11] Whether the definitions of "person" and "mandataire" should be amended or deleted.

Background:

[12] The current definition of "person" in the CBCA includes: "an individual, partnership, association, body corporate, trustee, executor, administrator or legal representative." A legal practitioner has advised that there is a discrepancy in the equivalent definition of "personne" in the French version in that it includes the term "mandataire". "Mandataire" means "agent" which is not found in the English definition. Instead, the English definition uses the term "legal representative" which has a different meaning from the English term "agent" and the French term "mandataire".

[13] This raises the question as to whether the French definition was meant to include legal representative or whether the English definition was meant to include agent.

[14] The Bank Act[3] defines "person" as including three things: "a natural person, an entity or a personal representative." That Act defines "personal representative" as:

> a person who stands in place of and represents another person and, without limiting the generality of the foregoing, includes, **as the circumstances require**, a trustee,

---

[3] S.C. 1991, c. 46.

> an executor, an administrator, a committee, a guardian, a tutor, a curator, an assignee, a receiver, an **agent** or an attorney of any person. [emphasis added]

[15] The equivalent French definition of "personal representative" includes "mandataire". Hence, the Bank Act definition of "person" is consistent in both French and English.

[16] The Ontario Business Corporations Act (Ontario BCA) defines "person" in English as including a ". . . and a natural person in his or her capacity as trustee, executor, administrator, or other **legal representative**" [emphasis added]. In French, the equivalent term is defined as including "un représentant". There is no mention of "mandataire".

[17] The term "person" is used throughout the CBCA. In many circumstances, it appears appropriate that the definition of person should include an "agent" of the person and the Bank Act's broader definition therefore seems appropriate. Moreover, the definition of "personal representative" in the Bank Act, by using the phrase "as the circumstances require", seems to be very flexible.

Recommendations:

1. The definition of "person" in s. 2 be amended in both French and English versions to include "an individual, partnership, association, body corporate, or personal representative."

2. A definition of "personal representative", similar to that found in the Bank Act, be added to s. 2.

3. The definition of "mandataire" (defined in the French version only) be deleted.

## III. DEFINITION OF DOCUMENT (s. 2)

Issue:

[18] Whether the term "document" should be defined in the CBCA.

Background:

[19] There are over 60 references in the CBCA to "document" or "documents". Although this term is defined for the purposes of the CBCA regulations, it is not defined in the CBCA itself. One practitioner has suggested that the term "document" is not used consistently and should therefore be defined in the statute.

[20] The usage of "document" in the statute is broader than in the regulations. The regulations define "documents" as "a document required to be sent to the Director under the Act". However, the CBCA uses the term "document" in a conventional way as well as to refer to specific documents that a corporation is required to send to the Director. For example, subs. 65(3) refers to a signature "either on the security or on a separate document." Section 246 refers to "any articles or other document required by this Act to be filed by him."

[21] "Document" in its common usage is defined as:

> something which gives you information . . . something which makes evident what would otherwise not be evident . . . the form which the so-called document takes is perfectly immaterial so long as it is information conveyed by something or other; it may be anything, upon which there is written or inscribed information.[4]

[22] The term "document" is sometimes used alone in the statute and is sometimes used as an apparent catch-all after a listing of specific documents. For instance, s. 250 states "any person who makes or assists in making a report, return, notice or other document required by this Act or the regulations . . .". Further, "document" is often coupled with "notices" or "records". Both "notices" and "records" are specifically defined in the statute and are subsets of the conventional definition of "documents."

[23] In the Ontario BCA, the term "document" is used in a fashion similar to the CBCA. It is not defined in the Ontario BCA and although not specifically defined in the regulations, subs. 24(1) provides that documents sent to the Director must take a specific form.

Recommendation:

[24] No change is recommended. The term "document" as used in the CBCA can refer not only to those documents which are required by the CBCA to be filed but also to the multitudes of documents that may be used by a corporation in its business. Where the document is a specific one required by the CBCA, the section so provides.

---

[4] Duklow & Nuse eds., The Dictionary of Canadian Law (Carswell: Toronto, 1994), p. 349.

## IV. DEFINITION OF "PROPERTY" (subs. 25(5))

Issue:

[25] Whether to amend the definition of "property" in subs. 25(5) to exclude only those promissory notes or promises to pay issued by the subscriber or a person related to the subscriber.

Background:

[26] Two letters commenting on the Technical Amendments discussion paper[5] recommended that a further clarification be made to Part V on "Corporate Finance" through an amendment to subs. 25(5).

[27] Subsection 25(5) provides that:

> For the purposes of this section, "property' does not include a promissory note or a promise to pay.

[28] The term "property" is used in subs. 25(3) which prohibits the issuance of a share until the consideration for it is fully paid "in money or in property or in past services that are not less in value than the fair equivalent of the money that the corporation would have received if the share had been issued for money". Subsection 25(4) gives certain directions in the determination of what is a fair equivalent and subs. 118(1) imposes liability on the directors to make good any amount by which the consideration is less than the fair equivalent.

[29] One letter recommended that:

> the words 'issued by the subscriber' be inserted after the words 'promise to pay' in CBCA subsection 25(5). For example, if a subscriber wishes to settle his subscription obligation by tendering securities such as bearer bonds issued by a third party, such bonds although technically containing promises to pay should be recognized as type of property eligible to settle the subscription obligation.

---

[5] Released by Industry Canada in September 1995.

[30] The equivalent provision in the Alberta Business Corporations Act (Alberta BCA), while using different words, essentially already provides for this. Alberta BCA subs. 25(5) reads:

> For the purposes of this section, "property" does not include a promissory note or promise to pay given by the allottee. [Emphasis added]

[31] A second letter commented:

> The Act states that the consideration provided to the corporation for the issuance of shares can include "property". Subsection 25(5) excludes from the definition of property 'a promissory note or a promise to pay'. While it appears that the provision is intended only to exclude promissory notes of the subscriber, the current wording of subs.25(5) can technically be interpreted to include any promissory note including indebtedness of arm's length third parties. The issue is of particular concern in the context of re-organizations where subs. 25(5) could be interpreted to exclude the assumption by a subscribing corporation of an issuing corporation's third party indebtedness.

[32] The letter then refers to the equivalent provision of the Ontario BCA (subs. 23(6)) and recommends that the CBCA be amended along similar lines "to clarify that third party indebtedness not be excluded from the definition of property that constitutes consideration for the issuance of shares."

[33] Ontario BCA subs. 23(6) provides as follows:

> . . . a document evidencing indebtedness of a person to whom shares are to be issued, or of any other person not dealing at arm's length with such person within the meaning of that term in the Income Tax Act (Canada), does not constitute property.

[34] It appears that, as the letters point out, the intention behind subs. 25(5) is not to exclude all promissory notes or promises to pay. In many circumstances, such "property" may constitute valid and valuable consideration for shares issued by the corporation. Subsection 25(5) appears to be an anti-avoidance provision to prevent the issuance of unpaid or partly paid up shares through the corporation taking as consideration a simple promise to pay from the person to whom the shares are issued. With its enactment in 1975, the CBCA eliminated the ability of corporations to issue partly paid up shares.[6]

---

[6] CBCA subs. 25(2). See discussion of this issue in paragraph 104 of R.W.V. Dickerson, J.L Howard, L. Getz, Proposals for a New Corporations Law for Canada (Ottawa: Information Canada, 1971), vol. 1, p. 38, "Dickerson Report".

[35] It is important to note that any amendment to subs. 25(5) would not affect the obligation on directors to ensure that the property received as consideration is the fair equivalent of the money that the corporation would have received if the share had been issued for money (subs. 25(3) and subs. 118(1)).

Recommendation:

[36] Amend CBCA subs. 25(5) along the lines of Ontario BCA subs. 23(6).

Options:

1. Amend CBCA subs. 25(5) by inserting the words "issued by the subscriber" after the words "promise to pay".

2. Amend CBCA subs. 25(5) along the lines of Alberta BCA by inserting the words "given by the allottee" after the words "promise to pay".

## V. SERIES OF SHARES DESIGNATED IN ARTICLES (subs. 27(5))

Issue:

[37] Whether to amend subs. 27(5) to permit series of shares to be designated in the articles of incorporation.

Background:

[38] Section 27 states that the articles may "authorize" the issue of shares in a series and may "authorize" the directors to fix the number and determine the designation, rights, privileges, restrictions etc. attaching to each share in a series. Subsection 27(5) requires that before a corporation issues shares in series the directors must send to the CBCA Director articles of amendment to designate the series of shares.

[39] The ability of the incorporators of a corporation to designate shares in series in the original articles has been questioned because of the wording of subs. 27(5). It has been

suggested that this provision prohibits the designating of a series of shares at the time of incorporation.[7]

[40] The CBCA gives corporations the ability and flexibility to respond quickly by allowing the directors, subject to the limitations in the articles, to designate and issue shares in series without shareholder approval. Once the shares have been issued, however, there is concern that the rights and privileges attached to the series are not changed by the directors alone. The requirement to send articles of amendment to the Director before issuing ensures that: "Once issued . . . the terms of the shares cannot again be amended by the directors alone, but only by the shareholders in accordance with [Part XV of the CBCA]"[8]

[41] If shares in series are designated on incorporation, directors would not be able to change the rights and privileges attached to the series in the articles without shareholder approval (s. 173). Shareholders rights would therefore be protected just as if the designation had taken place after incorporation and articles of amendment had been filed by the directors pursuant to subs. 27(5).

Recommendations:

1. Amend subs. 27(1) to clarify that series of shares may be designated in the articles of incorporation;

2. Amend subs. 27(5) to clarify that, if the series is already designated in the articles of incorporation, no articles of amendment are required on the issuance of the shares.

## VI. REDEMPTION OF SHARES (subs. 36(1))

Issue:

[42] Whether the French version of subs. 36(1) should be changed.

---

[7] This issue was raised in: Alberta Government, Municipal Affairs, Registries, A Discussion on the Law of Business Corporations (March 1995) p. 7 "Alberta BCA Discussion Paper".

[8] Dickerson Report, Vol. 1, p. 40.

Background:

[43] The English text of subs. 36(1) clearly states that a corporation may purchase or redeem any redeemable shares issued by it at prices not exceeding the redemption price thereof stated in the articles or calculated according to a formula stated in the articles. The French text sets out only one situation, that is when the price does not exceed the redemption price thereof stated in the articles and calculated according to a formula stated in the articles. It appears that the French version is unduly restrictive.

Recommendation:

[44] Amend the French version of subs. 36(1) to provide that a corporation may purchase or redeem any redeemable shares issued by it at prices not exceeding the redemption price thereof stated in the articles or calculated according to a formula stated in the articles.

## VII. DEBT OBLIGATIONS TERMINOLOGY (subss. 39(11), (12), s. 44 and subs. 189(1))

Issue:

[45] Whether the CBCA terminology concerning debt obligations should be reviewed and updated.

Background:

[46] A legal practitioner has advised Industry Canada that the CBCA debt obligations terminology should be changed in order to harmonize it with the new Québec Civil Code. The Civil Code groups under the term "hypothec" all real rights on a movable or immovable property made liable for the performance of an obligation (art. 2660). According to article 2665 of the Civil Code, a movable hypothec with delivery (of the hypothecated movable) may also be called a pledge. Since the term "hypothec" now includes the meaning of "pledge," it seems appropriate to refer to debt obligations which are "pledged or hypothecated," as merely "hypothecated." A general review of the CBCA debts obligations terminology should be made in order to reflect this terminology used in the new Civil Code of Québec.

Recommendation:

[47] The CBCA should be reviewed and updated to match the terminology used in the new Civil Code of Québec regarding debt obligations (for example, subss. 39(11), (12), s. 44 and subs. 189(1).

## VIII. STATUS OF HOLDERS OF REDEEMABLE (RETRACTABLE) SHARES (ss. 40 and 36)

Issue:

[48] Whether to extend the application of s. 40 to redemption of shares under s. 36.

Background:

[49] A letter commenting on the technical amendments paper has recommended:

> [TRANSLATION] In our opinion, it would be advisable to extend the application of section 40 to redemptions of shares under section 36. As the law now stands, a company can unilaterally redeem or be forced to redeem some "redeemable" shares at the request of their holders, without however paying them if it does not meet the tests under section 36. As a result thereof, the holders of these shares will very likely become ordinary creditors because of the inapplicability of subsection 40(3). In this respect, see the case of Re Central Capital Corp., [1995] 29 C.B.R. (3rd) 33 as well as the cases referred to therein. Subsection 123.57 of the *Companies Act* of Québec extends the prohibition to turn the shareholder into the creditor to the redemption under subsection 123.54 (redemption at the demand of the holder). It disallows the unilateral redemption of shares without paying cash for these shares (ss. 123.53 and 123.57). The CBCA should take heed of this model.

[50] Section 36 of the CBCA set out the rules under which a corporation may purchase or redeem any redeemable shares issued by it. Section 2 defines "redeemable share" to mean "a share issued by a corporation (a) that the corporation may purchase or redeem on demand of the corporation, or (b) that the corporation is required by its articles to purchase or redeem at a specified time or on demand of a shareholder". The latter category of redeemable share are sometimes called retractable shares.

[51] In Re Central Capital Corp., the holders of retractable shares irrevocably deposited their shares with the corporation for redemption before an order was made under the

Companies' Creditors Arrangement Act. However, the redemption date did not occur until after the CCAA order was made. The court held that the shareholders remained shareholders (as the corporation could not redeem the shares under s. 36 on the redemption date) and were not creditors. The court compared the regime under s. 40 as follows:

> It is interesting to compare the scheme set out in s. 40 of the CBCA for purchase of its shares by a corporation pursuant to a contract. Such a contract is specifically enforceable, subject to the defence by the company that to buy the shares would put it in breach of similar solvency tests set out in ss. 34 and 35 dealing with a corporation's ability to purchase its own shares. Section 40(3) deals with the status of the contracting party pending enforcement of the contract:
>
> > (3) [Status of contracting party.] Until the corporation has fully performed a contract referred to in subsection (1), the other party retains the status of a claimant entitled to be paid as soon as the corporation is lawfully able to do so or, in a liquidation, to be ranked subordinate to the rights of creditors but in priority to the shareholders.
>
> The contracting party is not made a creditor, but is entitled to be paid out ahead of shareholders because of the outstanding contract claim. [Emphasis added]

[52] The court does not characterize a shareholder who contracts to sell the shares as a "creditor". From the wording of subs. 40(3) which provides that the "claimant" ranks subordinate to the rights of creditors, this appears to be a correct conclusion. Even the Québec Companies Act, which states that the shareholder becomes a "creditor", expressly provides that the shareholder ranks by preference after the creditors (s. 123.57). Thus, even if subs. 40(3) applied in the Re Central Capital Corp. case, it appears that the persons holding the retractable shares would not have been entitled to rank equally with the creditors.

[53] With respect to the issue of whether the securities are debt or equity capital, the court in Re Central Capital Corp. quoted the following two extracts to conclude that shares are equity:

> If a person contributes capital to a business, even though that person is not a partner in the business and may have received no share of the profits, he cannot prove his claim in bankruptcy in competition with the creditors of the business. Although such a claimant may have a valid claim for the return of the investment funds, he cannot rank pari passu with the unsecured creditors. He would likely have an equitable right to share in the distribution of the assets but only at such time as the remaining unsecured creditors have been paid in full. It is of the utmost importance to determine the basis of the infusion of the monies: Canada Deposit Insurance Corp. v. Cdn. Commercial Bank (1987), 67 C.B.R. (N.S.) 136, reversed on other grounds, . . . [1992] 3 S.C.R. 558 . . . applying Laronge

> Realty Ltd. v. Golconda Investment Ltd. (1986), 63 C.B.R. (N.S.) 76 . . . (C.A.). [From Houlden and Morwetz, Bankruptcy and Insolvency Law of Canada, 3rd ed., vol. 1, p. 5-34.] . . .
>
> Preferred shares have been called "compromise securities" as having an intermediate position between common shares and debt. The hope has been that preferred would take on some of the characteristics of both debt and common shares, and theoretically at least, this can be achieved. . . . the company cannot issue "secured" preferred shares in the sense that shares cannot have a right to a return of capital which is equal or superior to the rights of creditors. Preferred shareholders are risk-takers who are required to invest capital in the business and who can look only to what is left after creditors are fully provided. . . . In short, a preferred shareholder always remains a shareholder. [From Grover and Ross, Materials on Corporate Finance, p.47/48/49, ch. 11 Equity.]

[54] Nevertheless, whatever the treatment of shareholders is under subs. 40(3), there appears to be little reason to treat s. 36 shareholders differently from ss. 34 or 35 shareholders. In the absence of an insolvency setting, s. 36 shareholders deserve to be treated as "claimants" and have their priority established in accordance with the same rules applicable to other persons contracting to sell their shares to the corporation under ss. 34 and 35.

Recommendation:

[55] Amend subs. 40(1) and (2) by replacing the words "section 34 or 35" with "section 34, 35 or 36".[9]

## IX. CONTENTS OF SHARE CERTIFICATE (par. 49(7)(b))

Issue:

[56] Whether the words "Incorporated under the Canada Business Corporations Act" required to be stated on each share certificate should be changed.

---

[9] One technical issue is that subss. 40(1) and (2) refer to a "contract with the corporation". In the case of share purchases under ss. 34 and 35, there is likely to be an independently executed contract between the corporation and the shareholder. In the case of a share redemption in accordance with provisions in the articles, is there in fact "a contract" with the corporation? Do the provisions in the articles setting out share redemption rights constitute a "contract"? Presumably, the answer is yes. If this is not the case, any amendment will be more complicated than simply adding a reference to s. 36 in subss. 40(1) and (2).

Background:

[57] A legal practitioner has recommended that the words "Incorporated under . . ." in par. 49(7)(b) be replaced by "Governed by . . ." It is argued that the latter designation is more accurate since it is linked to the state of the corporation when the statement is made on the share certificate and not at the moment of the corporation's constitution. In fact, some corporations are not incorporated under the CBCA but under the Canada Corporations Act or under the laws of other jurisdictions and continued under the CBCA.

[58] Section 87 of the Bank Act provides that there shall be stated on the face of each share certificate "a statement that the bank is subject to the Bank Act." This designation refers to the governing act when the share certificate is issued. The wording of the Bank Act seems to avoids any confusion. Adopting this terminology would harmonize the CBCA with other federal legislation.

Recommendation:

[59] Amend par. 49(7)(b) by replacing "Incorporated under . . ." by "Subject to . . ."

## X. NOTICE OF PURCHASE OF OWN SHARES BY A CORPORATION (s. 128)

Issue:

[60] Whether to repeal CBCA s. 128 which requires a corporation proposing to purchase or otherwise acquire its own shares to, in prescribed circumstances, give notice to the CBCA Director.

Background:

[61] This provision was adopted in 1978 to add a regulation making power requiring a corporation in prescribed circumstances to disclose to the CBCA Director any proposed acquisition of its own shares. The material prepared to brief Parliamentarians (the 1978 Briefing Book) noted that the new rule was intended to supplement the rule on take-over bids, which apply to bids by issuers to purchase their own shares, in CBCA Part XVII. The 1978 Briefing Book noted:

The proposed regulations will require the corporation to give different kinds of notice in different cases, particularly to give notice to a stock exchange and to the public generally, where it is making a creeping acquisition through exchange facilities without publishing and distributing any take-over bid circular. The purpose of requiring notice to the Director is to ensure that a corporation complies with the regulations.

[62] CBCA Regulation s. 31.1 currently prescribes certain limited number of circumstances where a corporation with 15 or more shareholders proposes to purchase its own shares (basically certain types of exempt offers under CBCA s. 194, prescribed in CBCA Regulations subs. 58(c) or (d)). When the regulation was adopted in 1979,[10] the explanatory note stated that the amendment "will permit . . . a greater uniformity in the disclosure of corporations' interests when acquiring their shares in the open market or otherwise."

[63] Recently, the CBCA Director has consulted on proposed changes to the CBCA regulations which would include the repeal of regulation s. 31.1. The reasons given for the repeal of this regulation include that "this requirement is unnecessary given the fact that there are already adequate provisions under the stock exchange rules in this regard with respect to listed corporations. The proposal would eliminate altogether the expense and unduly burdensome requirement of publishing a notice in the newspapers with respect to private corporations with 15 or more shareholders." Consultations with users of the CBCA supported the repeal of Regulation s. 31.1.

[64] If Regulation s. 31.1 is repealed, there will remain no prescribed grounds under s. 128 requiring notification of share purchases. Given this, it has been questioned whether s. 128 is required any longer.

Recommendation:

[65] Repeal CBCA s. 128.

## XI. NOTICE OF RECORD DATE (subs. 134(4))

Issue:

[66] Whether the notice of record date should be reduced to five days.

---

[10] SOR/79-728 11 October 1979, Canada Gazette Part II, Vol. 113, No. 20, pages 3635-6.

Background:

[67] Subsection 134(4) requires directors to give public notice of the record date a minimum seven days before the record date. A practitioner has advised Industry Canada that:

> [TRANSLATION] As Canadian stock exchanges have reduced transaction times for companies listed since June 30, 1995 from five (5) business days to three (3) business days, why not reduce the notice of record date from seven (7) to five (5) days.

[68] The Montreal Exchange has reduced its requirement from 5 business days to 3 business days for registration of a transaction on the transfer books. Likewise, it appears that the required notice of record date for the Montreal Exchange is now 5 days.[11]

[69] The rules of the Toronto Stock Exchange require seven trading days notice of record date for the declaration of dividends and follows National Policy 41 with regard to record dates for shareholder meetings which is a minimum of 7 days (NP41, Part IV, rule 1). The rules of the Alberta Stock Exchange require that notice of record date be given 10 trading days prior to the record date set for dividends and does not appear to address the issue of record dates for shareholder meetings.

[70] The notice requirements in the CBCA were decreased from 14 days to 7 in 1978.[12] The material prepared to brief Parliamentarians (the 1978 Briefing Book) gave the following justification for the amendment:

> By shortening this pre-notice period to 7 days, the CBCA gives a corporation more time to complete other formalities. This is particularly true where a public distributing corporation in connection with the payment of quarterly dividends must give notice to each stock exchange on which it shares are listed and also publish notice in several newspapers across Canada.

[71] Along with questions of cost and efficiency for corporations, the interests of shareholders must also be considered. Shareholders and other investors must be given a reasonable period of time to become aware that a record date has been set.

---

[11] CCH Canadian Stock Exchange Manual (CCH: North York, 1995), paragraph 9919 at p. 111,031, and Policy 1-8, paragraph 7 at page 112,074.

[12] Bill S-5.

[72] With the exception of the Montreal Exchange, the CBCA is equally as onerous or less onerous than the notice requirements set by the provincial stock exchanges. Further, given that a recommendation has been made to amend the CBCA to require corporations set a fixed record date for voting,[13] the public notice of the record date requirements in subs. 134(4) becomes all the more important. Seven days seems to be an appropriate minimum.

Recommendations:

1. Do not amend subs. 134(4) to decrease the minimum notice period to five days..

2. Amend subs. 134(4) to provide that the minimum notice period or periods of record dates shall be prescribed by regulations.

## XII. SHAREHOLDER PROPOSALS (s. 137)

Issue:

[73] Whether s. 137 on shareholder proposals should be amended to provide:

1. shareholders with the right to submit a more detailed supporting statement;
2. a less expansive list of exemptions for excluding shareholder proposals;
3. that a shareholder be required to hold a minimum number of shares for a minimum time period before being eligible to submit a proposal; and
4. an administrative review of management decisions to exclude shareholder proposals.

Background:

- CBCA Provisions

[74] Section 137 provides that a shareholder entitled to vote at an annual meeting may submit a proposal to the corporation in regard to a matter the shareholder wishes to raise at the next annual meeting. The proposal may be accompanied by a statement of no more than 200 words and must be delivered at least 90 days before the anniversary date of the previous annual meeting. A corporation which is required to send a management proxy to

---

[13] CBCA discussion paper Shareholder Communications and Proxy Solicitation Rules, released August 1995, recommendation 7.

shareholders must include the proposal and statement in the materials. This right however is not unrestricted. Subsection 137(5) lists five grounds on which a corporation may exclude a proposal from the proxy materials. If the corporation decides that the proposal falls into one of the five categories, the corporation is not obligated to include the proposal in its information circular.

[75] If a shareholder proposal is excluded, the corporation must notify the shareholder and provide the shareholder with a statement of the reasons for the refusal. Shareholders who wish to challenge the decision of the corporation may apply to a court which may restrain the holding of the meeting or make any order the court sees fit.

[76] One exemption which has generated discussion allows a corporation to exclude a proposal where its primary purpose is to promote general economic, political, racial, religious or similar causes. A corporation may also exclude proposals that have been presented within the last two years and defeated, that were previously included but the shareholder failed to present at the meeting, that were not submitted within the time delay and that are made to secure publicity.

[77] Statistics indicate that the shareholder proposal provision has been rarely used in Canada.[14] In comparison, the equivalent provision in the United States has been used quite frequently.[15] Although there may be a number of reasons why the frequency of use of the shareholder proposal provision between Canada and the U.S. differ, the difference in corporate structure as well as the statutory framework may be two of the primary reasons. In Canada, most large corporations have a controlling shareholder while in the U.S. a majority of the large corporations are widely held. The fact that many Canadian corporations have a controlling shareholder may be a disincentive for shareholders to submit proposals as the likelihood of their success is thereby limited. It may also be argued that the U.S. framework is more favourable to shareholder proposals than the CBCA.

- US Rules

[78] Rule 14a-8 of the Securities Exchange Act of 1934 (Securities Exchange Act) sets out the U.S. framework for submission of proposals by security holders. Under this rule, shareholders must have owned at least 1% or $1000 in market value of securities for a least one year before making a proposal. Along with the proposal, a supporting statement of no

---

[14] In a report published by Allenvest (now Fairvest), one shareholder proposal was submitted in 1990 and in both 1991 and 1992 no proposals were submitted by the 480 corporations Allenvest follows (see Catherine McCall and Réjean Wilson, "Shareholder Proposals, Why Not in Canada", Corporate Governance Review, Vol. 5, Number 1, January 1993).

[15] Investor Responsibility Research Centre (U.S.) reports that in the top 1500 U.S. corporations in 1991, 400 shareholder proposals on corporate governance issues and 300 shareholder proposals on a variety of social issues were submitted. (see Catherine McCall and Réjean Wilson, "Shareholder Proposals, Why Not in Canada", Corporate Governance Review, Vol. 5, Number 1, January 1993).

more than 500 words may be submitted. Both must be delivered at least 120 days before the anniversary of the previous annual meeting. Unless the proposal falls under one of the 12 grounds for exclusion, the corporation is obligated to include it in the proxy materials.

[79] Under the Securities Exchange Act, there are a number of technical reasons why a corporation may exclude a shareholder proposal including a violation of state law, duplication, and a similar proposal made within the previous 5 years without receiving a minimum amount of shareholder support. There are, in addition, two main substantive reasons: (1) proposals which relate to less than 5% of the corporation's total assets and earnings and does not otherwise significantly relate to the corporation's business; and (2) proposals that deal with a matter which relates to the conduct of the ordinary business operations of the corporation.

[80] If a company omits a proposal, it must notify both the shareholder and the Securities Exchange Commission (SEC) and justify the exclusion. The staff of the SEC (the Staff) may hear arguments on the matter. If the Staff agrees with the corporation, it will issue a "no-action" advice. If, however, the Staff disagrees with the exclusion of the proposal, it will issue an "action" letter recommending enforcement to the commission. The decisions of the Staff are only advisory. A shareholder must either commence a private legal action or appeal to the SEC for a decision binding the corporation.[16]

- Purpose of the Shareholder Proposal

[81] The Dickerson Report states that the intent behind introducing the shareholder proposal rule in Canada was to give shareholders a greater voice in the corporation's affairs, albeit within limits.[17] As one author has argued:

> The success of the proposal rule lies rather in the opportunity granted to shareholders to express their concerns regarding certain issues and to challenge some of managements's policies and operations. Not only does this process enable stockholders to be enlightened on certain controversial questions but it also allows them to force management to justify its position concerning these matters. Such a disclosure or simply the perspective of having to disclose some facts, may incite management to alter its policies or behaviour.[18]

[82] Subsection 137(1) of the CBCA gives shareholders the right to submit notice of "any matter" they wish to raise at an annual meeting and the right to discuss that matter at

---

[16] The SEC decision is itself subject to judicial review by the courts.

[17] Dickerson Report paragraphs 273-279.

[18] Raymonde Crête, The Proxy System in Canadian Corporations, (Wilson & Lafleur, Martel Ltée: Montreal, 1986) p. 194.

the meeting. Presumably, therefore, under the current s. 137, shareholders may raise topics that are within their decision making power, within the directors' decision making power and even topics which are in neither's decision making power:

> Thus far the purpose seems clear. The shareholders' meeting is a forum for discussion of corporate affairs and this section contemplates that shareholders may have some original ideas, rather than be a mere audience. Further, it is to be noted that sub-s. (1) imposes no restrictions on the topics which may be brought up: presumably, the shareholder is entitled to propose that the assembled shareholders wish the chairman a happy birthday (a proposal not clearly falling within either the shareholders' or the directors' sphere of influence under the statutory division of powers), that the directors all be dismissed (a proposal clearly within the shareholders' power to both consider and bring about by majority vote), or that the corporation refuse to continue supplying materials under contract to the Canadian government on the grounds that the Prime Minister is insufficiently pro-American (a proposal which, I venture, the shareholders may well discuss, but cannot effectively rule on, barring an unusual corporate constitution, because its subject matter clearly falls within the board of directors' power to manage the corporate business).[19]

[83] Subsection 137(5) however, restricts a shareholder's right to submit a proposal on "any matter." Proposals which relate primarily to general economic, political, racial, religious, social or similar causes may be excluded by the corporation. Under the Ontario BCA the test is even more restrictive in that it allows a corporation to exclude proposals that are not related in any significant way to the business or affairs of the corporation.[20]

[84] These rules on shareholder proposals appear to be designed to stimulate debate and provide shareholders with the ability to influence corporate behaviour. However, the debate and influence is limited to matters which relate directly to the corporation. The U.S. rules appear to further restrict proposals to matters within the powers of the shareholders (i.e., not matters relating to the ordinary conduct of business).

- Effect of a Shareholder Proposal

[85] When analysing the shareholder proposal scheme under the CBCA, it is important to consider not only what types of proposals may be made but also, if the proposal is adopted

---

[19] Bruce Welling, Corporate Law in Canada (Butterworths: Toronto, 1991), p. 475.

[20] Ontario BCA par. 99(5)(b).

by shareholders, the impact thereof. Are proposals binding or merely influential? Section 137 does not address the effect of shareholder endorsement of a proposal.

[86] The CBCA sets out a number of provisions that allow a shareholder to make a proposal on a specific subject within shareholders power (for example, to make, amend or repeal a bylaw (subs. 103(5), to amend the articles (subs. 175(1)) and to call for the liquidation or dissolution of the corporation (s. 211)).

[87] These sections, read together with s. 137, would arguably result in the proposal being binding on directors once it was approved by the shareholders.

[88] One author does not agree with this position and argues that shareholders only have the power to make a proposal to make a by-law or amend the articles, as s. 137 does not specify the effect of a proposal that is ratified by the shareholders. The proposal, therefore, remains a proposal and is merely influential and not binding on the directors:

> To summarize the shareholder's proposal for a by-law: s. 103(5) permits the shareholder to propose the by-law, using the procedures of s. 137. Unfortunately, s. 137 does not authorize the shareholders in a general meeting to do anything with respect to the proposal. They are free to discuss it, vote on it, change it as they see fit - but unless they are given the power under some other section to make the proposal into a by-law, then it remains what it was: just a proposal.[21]

[89] The Ontario BCA appears to have recognized this concern and has added subs. 116(5) to clarify the issue. Subsection 116(5) states that a proposal to make etc. a by-law which is adopted by shareholders at a meeting is effective from the date of its adoption. Arguably then, the issue of whether a proposal is binding on an Ontario corporation would depend on whether the proposal was categorized as a by-law. If the proposal is not properly the subject matter of a by-law then the directors would not be bound by it.[22] The issue then becomes: what is the proper subject matter of a by-law? The answer to this question is not clear, however. Conventionally bylaws are organizational in nature whereas directors' resolutions, for instance, deal with the daily management of the business.

[90] The Alberta Law Reform Commission, however, did not share the concerns of the drafters of the Ontario BCA's subs. 116(5). Although they do acknowledge that there may

---

[21] Welling, note 19, p. 475.

[22] Ibid., p. 479.

be some ambiguity, they argue that a court would interpret s. 137 and s. 103 together and conclude that the proposal to make a by-law would be effective.[23]

[91] The CBCA has specifically indicated some examples of where shareholders have the power to make decisions as well as where the decisions are left up to the directors. Section 137 does not clearly indicate that the shareholder proposal provision alters this division of powers, rather it merely indicates that shareholders may make proposals. Where a shareholder proposal deals with a subject matter which is, according to the division of powers, a decision left to the directors, approval of the proposal by shareholders would likely only have an influential effect.

- Suggested Amendments

[92] Legal and the newspaper articles have raised problems with s. 137 and we have received a number of suggestions for reform from CBCA stakeholders. The suggestions can be grouped into two major areas: (1) substance of the proposal; and (2) format and process limitations.

(1) Substance of the proposal:

[93] (a) A suggestion has been made to expand the types of proposals permitted by narrowing the grounds set out in par. 137(5)(b) upon which a corporation may exclude a proposal. Some CBCA stakeholders have expressed their concern that as the grounds presently stand, a corporation can exclude virtually any shareholder proposal by stating that it is a general political or social question. It has been argued that shareholders should be able to question whether the corporation's assets are being used in an economically and socially responsible manner.

[94] Expanding the subjects upon which a shareholder may submit a proposal may lead to shareholders becoming involved beyond the traditional bounds of shareholder decision making. This may cause directors to focus the corporate agenda, to some degree, on broader societal questions and away from the traditional corporate goal of maximizing shareholder returns.[24] Directors, in their decision making, must consider the best interests of the corporation. This raises the concern that if directors make corporate decisions based on general economic, social or political considerations they may breach their fiduciary duty to the corporation.[25]

---

[23] Draft Report No. 2: proposals for a New Business Corporations Law for Alberta (Edmonton: Institute of Law Research and Reform, Jan., 1980), p. 57.

[24] Ron Daniels and Ed Morgan, "World's Problems aren't Directors' Business" Financial Post, Tuesday, August 25, 1992, p. 10.

[25] See discussion pp. 14-20 in the Discussion Paper on Director's Liability released in November, 1995.

[95] The liberalization of the shareholder proposal scheme in this manner may also result in corporations being inundated with proposals by parties with political or social agendas and no genuine concern for the best interests of the corporation. Forcing corporations to address such proposals may be time consuming and expensive with little or no positive effect on the corporation.

[96] Some stakeholders have argued in support of narrowing the types of proposals permitted to be made by shareholders to only those matters which are within the power of the shareholders. Paragraph 99(5)(b) of the Ontario BCA provides that corporations may exclude proposals which do not relate in any significant way to the business or affairs of the corporation. The provision does not expressly list certain grounds such as par. 137(5)(b) of the CBCA. For this reason, arguably, the grounds for exclusion under the Ontario BCA are broader than under the CBCA.

[97] SEC rule 14a-8(c)(5) is similar to par. 99(5)(b) of the Ontario BCA in that it allows for the exclusion of proposals which lack a significant relationship to the issuer's business. At a meeting between the American Society of Corporate Secretaries (ASCS) and the SEC, the ASCS supported the elimination of this provision as a ground for omitting shareholder proposals. The ASCS proposed that, in exchange for the removal of this ground, which would likely result in a substantial increase in proposals submitted, corporations be given a mechanism to effectively deal with the increase. Their proposal suggested setting a mandatory limit on the number of proposals that can be included in each circular. The proposals to be included would be chosen by lottery from among those proposals which were not otherwise excluded based on technical grounds.[26]

[98] (b) Another suggested amendment to s. 137 of the CBCA is to limit shareholder proposals to matters that are within the powers of shareholders to decide. This suggestion is in line with the division of decision making powers in the CBCA. For example, directors alone have the power to declare dividends. It seems reasonable that shareholders should not be able to make proposals in regard to matters which are not within their decision making power.

[99] Alternatively, if the proposal mechanism is seen not as a means to control the corporation but as a means for shareholders to raise issues regarding the corporation that concern shareholders, then to limit proposals based on division of powers may defeat the provision's intent.[27]

---

[26] CCH Corporate Secretary's Guide, Issue No. 169, April 25, 1995.

[27] This issue is also discussed in the context of the discussion on the requisition of shareholder meetings' in the discussion paper, Proposals for Technical Amendments, released September 1995, pp. 58-60.

[100] (c) Another stakeholder has suggested that subs. 137(5) of the CBCA be amended to allow a corporation to exclude proposals which contain untrue or misleading statements. Presently the CBCA allows an interested person to apply to a court where there are untrue or misleading statements in a form of proxy (s. 154). The court may make any order it sees fit including restrain the meeting or order the correction of the proxy. The CBCA also makes it an offence under subs. 250(1) to make untrue or misleading statements in any document required by the CBCA. It could be argued that, based on these two sections, a corporation would have grounds to exclude a proposal that contained such statements. The SEC rules expressly provide that false or misleading statements in a proposal are grounds for its exclusion. On the other hand, it can be argued that the decision as to whether statements in a shareholder proposal are false or misleading is better left to an impartial adjudicator.

(2) Format and process:

[101] (a) It has been suggested that the proposal, supporting statement and corporation response process should be reviewed. Presently, the shareholder supporting statement for a proposal is limited to a maximum of 200 words while the corporation can respond at any length to a shareholder proposal in the management proxy circular. Moreover, the shareholder who made the proposal is not entitled to see the corporation's response nor rebut it before it goes out in the circular. This may restrict the shareholder from adequately presenting his/her position. On the other hand, as the expense of publishing and distributing the circular falls on the corporation, there is a concern that lengthy submissions and counter submissions could become costly and time consuming.

[102] It has been suggested that s. 137 of the CBCA be amended to give shareholders the right to submit a supporting statement of 500 words and that the corporation's response be limited to 500 words. A stakeholder has further suggested that the s. 137 process should be changed in order to give the proponent of a proposal an opportunity to rebut the corporation's response before it is released to the shareholders.

[103] (b) Another suggestion has been made that the CBCA adopt a provision similar to the constraint in the Securities Exchange Act which requires that a minimum number of shares be held and that those shares be held for a year prior to the making of the proposal. This requirement may have the effect of ensuring that a shareholder manifests a genuine interest in the corporation before he/she is allowed to utilise the proposal mechanism. On the other hand, to require a minimum share holding may disenfranchise small minority shareholders who may have a genuine interest and concern which would appropriately be the subject matter of a shareholder proposal. The minimum time period for holding the shares may also thwart a shareholder with a pressing concern from having the issue addressed in a timely fashion. It could be argued that these shareholders are not stopped from submitting their proposal because they have the right to prepare and circulate a dissident proxy circular. This may however be an elusive right because the cost will usually be prohibitive.

[104] (c) A concern has been raised that the CBCA does not adequately address the issue of repeated submission of the same proposal. Paragraph 137(5)(d) allows a corporation to omit a proposal if a substantially similar proposal was submitted to shareholder in the previous 2 years and was defeated. A criticism of this provision has been that it fails to take into account the awareness raising element of proposals. It may take a number of attempts before shareholders are sufficiently educated to support a proposal.[28] The US provision accounts for this by stating that a proposal which is substantially similar to a proposal made in the previous 5 years may be excluded from any meeting held within 3 years of its most recent submission to shareholders provided the proposal: if submitted at only one meeting received less than 3% of the votes; if submitted at 2 meetings it received less than 6% of the votes at the 2nd meeting; and if submitted at 3 or more meetings the proposal received less than 10% of the votes.[29] It has been suggested that par. 137(5)(d) be amended to include a provision similar to the US provision.

[105] (d) Presently, par. 137(5)(a) requires that a shareholder proposal be submitted to the corporation at least 90 days before the anniversary date of the previous annual meeting of shareholders. It has been suggested that, as is the case in the US, corporations should be required to indicate the deadline for submission of proposals for the following year in the present year's proxy circular. This would notify shareholders of their right to submit proposals and the deadline by which to do so.

[106] (e) A CBCA stakeholder has submitted that the CBCA be amended to provide for an automatic review of a corporation's decision to exclude a proposal by requiring the corporation to report and justify their decision, as is presently required by the Securities Exchange Act. This would have a threefold effect. The concern that corporations can dismiss a proposal by simply calling it, for example, "political" would be alleviated. Second, the shareholder may not have to bear the expense of costly litigation in order to have the corporation's decision reviewed. Third, corporations that legitimately refuse a shareholder proposal would have the support of a review body's decision, although many corporations may strongly object to having their decision reviewed.

[107] A key related issue to be considered would then be who would be responsible for the review as well as for issuing any decision and what would be the effect of the decision. Resource implications for any administrative review are also a major consideration. A commentator suggests that if it is not practical to create an administrative body to review a corporation's decision to exclude a proposal then an alternative solution might be to require the corporation to apply to a court for permission to exclude a proposal. It was further suggested that in either case, the corporation should bear the costs of the attempt to exclude the proposal and the burden of proof.

---

[28] Crête, note 18, p. 227.

[29] Securities Exchange Act, Sec. 14a-8(c)(12).

Recommendation:

[108] No recommendation is made at this time.

Options:

1. Amend par. 137(5)(b) by removing the words "or primarily for the purpose of promoting general economic, political, racial, religious, social or similar causes" and introduce a mechanism to deal with any increase in the volume of proposals submitted (for example, the ASCS proposal).

2. Amend par. 137(5)(b) by adopting wording similar to those in s. 99 of the Ontario BCA to read "or for a purpose that is not related in any significant way to the business or affairs of the corporation."

3. Amend s. 137 to limit shareholder proposals to matters that are within the decision making power of shareholders.

4. Amend subs. 137(5) to allow a corporation to exclude a shareholder proposal that includes untrue or misleading statements.

5. Amend s. 137 to increase the maximum length of the shareholder supporting statement to 500 words and limit the corporation's response to a maximum of 500 words.

6. Amend s. 137 to allow a proponent of a proposal to rebut the corporation's response before it is submitted to shareholders.

7. Amend s. 137 to include a minimum share ownership requirement (1% or $1000) before a shareholder is eligible to submit a proposal.

8. Amend s. 137 to include a requirement that the minimum share ownership is held for a minimum time period (1 year).

9. Amend par. 137(5)(d) to allow for resubmission of substantially similar proposals where certain minimum levels of support are met.

10. Amend s. 137 to require that a corporation give notice in the present year's proxy circular of the deadline for submission of proposals for the following year.

11. Amend s. 137 to require that a corporation justify, to a specified review body, why a shareholder proposal is excluded.

12. Amend s. 137 to state that corporations seeking to omit the inclusion of a proposal must bear the costs of the action and discharge the burden of proof in any administrative or judicial process.

13. Amend s. 137 to adopt a provision similar to subs. 116(5) of the Ontario BCA.

## XIII. SHAREHOLDER REQUISITION OF MEETING (subs. 143(5))

Issue:

[109] Whether CBCA s. 143 should be amended to clarify that the obligations of the board with respect to notices and proxy solicitation continue where a shareholder has called a meeting in accordance with subs. 143(4)?

Background:

[110] Under subs. 143(4), a shareholder who has requisitioned a meeting of shareholders under subs. 143(1), which meeting has not been called by the board within 21 days of the date of the requisition, is entitled to call the meeting. Subsection 143(5) provides that a meeting of shareholders requisitioned by a shareholder under s. 143 must be called "as nearly as possible in accordance with the by-laws, this Part and Part XIII."

[111] Section 143(5) does not, however, explicitly state that the board of directors is required to fulfil the same obligations in respect of shareholder meetings called under s. 143 as meetings called by the directors. It has been suggested that this has led to ambiguity and, therefore, situations where directors have not complied with requirements of the legislation regarding notices and proxy solicitations where shareholders have called the meeting.

[112] The Dickerson Report indicates that "subsection (5) is included to make it clear that a meeting called pursuant to this section is subject to the proxy provisions of the Draft Act."[30]

---

[30] Paragraph 291.

[113] Ontario, Saskatchewan and Alberta use the same wording as subs. 143(5) of the CBCA. There have not been any formal complaints to the CBCA Director nor court cases on this issue and we believe the current wording to be sufficiently clear.

Recommendation:

[114] No amendment to s. 143 is proposed.

Option:

[115] Amend s. 143 to expressly state that where a shareholder requisitions a meeting in accordance with subs. 143(4), directors must comply with the notice and proxy solicitation requirements.

## XIV. HOLDING BALLOT WHERE DISSENTING VOTES (subs. 152(3))

Issue:

[116] Whether subs. 152(3) should be amended to clarify that the words "the votes that might be cast at the meeting" means votes that could be cast by shareholders who are present in person or represented by proxy at the meeting.

Background:

[117] Subsection 152(3) states that:

> where the chairman of a meeting of shareholders declares to the meeting that, if a ballot is conducted, the total number of votes attached to shares represented at the meeting by proxy required to be voted against what to his knowledge will be the decision of the meeting in relation to any matter or group of matters is less than five per cent of all the votes **that might be cast at the meeting** on such ballot, unless a shareholder or proxyholder demands a ballot [the chairman may conduct the vote by a show of hands][emphasis added].

[118] The materials prepared for Parliament explaining the policy rationale for the 1978 amendments to the CBCA indicated that:

> the proposed new ss. (1.2) [now subs. 152(3)] empowers the Chairman of the meeting of shareholders to avoid a ballot where he knows that there are fewer than

> five percent dissenting votes **either in person or represented by proxy at the meeting**. The purpose is to avoid wasting the time of the meeting conducting futile ballots [emphasis added].

[119] The equivalent provision in the Alberta BCA, subs. 146(3), uses the following wording: "is less than 5% of the votes attached to the shares **entitled to vote and represented at the meeting on that ballot**"[emphasis added].

Recommendation:

[120] Amend subs. 152(3) by replacing the words "votes that might be cast at the meeting" with the words "votes that might be cast by shareholders present in person or represented by proxy at the meeting."

## XV. AMENDMENT OF ARTICLES (s. 173)

Issue:

[121] Whether to amend s. 173 to expressly allow a corporation to amend its articles to eliminate a class of authorized but unissued shares.

Background:

[122] Section 173 provides for the amendment of the articles of incorporation. However, s. 173 does not expressly allow a corporation to amend its articles to eliminate a class of authorized but unissued shares. This limitation was raised in the Alberta BCA Discussion Paper (p.9):

> Section 167(1) identifies when the articles of a corporation may be amended. It was proposed that we amend this section to permit a corporation to cancel a class of shares where there are no issued or outstanding shares.
>
> Comments:
>
> Section 167 of the Act does not contain express provisions to eliminate a class of authorized but unissued shares. To accomplish the elimination of a class of unissued shares, many corporations are using 167(1)(c) to reduce the number of

authorized shares to nil, the result being that the corporation is no longer authorized to issue any shares of that class.

- Is a more direct method needed?

[123] CBCA s. 173 consolidates a uniform regime governing amendments to articles of incorporation. This list, however, is not exclusive because par. 173(1)(o) permits the corporation "to add, change or remove any other provision that is permitted by this Act to be set out in the articles."[31] As s. 6 permits the classes of shares to be set out in the articles, par. 173(1)(o) arguably provides the statutory authority to eliminate an authorized but unissued class of shares.

[124] The Ontario BCA does not have a provision equivalent to par 173(1)(o) of the CBCA, nor does it expressly allow the elimination of a class of authorized but unissued shares. However, the Ontario BCA stipulates in the introductory words to subs. 168(1) that "a corporation may from time to time amend its articles to add, change or remove any provision that is permitted by this Act to be, or that is, set out in its articles, **including without limiting the generality of the foregoing, to . . .**"[emphasis added].

Recommendation:

[125] No amendment is recommended.

Option:

[126] Amend s. 173 to expressly add a reference to the elimination of a class of authorized but unissued shares.

## XVI. CLARIFICATION OF THE FRENCH VERSION (subs. 180(4))

Issue:

[127] Whether the French version of this subsection should be clarified.

---

[31] See also, paragraphs 348-351 of the Dickerson Report.

Background:

[128] The English version of subs. 180(4) states: "Restated articles of incorporation are effective on the date shown in the restated certificate of incorporation and supersede the original articles of incorporation and all amendments thereto"[emphasis added].

[129] The French version differs substantially from the English version. The French version does not mention that the restated articles supersede the original articles of incorporation and all amendments thereto. The subsection only sets out the first part of the English version of subs. 180(4) ("Les statuts mis à jour prennent effet à la date figurant sur le certificat").

Recommendation:

[130] Amend subs. 180(4) by adding, in the French version, the equivalent of "and supersede the original articles of incorporation and all amendments thereto."

## XVII. CLARIFICATION OF THE FRENCH AND ENGLISH VERSIONS (subs. 183(4))

Issue:

[131] Whether the French and English versions of this subsection should be clarified.

Background:

[132] The English and French versions of subs. 183(4) state:

> The holders of shares of a class or series of shares of an amalgamating corporation are entitled to vote separately as a class or series in respect of an amalgamation if the amalgamation agreement contains a provision . . .
>
> Les détenteurs d'actions d'une catégorie ou d'une série sont habiles à voter séparément sur la convention de fusion si celle-ci contient une clause . . .[emphasis added]

[133] A practitioner has advised Industry Canada to replace "in respect of an amalgamation" with "in respect of the amalgamation agreement." In addition to harmonize

the English version with the French version, this was also harmonize subs. 183(4) with subs. 183(1) and 183(5) which use the words "amalgamation agreement." Also, some other minor changes should be made to the French and English versions.

Recommendation:

[134] Amend subs. 183(4) by replacing, in the English version, "in respect of an amalgamation" with "in respect of the amalgamation agreement." Also, add the words "de chaque société fusionnante" after the word "série" in the French version and, replace the word "an" by the word "each" before "amalgamating corporation" in the English version.

## XVIII. SHORT-FORM AMALGAMATION (s. 184)

Issue:

[135] Whether the directors should be permitted to approve a new name for the amalgamated subsidiary corporation in case of a short-form amalgamation.

Background:

[136] Section 184 empowers the directors to effect an amalgamation between a holding corporation and a wholly-owned subsidiary or between two wholly-owned subsidiaries with a minimum of formality. To preclude any possibility that these short-form amalgamation techniques might be used to prejudice some of the shareholders, they are permitted only in respect of wholly-owned subsidiary and there are restrictions on what may be included in the amalgamated corporation's articles.

[137] Under the CBCA, an amalgamated corporation may only change its name through application of section 173 (amendment of articles) which requires a special resolution of shareholders. However, The Business Corporations Act[32] (BCA) of Saskatchewan has recently been amended to allow, in case of a horizontal short-form amalgamation, the name of the amalgamated subsidiary corporation to be changed by resolution of the directors. A special resolution of the shareholders is no longer required.

---

[32] R.S.S. 1978, c. B-10, amended by S.S. 1995, c. 4, s. 5 adding subs. 178(3): "Notwithstanding subclause (2)(b)(ii) or section 167, the directors, by resolution, may approve a new name for the amalgamated subsidiary corporation whose shares are not cancelled." This formulation is somewhat confusing as it is not specified which directors (of which corporation) may approve the new name and it is the amalgamating subsidiary corporation whose shares are not cancelled, not the amalgamated corporation.

[138] There appears to be no policy reason to prohibit the directors of an amalgamating corporation to approve a new name in the case of a horizontal short-form amalgamation. The board of directors of the parent corporation would have the power to adopt the special resolution required to change the name of any subsidiaries and that board also appoints the subsidiary board. Because the sole shareholder of the subsidiary is the parent corporation, no shareholders are deprived of their right. Further, allowing the directors of the amalgamated corporation to change the name of the corporation by resolution also decreases the paper burden unnecessarily imposed on the corporation.

[139] However, there appear to be different concerns in the case of a vertical short-form amalgamation (where a parent corporation amalgamates with its subsidiary). The vertical short-form amalgamation should follow the normal rules, and the parent corporation should get the approval of its shareholders (special resolution), as required by par. 173(1)(a).

Recommendation:

[140] Amend s. 184 to permit the directors of the amalgamating subsidiary corporation whose shares are not cancelled in a shortform horizontal amalgamation to change the name of the corporation and permit that name to be set out in the articles of amendment.

## XIX. CLARIFICATION OF THE FRENCH VERSION (subs. 190(6))

Issue:

[141] Whether the French version of this subsection should be clarified.

Background:

[142] The English version of subs. 190(6) states that:

> The corporation shall, within ten day after the shareholders adopt the resolution, send to each shareholder who has filed the objection referred to in subsection (5) notice that the resolution has been adopted, but such notice is not required to be sent to any shareholder who voted for the resolution or who has withdrawn his objection.

[143] The French wording differs from the English version. The French version of subs. 190(6) does not mentioned that the notice is not required to be sent to shareholder who voted for the resolution or who has withdrawn his or her objection.

Recommendation:

[144] Amend subs. 190(6) by adding, in the French version, the equivalent of "but such notice is not required to be sent to any shareholder who voted for the resolution or who has withdrawn his objection."

## XX. CLARIFICATION OF THE FRENCH VERSION (subss. 214(1) and 241(2))

Issue:

[145] Whether the French version of these subsections should be clarified.

Background:

[146] A practitioner has advised Industry Canada that the French and English versions of subss. 214(1) and 241(2) are not equivalent. It is recommended that the words "abuse des droits" in the French version be replaced by "brime les droits" as the equivalent of the words in the English version of "that is oppressive . . . to . . . the interests." In French, "abuser" can only refer to "droits" so it is redundant to refer to "abuse des droits."

[147] Also, "des droits des détenteurs de valeurs mobilières" is not the equivalent of "interests of any security holder." The French version should be read "des droits de tout détenteur de valeurs mobilières."

Recommendation:

[148] Amend subss. 214(1) and 241(2) by replacing, in the French version, "abuse des droits" by "brime les droits" and, "des droits des détenteurs de valeurs mobilières" by "des droits de tout détenteur de valeurs mobilières."

## XXI. FORFEITURE OF LAND (s. 228)

Issue:

[149] Whether to amend the CBCA to provide that the forfeiture to the Crown of land of a dissolved body corporate is not effective against a purchaser for value if the forfeiture occurred more than 20 years previously.

Background:

[150] The Ontario BCA was amended in 1994 to add a new subsection 3 to section 244 of that Act which is the equivalent of CBCA s. 228. Both these sections provide for forfeiture of property to the Crown. CBCA s. 228 reads:

> (1) Subject to subsection 226(2) and section 227, property of a body corporate that has not been disposed of at the date of its dissolution under this Act vests in Her Majesty in right of Canada.
>
> (2) If a body corporate is revived as a corporation under section 209, any property, other than money, that vested in Her Majesty pursuant to subsection (1), that has not been disposed of shall be returned to the corporation and there shall be paid to the corporation out of the Consolidated Revenue Fund
>
> (a) an amount equal to any money received by Her Majesty pursuant to subsection (1); and
>
> (b) where property other than money vested in Her Majesty pursuant to subsection (1) and that property has been disposed of, an amount equal to the lesser of
>
> (i) the value of any such property at the date it vested in Her Majesty, and
>
> (ii) the amount realized by Her Majesty from the disposition of that property.

[151] The amendments to the Ontario BCA added a third subsection as follows:

> (3) A forfeiture of land under subsection (1) or a predecessor of subsection (1) is not effective against a purchaser for value of the land if the forfeiture occurred more than 20 years before the deed or transfer of the purchaser is registered in the proper land registry office.

[152] The purpose of this new subsection is to protect purchasers of land by allowing them to obtain good title to land even though the corporate owner was dissolved many (over 20) years before.

Recommendation:

[153] Amend CBCA s. 228 to add new subsection (3) similar to Ontario BCA subs. 244(3).

## XXII. NOTICE TO DIRECTORS RE COMMENCEMENT OF DERIVATIVE ACTION (par. 239(2)(a))

Issue:

[154] Whether to render the notice requirements in paragraph 239(2)(a) unnecessary in cases where all the members of the board of directors are defendants.

Background:

[155] Section 239 sets out a complainant's right to apply to court for leave to bring a derivative action in the name of the corporation to enforce a right of the corporation. The derivative action remedy is typically invoked against directors or officers for breach of duty owed to the corporation.

[156] Subsection 239(2) lists three conditions which must be met before a derivative action may be commenced. Paragraph 239(2)(a) lists the first condition: the complainant must give the directors reasonable notice that **if they do not commence the action** the complainant will apply to court for leave to bring a derivative action.

[157] It has been suggested that where all the directors of a corporation are defendants, par. 239(2)(a) appears to require a complainant to give notice to those directors that if they do not commence an action against themselves the complainant will commence a derivative action. In this case, the requirement to give notice may be unnecessary as it is unlikely that the directors will commence an action against themselves. On the other hand, individual notice to directors may be important to ensure adequate notification occurs.

[158] The Ontario BCA derivative action provision also requires notice be given to the directors (s. 246). The Ontario BCA provision only requires that the complainant give the

directors fourteen days notice of the intention to apply to court for leave to bring an action (subs. 246(2)). However, before leave is granted, the court must be satisfied that the directors will not bring the action.

Recommendation:

[159] No amendment to par. 239(2)(a) is proposed.

Option:

[160] Amend subs. 239(2) to adopt wording similar to subs. 246(2) of the Ontario BCA.

## XXIII. REFERENCES TO REPEALED PROVISIONS (par. 246(c))

Issue:

[161] Whether par. 246(c) of the CBCA should be amended to delete reference therein to subss. 163(4) and 160(3), which have been repealed.

Background:

[162] Subsections 163(4) and 160(3), referenced in subs. 246(c) of the CBCA, were repealed in 1994.

Recommendation:

[163] Amend subs. 146(c) of the CBCA to delete reference to subss. 163(4) and 160(3).

## XXIV. UNDELIVERED NOTICES (subs. 253(4))

Issue:

[164] Whether to reduce the requirement that a notice or document be returned to the corporation three times before a shareholder can be treated as not being found for the purposes of future notices.

Background:

[165] Section 253 addresses the issue of how to give notice to directors and shareholders. In subs. 253(4) a corporation is relieved of the obligation to send further notices or documents to a shareholder if a notice or document, sent in accordance with s. 253, is returned to the corporation three times because the shareholder cannot be found.

[166] Practitioners have submitted that:

> Given the reliability of the mail, it is simply unnecessary to require a corporation to mail the same document three times to the same address and to keep the necessary records of returned mail over a substantial period of time.

[167] This requirement may increase the administrative burden and impose unnecessary costs on corporations.

[168] Section 80.2 of the Québec Securities Act provides that the corporation may stop sending documents to a shareholder: "when documents sent to the address indicated have been returned to the sender." It is suggested that documents, therefore, need only be sent and returned once.

[169] An additional problem is that subs. 253(4) only applies when a corporation sends a notice and thereby relieves its obligations. Other parties sending notices do not benefit from the same relief even though, for example, they may be sending a notice to directors at the latest address as shown in the records of the corporation or the government. Subsection 253(3) provides that a document sent is deemed to be received unless there are reasonable grounds for believing that the shareholder or director did not receive the document. If a notice or document is returned to the sender, it is likely that its return would constitute such reasonable grounds. Senders, therefore, would not have delivered the notice or document and only corporations are able to rely on subs. 253(4) to relieve them of the obligation.

[170] It may therefore be appropriate to extend subs. 253(4) to relieve other parties of the obligation to send notices or documents where the notice or document has been sent and returned.

Recommendation:

[171] Amend subs. 253(4) to require that if a notice or document is returned to the corporation twice the corporation is not required to send further notices and documents to the shareholder until the shareholder informs the corporation in writing of his/her new address.

Options:

1. Require notices or documents to be sent and returned only once before the sender is relieved of the obligation under subs. 253(4).

2. Extend the relief offered by subs. 253(4) to other parties.

3. Status quo.

## XXV. REGULATORY REFORM (subs. 261(1))

Issue:

[172] Whether to simplify and make more effective certain aspects of the regulatory process under the CBCA.

Background:

[173] The federal government has been looking at ways to simplify and make more effective the regulatory process. While a broader reform initiative is looking at replacing the current Statutory Instruments Act[33] (SIA) with a proposed Regulations Act,[34] applicable to all federal statutes, two particular initiatives might be undertaken to improve the system

---

[33] R.S.C. 1985, S-22.

[34] Bill C-25, given first reading in the House of Commons on March 22, 1996.

under the CBCA to respond effectively to the needs of users of the Act. The first area is form making under the CBCA. The second area is exemptions.

- Forms

[174] Under s. 258.1, when proclaimed in force, the CBCA Director will have the power, subject to any regulations, to specify the manner of sending or issuing documents in electronic or other form. However, under pars. 261(1)(c) and (c.1), the actual contents of the forms (notices or documents), the electronic and other forms of the notices or documents and other matters respecting their sending or issuance must be prescribed in regulations by the Governor in Council.

[175] However, current regulatory reform initiatives have in part focused on further delegation of form making authority. The proposed Regulations Act would allow the Governor in Council to delegate to a Minister the authority to prescribe a form by regulation. In turn, the Minister was given the power "to authorize any person to determine the format of the form and any incidental information to be provided on it and the method of submitting the form, including paper and electronic formats and methods."[35]

[176] Allowing the CBCA Director to specify the content, electronic or other form and the manner of submission or issuance of notices and documents would streamline the process of keeping the forms up to date. Currently, regulations, even simple housekeeping changes to the instructions on the forms, can take a year or longer to bring into force. This delay can result in confusion and inconvenience to users and hamper the efficiency with which the Act would otherwise be administered. Delays inherent in the current process contribute to regulatory delay, thereby increasing the regulatory burden on and cost to business.

[177] Concerns might be raised about the impact of any changes to forms upon users of the CBCA, including corporations, their employees and directors, and their advisors. There may be some concern about the introduction of substantive rules through a change in forms or about an attempt to legislate through forms or to make unreasonable demands on the public. However, there is no evidence that the current regulatory process would in any real way preclude such a danger or that a streamlined process would lead to abuse. For example, forms are currently made under the Income Tax Act[36] by the Minister of National Revenue outside the regulatory process. Procedures would be adopted internally to ensure that any changes to the forms or orders adopted are lawful and that there has been an appropriate opportunity for users to comment.

---

[35] Bill C-84, s. 20.

[36] R.S.C. 1985 (5th Supp.), c. 1, as amended, subs. 248(1) "prescribed".

[178] Another concern is that any provisions for electronic filing and issuance of documents must be carefully drafted to ensure authenticity of the documents and acceptance of the documents by the public and in legal proceedings. Many of the matters are very complex, such as the "signature [of notices or documents] in electronic or other form or their execution, adoption or authorization in a manner that pursuant to the regulations is to have the same effect for the purposes of this Act as their signature". However, these concerns arise whether the matters are dealt with by regulations made by the Governor in Council or by orders issued by the CBCA Director. The key is adopting the right rules to ensure authenticity and reliability of documents sent to or issued by the Director.

- Exemptions

[179] A second issue is whether to clarify that certain individual exemption orders made by the Director under the CBCA are not subject to the application of the Statutory Instruments Act and to consider whether blanket exemption orders should also be exempted.

[180] Section 2 of the SIA broadly defines those "regulations" that are subject to specific requirements for examination,[37] registration[38] and publication in the Canada Gazette.[39] A regulation is defined to include "a statutory instrument ... made in the exercise of a legislative power conferred by or under an Act of Parliament". The courts have characterized an instrument as having a legislative nature if it embodies a rule of conduct of general application.[40] "Statutory instrument" "means any rule, order, regulation, ordinance ... or other instrument issued, made or established ... in the execution of a power conferred by or under an Act of Parliament".[41]

[181] It can be argued that "blanket" exemption orders issued by the CBCA Director under s. 258.2[42] to exempt the filing of certain classes of documents would fall under the definition of "regulation" under the SIA. Additionally, exemption orders of the CBCA Director made under other sections of the statute (subss. 2(8), 10(2), 82(3), 127(8), 151(1), 171(2) and s. 156), even though applying to specific persons, might potentially be seen to be "regulations" in that they could be viewed as modifying the scope of legislative statutory

---

[37] By the Clerk of the Privy Council, in consultation with the Deputy Minister of Justice (s. 3 of the SIA).

[38] Section 6 of the SIA.

[39] Section 11 of the SIA.

[40] See Re: Manitoba Language Rights [1992] 1 S.C.R. 212 at 224.

[41] Subsection 2(1) of the SIA.

[42] When the section is proclaimed in force.

rules. If this is the case, an argument could be made that these types of orders are "regulations" within the meaning of the SIA and should follow the regulatory process.

[182] However, having to follow the full regulatory process appears inappropriate in the case of exemptions granted to specific applicants. Application of the full regulatory process would be impractical due to the number of orders made by the CBCA Director under these provisions (approximately 100 annually). Moreover, such exemptions are currently often granted on a very timely basis, and are frequently requested by clients on an urgent basis. If such orders were subject to the full regulatory regime, unreasonable difficulties and delays in the completion of corporate transactions may be unnecessarily imposed.

[183] Under the SIA itself, regulations may be issued exempting classes of regulations from requirements of examination, registration and/or publication where "registration thereof is not reasonably practical due to the number of regulations of that class" or where "the regulation or class of regulation affects or is likely to affect only a limited number of persons and that reasonable steps have been or will be taken for the purpose of bringing the purport thereof to the notice of those persons affected or likely to be affected by it".[43] Individual CBCA exemption applications and orders meet at least some of these conditions in that they affect a limited number of persons, often only the applicants. The applicants themselves are obviously fully aware of the instrument and its effect. It is possible that third parties could be prejudiced by such exemption orders, but the Director has the authority to consider any prejudice to third parties in deciding whether to grant or refuse an application. In some cases, the Director is expressly required to ensure there is no prejudice to shareholders or others in making an order.[44] The applicant and any other person who feels aggrieved by the decision is entitled to apply to a court for an order requiring the Director to change the decision.[45]

[184] Also at issue is whether blanket exemption orders to be issued under s. 258.2 should be subject to the full regulatory process under the SIA. These exemptions are clearly general in scope and could apply to a large number of persons. Therefore, application of the regulatory process appears appropriate to protect the public and ensure public input. On the other hand, an order may only be granted under s. 258.2 to exempt the filing of documents where documents containing similar information are publicly filed elsewhere. There appear to be less concerns about protection of the public in such circumstances. One option would

---

[43] Subsection 20(b) and paragraph 20(c)(ii) of the SIA.

[44] See CBCA subss. 2(8) and 171(2).

[45] CBCA s. 246.

be to exempt orders made under s. 258.2 from the regulatory process but require them to be published in the Corporations Bulletin.[46]

Recommendations:

[185] With respect to CBCA forms, amend the CBCA by:

1. repealing pars. 261(1)(c) and (c.1);

2. adding a new section permitting the CBCA Director to specify, by order, the contents and electronic and other forms of notices and documents required to be sent to or issued by the Director and any other matter respecting the sending or issuance of notices and documents in electronic or other form (similar to those items set out in par. 261(1)(c.1));

3. expressly providing that any such order is not subject to the provisions of the SIA; and

4. amending the definition of "prescribed" in subs. 2(1) to mean:

   (a) in the case of the contents and electronic and other forms of documents and notices required to be sent to or issued by the Director, and any other matter respecting the sending or issuance of notices and documents in electronic or other form, specified by order of the Director;[47] and

   (b) in any other case, prescribed by regulation.

[186] With respect to exemption orders made by the CBCA Director,

5. For greater certainty, amend the CBCA to expressly provide that any exemption orders made by the CBCA Director under subss. 2(8), 10(2), 82(3), 127(8), 151(1), 171(2) and s. 156 are not subject to the SIA.

6. Amend the CBCA to provide that any blanket exemption orders made by the CBCA Director under s. 258.2 (when proclaimed in force) are not subject to the SIA and to require such s. 258.2 orders to be published in the Corporations Bulletin.

---

[46] Currently, a number of items must be published in the periodical, including exemptions issued by the CBCA Director under subss. 127(8) and 151(1).

[47] The term "prescribed" must be amended because the CBCA refers to certain notices or documents in "prescribed form". See, for example, subs. 19(2).

## XXVI. PRE-PUBLICATION PERIOD FOR CBCA REGULATIONS (subs. 261(2))

Issue:

[187] Whether to amend the CBCA to shorten the current 60 day pre-publication requirement for regulations to 30 days.

Background:

[188] Currently, subs. 261(2) requires the Minister to publish in the Canada Gazette and in the Corporations Bulletin a copy of every regulation that the Governor in Council proposes to make under the CBCA "sixty days before the effective date thereof". The 60 day requirement is not common. Usually, a thirty day pre-publication period is imposed.

[189] Reducing the pre-publication period is unlikely to prejudice the ability of CBCA users to adequately comment on proposed regulations. The shorter period will speed up somewhat the current lengthy regulatory approval process.

Recommendation:

[190] Amend subs. 261(2) of the CBCA by replacing the word "sixty" with "thirty".

## XXVII. CERTIFICATE OF COMPLIANCE (subs. 263(2))

Issue:

[191] Whether subs. 263(2) concerning certificates of compliance be clarified by:

1. changing or removing the marginal note which refers to the paragraph as certificates of compliance; and

2. Separating subs. 263(1) dealing with annual returns from subs. 263(2) dealing with certificates of compliance.

Background:

[192] Subsection 263(2) currently provides that:

> The Director may furnish any person with a certificate that a corporation has sent to the Director a document required to be sent to him under this Act.

[193] Although the marginal notes refer to this document as a certificate of compliance, the statutory wording itself does not. A concern has been raised that referring to this document as a certificate of compliance may lead some to believe that the issuance of such a certificate signifies complete compliance with the CBCA.

[194] The purpose of a certificate of compliance is to act as a verification from the CBCA Director that certain basic statutory filings, such as annual forms, have been made and therefore the corporation has not been, and is not about to be, dissolved for such a failure. In some instances however, it is not possible for the Director to know if a corporation is in complete compliance with the Act. For example, a change of directors may have occurred, but no notice of change of director has been filed.

[195] Certificates of compliance are most often used as a tool to facilitate corporate transactions where assurances are made to a financial institution or other commercial party that the corporation is in compliance with the statute. From this perspective, it may be important to make it clear that only certain filings are being attested to in the certificate of compliance and that the issuance of the certificate does not certify complete statutory compliance. This seems to be the reason for the way the section is currently worded.

[196] Along with annual returns, the payment of certain annual fees is an administrative matter that may be important to include in a certificate of compliance. It seems reasonable that a party requiring the corporation to produce a certificate of compliance would be interested in the status of fee payment particularly as failure to pay these fees may result in the corporation being dissolved.

[197] Neither the Ontario BCA nor the Bank Act have a provision equivalent to subs. 263(2) of the CBCA.

[198] A related concern is that having the requirement to file annual returns (subs. 263(1)) in the same section as the certificate of compliance, may lead to the confusion that such certificates relate only to the filing of annual returns. An option to clarify this may be to separate subs. 263(1) from subs. 263(2).

Recommendations:

1. Change the margin note for subs. 263(2) to read "Certificate".

2. Amend subs. 263(2) by adding the words "or fees" after the word "document."

3. Separate subs. 263(1) from subs. 263(2).

Option:

[199] Repeal subs. 263(2);

## XXVIII. DIRECTOR'S CONSENT

Issue:

[200] Whether to amend the CBCA to require persons to consent in writing to become directors of a corporation.

Background:

[201] Currently, the CBCA does not require that a director consent in writing to being appointed to the board of directors. "First directors" are named in the notice of directors which must be filed with the articles of incorporation. These directors hold office until the first shareholder's meeting where they are either elected to the board or replaced by new directors. Where there is a discrepancy regarding whether a person is in fact a director, that person must apply to court for a ruling that they are not a director (s. 145).

[202] The concern has been raised that because there is no provision requiring the consent of directors before being appointed to the board, there is the possibility that individuals may be listed in the articles of the corporation as directors without their consent and perhaps even knowledge. The liabilities imposed on directors are extensive. It may not be reasonable to require an individual, who was not aware or even refused a nomination, to bear the expense of a court application to determine their status as directors.

[203] To address this concern, it has been suggested that corporations be required to maintain written consents from each of their directors. In the case where an individual disputes their appointment or election as a director, the CBCA Director could be empowered to require the corporation to produce written consent confirming the individual's status as a member of the board. In the absence of such evidence, the individual contesting the point would be entitled to be treated as not being a director of the corporation.

[204] There may however be potential for abuse under this provision. There may be situations where individuals do not give written consent yet act as directors. It may also be the case that written consent is purposely withheld in order to act as a shield to someone acting as director. In both of these cases, individuals could be acting as directors and avoiding their duties and liabilities by simply not signing a written consent. In this case, the burden of going to court to prove that the individual was in fact a director, even though no consent was signed, would then be shifted onto the shareholders of the corporation or other third parties.

[205] The Ontario BCA recently added a new provision (subs. 119(9)) which states that:

> The election or appointment of a director under this Act is not effective unless the person elected or appointed consents in writing on or within 10 days after the date of the election or appointment.

Options:

1. Status quo. Do not amend the CBCA to require written consent of directors.

2. Amend s. 106 of the CBCA to include a provision similar to the Ontario BCA subs. 119(9).

3. In conjunction with option 2, amend the CBCA to give the Director powers to investigate in cases where an individual has not signed a written consent and seeks to rely on this as a defence to the claim that he/she is a director. This may address the concern that the mere lack of written consent is sufficient to avoid director liability.

4. Change Form 6 to require the signature of each director.

**Contact: Brian Dillon**
**Senior Project Leader**
**Corporate Law Policy Directorate**
**Industry Canada**

**Telephone: (613) 952-2118**
**Fax: (613) 952-2067**
**Internet: cbca.review@ic.gc.ca**

**Trish Harrison**
**Policy Analyst**
**Corporate law Policy Directorate**
**Industry Canada**

**Telephone: (613) 952-3652**
**Fax: (613) 952-2067**
**Internet: cbca.review@ic.gc.ca**