Report No. 36

PROPOSALS FOR A NEW ALBERTA BUSINESS CORPORATIONS ACT

VOLUME 1

REPORT

INSTITUTE OF LAW RESEARCH AND REFORM

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ABBREVIATIONS USED IN REPORT

LEGISLATION
(References to Amendments not included)

ACA	Alberta Companies Act, R.S.A. 1970 c. 60.
ABCA	Proposed Alberta Business Corporations Act.
BCCA	British Columbia Company Act, R.S.B.C. 1979 c. 59.
CBCA	Canada Business Corporations Act, S.C. 1974-75, c. 33
Man. C.A.	Manitoba Companies Act, S.M. 1976 c. 40.
OBCA	Ontario Business Corporations Act, R.S.O. 1970 c. 53
SBCA	Saskatchewan Business Corporations Act, R.S.S. 1978 c. B-10.

OTHER

Gower	The Principles of Modern Company Law, 3rd ed., L.C.B. Gower, 1969.
Gower, Draft Ghana Code	Final Report of The Commission of Enquiry into the Working and Administration of the Present Company Law of Ghana.
Kimber Report	Report of the Attorney General's Committee on Securities Legislation in Ontario, 1965.
Lawrence Report	Interim Report of the Select Committee on Company Law, 1967.
Proposals	Proposals for a New Business Corporations Law for Canada. Volume I. Commentary, Robert W.V. Dickerson, John L. Howard, and Leon Getz, 1971.
Draft CBCA	Proposals for a New Business Corporations Law for Canada, Volume II, Draft Canada Business Corporations Act, Robert W.V. Dickerson, John L. Howard, and Leon Getz, 1971.
UCC	Uniform Commercial Code, prepared under the joint sponsorship of the National Conference of Commissioners on Uniform State Laws and the American Law Institute.

PROPOSALS FOR A NEW ALBERTA BUSINESS CORPORATIONS ACT

VOLUME 1

REPORT

I.

INTRODUCTION

1. Form of Proposals

We have undertaken to put forward proposals for an Act to reform the law of Alberta relating to business corporations. We have prepared our proposals in two volumes. In this first volume, which we have entitled "Report", we will discuss the principles and policies upon which a business corporations statute for Alberta should be based. In the second volume, which we have entitled "Draft Act and Commentary", we put forward a draft Alberta Business Corporations Act, together with comments on many of the sections. The Comments sometimes cover some of the subject matter of the Report, but their purpose is to explain the relationship of sections of the Act to each other and to the principles and policies discussed in the Report; to explain departures from the Canada Business Corporations Act and in some cases from the Alberta Companies Act; and to discuss minor points of principle and policy which are not dealt with in the more generalized Report.

In the course of our Company Law Project we published 16 discussion papers. We also published our Draft Report No. 2, Proposals for a New Alberta Business Corporations Law for Alberta, and another volume containing a proposed Alberta Business Corporations Act and commentary. These documents were issued for the purpose of setting forth our tentative views and obtaining comment and advice upon them. The Report and the Draft Act and Commentary which we are now issuing cover the same subject matter as the earlier documents and supersede them. The earlier documents should therefore be discarded: they will not provide any substantial amount of additional information for the researcher, and they may well mislead him.

Each of the two volumes, the Report and the Draft Act and Commentary, can be read by itself. The interested reader however should read both, either in whole or in relation to any particular subject of special interest. Because of the different purposes of the two documents, the subject matter is ordered differently in them, but we hope that the cross-references will enable the reader to move easily from one to the other.

2. Historical Background and Reasons for Reform

The Alberta Companies Act was enacted in its present form in 1929 and was based upon the English Companies Acts, commencing with the Act of 1862. The ACA has been amended many times, but it has not been thoroughly reviewed, and it has become a patchwork of old and somewhat newer ideas and draftsmanship. We think that there is general agreement that it should be thoroughly reviewed; that its structure should be rationalized; its drafting made simpler and more intelligible; and that it should incorporate the advances which have been made in business

corporation law in Canada, the United Kingdom, and the United States.

There is another major reason for the enactment of a new business corporation statute in Alberta. That reason is that, for the first time, it is possible to achieve a substantial degree of uniformity between the two systems of company law in force in Alberta, the system governing federally incorporated companies and the system governing provincially incorporated companies. Considerations of uniformity with the business corporation law of the major commercial provinces also suggest the enactment of a new business corporations statute for Alberta; Manitoba and Saskatchewan have adopted most of the Canada Business Corporations Act, and the government of Ontario proposes to bring the Ontario Business Corporations Act into substantial conformity with it. Parliament and the Ontario Legislature made the achievement of substantial uniformity possible by abandoning the discretionary system of incorporation by letters patent and by adopting a system of virtually automatic incorporation following upon the filing of documents in form prescribed by law; the latter system is consistent with the system which Alberta has had from the beginning. We think that in the long run the achievement of substantial, though not slavish and unchangeable, uniformity, will more than justify the time and cost necessary to bring existing companies under a regime substantially uniform with that of the Canada Business Corporations Act, even though it will involve substantial departures from the scheme of the ACA and from a corporate constitution based upon a memorandum and articles of association.

Additional reasons for specific reforms will appear more clearly from the general discussion contained in this Report and from the comments following the sections of the Draft Act.

3. Scope of Project

Our purpose is to recommend the adoption of a statute embodying the basic law of business corporations. It should apply to all business corporations incorporated under the ACA or its predecessors back to territorial times, and it should apply to all new business corporations incorporated after its commencement. It should also make provision for the registration of business corporations incorporated in other jurisdictions.

The proposed Alberta Business Corporations Act should not govern the following:

(a) corporations incorporated by special Acts of the province, or incorporated under statutes regulating specific businesses, such as the Trust Companies Act or the Railway Act, except to the extent the other statute incorporates some or all of it by reference.

(b) corporations formed for purposes other than profit. For the time being, any not-for-profit companies incorporated under the ACA or its predecessors should remain subject to the ACA. We contemplate that another statute will replace the ACA and the Societies Act insofar as not-for-profit companies are concerned, but that is for the future.

(c) the regulation of subjects which are more properly covered by securities legislation. We propose that the regulation

of take-over bids and insider reporting should be left to securities legislation. We do propose however that the ABCA deal with proxy solicitation, the compulsory acquisition of a small balance of shares after a substantially successful take-over bid, and the imposition of civil liability for the misuse of insider information.

We would prefer that the proposed ABCA not deal with the subject of the registration of corporate mortgages and debentures, as we think that it would be more appropriate for legislation dealing with the registration of personal property securities to do so. We do propose however that the existing provisions of the ACA be brought forward into the proposed ABCA pending the enactment of a Personal Property Securities Act and that two changes of some importance be made in them.

4. Objectives of Project

We have given thought to the question whether or not the proposed ABCA should impose upon business corporations duties of the kinds contemplated by the term "good corporate citizenship". We have concluded that it should not do so. No doubt the conduct of business corporations, like the conduct of individuals, should conform to standards imposed in the public interest, e.g., business corporations should observe obligations to refrain from damaging the environment and to refrain from engaging in unfair trade and labour relations practices. We think however that rules of conduct of that kind should be imposed by legislation relating to those subjects, and we do not think that they should be dealt with by legislation providing for the creation and government of business corporations. Another subject which is sometimes included in the term "corporate citizenship" (the meaning of which varies from user to user) is that of the participation by employees in management; while the adoption of such a system might well affect corporate structures and procedures, we do not think that it should be compulsory at this time as a matter of business and corporation law.

If one of the principal objectives of the law of business corporations is business efficiency, the following should be considered when deciding what that law should be:

(a) Clarity. If possible, business corporation law should be accessible and understandable to a reasonably literate person. Certainly, it should be accessible and understandable to lawyers and accountants who have not engaged in extensive specialization.

(b) Flexibility. Company law should facilitate legitimate business activity, though that objective has to be balanced against the protection of creditors and shareholders.

(c) Cost. We think it inevitable and appropriate that there be public officials involved in the administration of the ACA and its successor, and that the cost of maintaining them should be borne by those who benefit from incorporation. Business corporation law, however, should be designed to minimize that cost by keeping down the things that have to be done by public officials.

There are also inevitable costs associated with the maintenance of corporate records and with the performance of

obligations imposed by law upon business corporations, including the cost of professional advice and assistance. Again, efforts should be made to keep the whole process as simple and inexpensive as is consistent with the achievement of the other objectives of the law.

(d) Uniformity. We have already mentioned the desirability of uniformity between federal and Alberta law governing business corporations and among the laws of the various provinces governing business corporations. In view of the importance of this subject, we will now deal with it at some length.

Both the federal and Alberta systems of business corporation law are necessarily in force in Alberta, and a lack of substantial uniformity between them has had unfortunate results. One result is ignorance of the law, since it is much more difficult for lawyers, accountants and businessmen to be familiar with two very different systems of law than with one system or two similar systems. Another result is cost: lawyers, accountants and businessmen take time to become familiar with two systems of law, and must maintain two very different routines for incorporation and corporate proceedings and accounting. There is therefore a strong reason for bringing about a substantial degree of uniformity between the CBCA, which is likely to be with us for a long time, and its Alberta counterpart.

The great obstacle to uniformity between the federal and Alberta systems of business corporation law has been the fundamental difference between the systems of incorporation embodied in them. The federal system formerly required the issue of letters patent prepared by government officials and gave substantial discretions to those officials; the Alberta system requires the Registrar of Companies to issue a certificate of registration upon receipt of documents in statutory form. The CBCA, however, abandoned the letters patent system and adopted a system which, in principle, is the same as the Alberta system. In view of that change, we think it worthwhile to bring the Alberta system into substantial uniformity with the federal system, even though very great changes in form will have to be made.

The second great reason for substantial uniformity between federal and Alberta corporations law is that it will bring about substantial uniformity with the law of several provinces. Manitoba and Saskatchewan have adopted new business corporation legislation based upon the CBCA, and similar legislation is being considered by New Brunswick, Prince Edward Island and Newfoundland. The Ontario Business Corporations Act already has much in common with the CBCA in principle, though with differences in detail and in form, and the government of Ontario has made legislative proposals which would bring the OBCA very close to it indeed.

There is a third reason why uniformity should be sought. A statute of the magnitude of a business corporations statute inevitably requires judicial interpretation. The process of judicial interpretation, and the resulting identification of weaknesses in the statute, will be more quickly and efficiently carried out by the courts of several jurisdictions than by the courts of any one of them. Also, the analysis of one of a group uniform statutes by practitioners and academic lawyers will

advance the understanding of all the statutes in the group. To the extent that there is uniformity, therefore, the efforts of business people and courts to understand the statute will be facilitated, and the need for amendment will more quickly and forcefully be brought to the attention of governments.

Finally, we think that the CBCA is an excellent piece of legislation which takes into account the modern work done in Canada and the United States. We think it suitable to current and foreseeable conditions in Canada.

For all the reasons which we have set forth we think that the proposed ABCA should follow the CBCA unless there is good reason why it should not. We have therefore examined and considered carefully the whole of the CBCA and each of its parts and sections, and have followed it in the draft ABCA in the absence of good reason to the contrary. We think that the draft ABCA achieves substantial uniformity with the CBCA, while making some improvements upon it and, of course, deleting some of its subject matter and adding some additional subject matter.

5. Major Proposed Specific Reforms

Provisions throughout the draft Act would make detailed changes in the business corporation law of Alberta, and the effect of those detailed provisions can be seen only by a detailed examination of the draft Act and the comments on each section. We will however refer here to some major specific reforms. These are as follows:

Part 1: (Incorporation)

(a) Adoption of articles of incorporation as the incorporating document.

(b) Provision for the one shareholder corporation.

(c) A provision by which a business corporation may adopt and be bound by a pre-incorporation contract, and which regulates the rights of the parties whether or not the contract does so.

Part 3: (Capacity and Powers)

(a) Abolition of the doctrines of ultra vires and constructive notice.

(b) Rationalization and extension of the internal management rule.

Part 5: (Corporate Finance)

(a) Abolition of partly paid shares and of par value shares.

(b) Changed provisions for the purchase by a corporation of its own shares. (Our previous report on the subject had application only to the ACA.)

Part 6: (Security certificates, registers and transfers)

(a) Adoption of the principle of negotiability of share certificates and certificates representing debt obligations.

(b) Clarification of the rights and obligations of issuers, owners and purchasers of securities, and of the rights and obligations flowing from the relationship of broker and customer.

Part 7: (Division 1, Trust Indentures)

Imposition of non-avoidable duties of good faith, care and skill upon trustees under trust indentures.

Part 7: (Division 2, Registration of Debt Obligations)

A provision that a mortgage or debenture does not obtain priority until it is registered, and a provision allowing late registration without court order but subject to intervening rights of third parties.

Part 8: (Receivers and receiver-managers)

Imposition of duties and possible liabilities on receivers, and imposition of possible liabilities on those for whom they are appointed.

Part 9: (Directors and Officers)

(a) A requirement that companies which distribute securities to the public have at least two outside directors.

(b) Provision for the making of by-laws by the directors of a corporation, subject to confirmation by the shareholders, unless the constitution otherwise provides.

(c) Provision allowing optional cumulative voting in the election of directors.

(d) Provision for the removal of directors by ordinary resolution unless a unanimous shareholder agreement otherwise requires.

(e) Imposition of duties of honesty, good faith, care, diligence and skill upon directors and officers.

Part 11: (Shareholders)

Provision for a unanimous shareholder agreement to govern many aspects of the corporate structure, the relationship between the shareholders and directors and which will bind transferees of the shares.

Part 13: (Financial disclosure)

Provision requiring a distributing corporation to have an audit committee.

Part 14: (Fundamental change)

Provision enabling a shareholder to "dissent" from some kinds of "fundamental change" which may amount to a change in the basic ground rules governing the constitution and business of the corporation, and, by dissenting, to require the corporation to buy out his shares at fair value.

Part 17: (Liquidation and Dissolution)

Simplified provisions for liquidation and dissolution of corporations.

Part 18: (Investigation)

Amplified provisions for carrying on the investigation of a corporation's affairs under court order where it appears that there may be fraud or oppression, the right to apply for the investigation being extended to any security holder and to the Director of the Securities Commission.

Part 19: (Remedies, offences and penalties)

Provisons allowing a minority shareholder to bring a derivative action in the name of the corporation with leave of the court, and enabling the minority shareholder to apply for appropriate relief in cases of oppression and unfair disregard of his interests, thereby avoiding the principal difficulties of the rule in Foss v. Harbottle.

6. Nomenclature: "Corporation" and "Body Corporate"

In order to avoid confusion we will mention here one drafting matter which affects the Report as well as the Draft Act and Commentary. The draft Act follows the CBCA in using the word "corporation" to denote a corporate entity for which the draft Act is the basic corporation law, that is a corporate entity incorporated under it or "continued" under it. The draft Act also uses the description "body corporate" to include a corporate entity wherever or however incorporated, including corporate entities incorporated or continued under it. The distinction is artificial, but a distinction of that kind is necessary for the purposes of the draft Act, and we think that it would be highly confusing if the draft Act were to use "company" in lieu of the CBCA's "corporation" We think that the departure from the existing ACA usage is justified.

Accordingly, when we use the word "corporation" throughout this Report, the draft Act and annotations, we mean a corporation incorporated under the proposed Alberta Business Corporations Act, and when we use the description "body corporate" we mean any body corporate however and wherever created.

7. Name of Proposed Act

The recent reform of Ontario company law was carried out under the name "Ontario Business Corporations Act" The reform of federal company law was carried out under the name "Canada Business Corporations Act". The reform of Saskatchewan company law was carried out under the name "Saskatchewan Business Corporations Act". While British Columbia and Manitoba have not followed that nomenclature, we think that the name "Alberta Business Corporations Act" is the most descriptive name that can be adopted, and that a usage corresponding to that of Ontario, Saskatchewan and Canada will provide the greatest assistance in locating the Act in indexes. We therefore propose to refer to the proposed legislation as the proposed "Alberta Business Corporations Act", or, "ABCA".

II.

THE STRUCTURE OF THE CORPORATION

1. Incorporators

(a) Number of incorporators

Under the ACA, it is necessary to have three incorporators for a public company and two for a private company. No one suggests that those numbers should be increased; the suggestion is often made, however, that a single incorporator should be allowed to incorporate a corporation.

The notion that a corporation with one member may have a legal personality separate from the legal personality of that member is a difficult one, and the historical use of the word "company", since it is based upon the notion of a group, made it even more difficult to accept a company which is not composed of a group. However, the corporation sole, with its only member the incumbent of a particular office, has been known since the middle ages; and it has been recognized since Salomon v. Salomon & Co. [1897] A.C. 22 that a single individual can be the beneficial owner of all the shares in a company without losing the benefits of incorporation. No doubt it can be argued that the benefits of limited liability should be reserved for undertakings which require the raising of capital from large numbers of individuals, but that argument has not prevailed. That being so, we see no reason in policy why a single shareholder, in order to obtain limited liability and any other benefits which incorporation may give him, should have to go to the trouble of finding a dummy shareholder to hold shares for him or why he should have to go through the additional paper work and troublesome formalities arising from the existence of a shareholder who has no practical function. The one-shareholder company has been recognized by the business corporations statutes of Canada, British Columbia, Manitoba, Ontario and Saskatchewan, and one-shareholder professional corporations have been recognized by the Alberta Companies Act. We propose that the ABCA make provision for the one-shareholder corporation, and s. 5 of the draft Act would do so.

(b) Qualification of incorporators

The CBCA disqualifies minors, persons of unsound mind, and undischarged bankrupts from acting as incorporators. The OBCA disqualifies minors. Neither the ACA nor the BCCA disqualifies anyone.

We see no reason for disqualification of incorporators, and we see reasons against disqualification. We are not aware that the lack of disqualification in the ACA has given rise to an evil which should be remedied. We think that it will be unusual for a minor, a person of unsound mind, or an undischarged bankrupt, to incorporate a corporation; but, if one does, we think that the consequences of holding that the apparently incorporated entity does not exist are worse than consequences of holding that it does. Further, we do not see any effective way of enforcing a qualification provision without requiring additional amounts of paper work by the incorporators and policing by the Registrar, both of which are undesirable, and which would be unnecessary and meaningless in all but a very few incorporations.

(c) Prescribed incorporation

A provision requiring the incorporation of a business venture involving more than 20 persons appeared in the first English Companies Act of the last century and has been carried forward to this day in England; in ACA s. 7; and in the BCCA. The provision was probably intended to abolish deed of settlement companies. Two reasons may be advanced for keeping it today. Firstly, a number of partners in excess of 20 seems too many for the foundation of mutual trust which is essential to the partnership relation. Secondly, the more certain and effective protection afforded to each of a large group of shareholders should be made available to those who would otherwise participate in syndicate agreements.

It is unlikely that more than 20 persons would for ordinary business reasons choose to carry on an ordinary business venture in the cumbersome form of a partnership. In the oil industry and in some other areas of activity, however, tax reasons have suggested the use of the partnership, and particularly the limited partnership, and in the professions, there are large legal and accounting firms with more than 20 partners.

We do not think that there is a public interest in prohibiting large partnerships. We do not think that the protection of individual partners requires such a prohibition, or, indeed, would be advanced by it. In our Draft Report, we expressed the same opinion, but went on to put forward a somewhat revised counterpart of ACA section 7 which we were prepared to recommend if the need for it was demonstrated. We did not receive any suggestion that such a section should be incorporated in the proposed ABCA, and the Institute of Chartered Accountants of Alberta though that it should not. Accordingly, we have not included in the draft Act a section similar to ACA section 7.

2. Incorporation Procedure

(a) Documents to be filed

(i) Articles of incorporation

For reasons which we will give in our discussion of the constitution of the corporation, the incorporators should be required to file articles of incorporation with the Registrar of Corporations. The contents are described in s. 6 of the draft Act.

(ii) By-laws

The ACA does not require a company to have articles of association, but it appears correct to say unless articles of association are filed with the Registrar of Companies the "Table A" articles will apply. The CBCA does not specifically require a corporation to have by-laws, and it does not require that by-laws be filed or even that they can be (though, in effect, anything which can be included in the by-laws can be included in the articles of incorporation: CBCA s.6(2)).

We had originally thought, for two reasons, that the proposed ABCA should require the filing of corporate by-laws. The first reason was that the by-laws would then be available for inspection by outsiders. The second reason was that if the

corporation's records are lost, or if there should be controversy about the contents of the records, the Registrar's office would have an official copy of the by-laws. We have since concluded that that opinion did not give sufficient weight to the effect of two important changes which the proposed ABCA would make.

The first change made by the proposed ABCA would be the abolition of constructive notice. The by-laws will not affect outsiders, and outsiders will therefore have no need to see the by-laws. Section 17 of the draft Act would abolish the present rule that an outsider is taken to have constructive notice of documents filed with the Registrar, and s. 18 would estop the corporation from asserting as against an outsider that the by-laws have not been complied with, or from denying as against an outsider the customary authority of the individuals who purport to act for corporation; the cumulative effect of these provisions is that an outsider need not examine the by-laws. An insider who is fixed with contrary knowledge by the concluding words of section 18 would not be assisted by, or have need of, a copy of the by-laws at the Registrar's office. If his knowledge is complete, he will not need any help. If his knowledge is not complete, he will usually have access to the by-laws at the corporation's records office. It is theoretically possible that he may not have that access, but if he is in the special relationship contemplated by s. 18, it is not too much to expect that he will call for a production of the by-laws as a pre-condition of dealing with the corporation.

The second important change which would be made by the proposed ABCA is that the by-laws of an ABCA corporation would be of much less importance than the articles of association of an ACA company: what is normally set out in by-laws is the less important provisions normally found in articles of association. Further, by-laws can be adopted and changed by an ordinary majority, and the preservation of a copy of the by-laws at a public office is therefore not a protection for the entrenched rights of a minority. Finally, a requirement that the Registrar accept, verify and store by-laws would impose upon him a substantial administrative burden; that burden would have to be borne if there is an important interest to be served by bearing it, but, for the reasons which we have given, we do not think that there is an important interest to be served. If there is an occasional case in which the maintenance of an official copy of by-laws is important, the corporation can include their subject matter in the articles of incorporation.

(iii) Notice of registered and records office and postal address for service

S. 19(2) of the draft Act would require the filing of a notice of registered office. It would also require the corporation to file notices of a records office and a postal address for service, if any. The registered office, records office and postal address are discussed at p. 33 and following of this Report.

(iv) Notice of directors

S. 101(1) of the draft Act would also require the filing of a notice of directors.

(b) Certificate of incorporation

(i) Right to obtain certificate

ACA s. 15 provides that the prescribed number of incorporators, by complying with the statutory requirements, "may . . . form an incorporated company" for any lawful purpose permitted by the ACA. ACA s. 26 provides that on the registration of the memorandum of association of a company, "the Registrar shall issue a certificate" of incorporation. The effect of these provisions is that anyone who complies with the ACA is entitled to incorporate a company and receive a certificate of incorporation.

The Canada Corporations Act was different. The incorporators applied for letters patent, and the grant was discretionary. There was therefore a fundamental difference between the incorporation of memorandum and articles companies under the ACA and the incorporation of letters patent companies under the Canada Corporations Act.

The CBCA has moved away from the Canada Corporations Act. CBCA s. 5 provides that one or more qualified individuals, or one or more bodies corporate, may incorporate a corporation by signing articles of incorporation and delivering to the Director those articles of incorporation and notices of registered office and of directors. Upon receipt of the articles of incorporation the Director is required to issue a certificate of incorporation. There are of course some limitations upon these provisions, but the CBCA has adopted the fundamental principle of incorporation as of right, and has therefore made it possible to achieve substantial uniformity between the federal and provincial business corporation statutes. Ss. 5 and 8 of the draft Act follow their CBCA counterparts with minor variations.

(ii) Conclusiveness of certificate of incorporation

Professor L.C.B. Gower (Gower, p. 259) said that it appears that the English counterpart of s. 27 of the Alberta Companies Act "must cover" a case in which a company does not fulfill the essential requirements for registration, and that "once a certificate has been granted no one can question the regularity of the incorporation". In Alberta, someone has questioned it, and the Court of Appeal has held, by a majority in at least one kind of case it can be questioned successfully: C.P.W. Valve & Instrument Ltd. v. Scott (1978) 5 Alta. L.R. (2d) 271. There the allegation was that a company did not exist on the date which appeared on the certificate of incorporation (i.e., that the certificate had been issued one day bearing the date of the preceding day) and therefore could not on the date of the certificate validly place an order for goods under a pre-existing contract between the incorporators and others. The court relied on Letain v. Conwest Exploration Co. [1961] S.C.R. 98, a case under the Dominion Companies Act, and held that, while the date on its certificate of incorporation may establish that a company acquires status from that date, it does not negate a breach of contract between other parties which existed before the certificate was issued. It said that ACA s. 27, which makes the certificate of incorporation conclusive proof of regularity, has no application to such a case; and that s. 28 which gives the company status from the date of incorporation, does not do so for all purposes.

Leaving aside for the moment the question of the antedated certificate, we think that there is general agreement that the certificate of incorporation must be taken to establish conclusively that a company exists. The possible consequences of holding that some defect in the incorporation procedure prevents a company from coming into existence are too severe, and the need for certainty is too great, to permit the certificate to be challenged. We recommend that proposed ABCA go at least as far as the ACA now does.

What then of the antedated certificate of incorporation? At first blush it seems wrong that a certificate should afterwards establish that a corporation existed on a certain day if an investigation on that day would have established that it did not. There are, however, countervailing considerations. It is of the utmost importance that everyone, whether inside or outside the corporation, be able to order his affairs in the certain knowledge that a corporation exists if a certificate of incorporation says it does; business cannot be effectively transacted if there is uncertainty about the existence of a legal entity which is a party to a transaction. Then, while the Registrar in an ideal world would no doubt be able to inspect every set of incorporation documents and issue a certificate of incorporation within minutes of the deposit of the documents with him, it must be recognized that he will often be physically unable to do so; and it must be recognized also that the legitimate exigencies of business often demand that business people enter into a transaction on the current day and not wait until the Registrar can carry out his administrative processing. For these reasons we think that the proposed ABCA should be so worded that a certificate of incorporation will be incontestable for all civil purposes. That would entail the consequence that the Registrar would have the legal power to antedate his certificate to a date before he receives incorporating documents (or even to issue a certificate without any supporting documents), but we think that the importance of establishing the conclusiveness of the certificate of incorporation far outweighs the danger that the Registrar might abuse his powers. S. 9 of the draft Act is intended to give effect to these views.

3. Kinds of Companies

(a) Closely held and widely held companies

(i) Need for distinctions

The business corporation is an important vehicle for great concerns with large numbers of shareholders, great masses of assets and great incomes. It is also an important vehicle for an individual who wishes to hold some of his investments in that form. It is an important vehicle for concerns falling between those extremes. Business corporation law must in some way deal with concerns at vastly different levels of size and complexity.

It would be possible to provide one statute for the large business corporation and one for the small; and, indeed, that is done in several European jurisdictions. We think that it is more efficient to deal with the whole subject in one statute, and the draft Act attempts to do so, as do the CBCA and all the provincial business corporations statutes. The effort, however, gives rise to difficulties and a business corporations statute, while it may in many instances be able to prescribe rules equally

appropriate to large and small corporations (e.g., incorporation procedure) may in many others (e.g., solicitation of proxies) be compelled to provide different rules for different classes of corporations.

(ii) The distinction between public and private companies

The early English and Alberta Companies Acts made little distinction between closely held companies and widely held companies. They later began, however, to impose requirements (e.g., the public filing of financial statements) which were found unduly onerous upon closely held companies, and they therefore made a distinction between what were, and are, characterized as "public" companies and what were, and are, characterized as "private" companies.

The distinction is based on three things: the number of shareholders; distribution of securities to the public; and freedom of transfer of shares. Under the ACA, a private company is one which restricts or prohibits the transfer of any of its shares; which limits its shareholders (apart from present and past employees) to no more than 50; and which prohibits an invitation to the public to subscribe for shares or debentures. It will be noted that if it does not meet all three of these requirements, the company is not entitled to the benefits of being a private company (ACA s. 48); it may in fact have three shareholders and no assets; and it may never have invited the public to subscribe for a share or debenture; but it may still be a "public" company.

The distinction between public and private companies is one of long standing; it is one to which the lawyers and businessmen of Alberta are accustomed and with which they are familiar; and (with the exception of some borderline problems of definition) it is simple. We therefore approached the question with a bias in favour of retaining the distinction in the draft Act.

We have gradually moved to the conclusion, however, that the distinction is not one which is appropriate to the needs of the present and of the foreseeable future. Instead, there are two other distinctions which appear to us to have functional significance.

(iii) Proposed distinctions

(A) Relationship between shareholders and management

Fairness among shareholders and shareholder groups is an objective sought by the draft Act. Often, however, rules which promote fairness detract from business efficiency or from the ability of shareholders to manage a business corporation as they want it managed. One of the circumstances which may affect the striking of the best balance among these competing values is the relative participation of the shareholders in the management of the corporation. For example, mandatory proxy solicitation and the disclosure that goes with it promote fairness because they improve the ability of shareholders to make effective decisions in the general interest, but the cost and rigidity of the proxy solicitation procedure detracts from business efficiency. In the case of a large corporation with many shareholders, fairness is

the consideration which should prevail, and proxy solicitation should be mandatory. In the case of a small corporation in which all or most shareholders are likely to participate in management or have a close relationship with those who do, considerations of business efficiency prevail and proxy solicitation should not be mandatory. There are other examples in the draft Act in which the same factor, i.e., the relative closeness of the shareholders to management, affects the balancing of competing values. We think that that factor is often important, and we now address ourselves to distinguishing between corporations in which fairness should receive greater emphasis in these cases, and corporations in which the emphasis should be more on business efficiency.

It would not be practicable for the proposed ABCA to make a distinction in the rules based on a division between a control group of shareholders and another group; such a test would only create confusion. It would be practicable to say that a given rule applies to a corporation if all its shareholders are directors, because that is something which can be easily and objectively determined; but we think that such a distinction would apply some protective rules to too many corporations in which there is a close relationship among shareholders and in which the rules are not needed. We have concluded that a distinction should be made on the basis of the number of shareholders; such a test must necessarily be somewhat arbitrary, but it would reflect what we believe to be a fact, namely, that (up to a certain point) the larger the number of shareholders, the less likely it is that all or most of them will be involved in management or have a close relationship to the shareholders who are.

It appears to us that the line should be drawn long before the ACA number of 50 shareholders plus past and present employees is reached. The range within which we think it should lie is between 10 and 20, and we are satisfied to adopt the number 15, which is used in the CBCA for the same purpose. That is the number which is used in the draft Act to differentiate between the closely held corporation to which some protective rules would not apply, and the more widely held corporation to which they would apply. The class of corporations with 15 or fewer shareholders would include the great majority of ABCA corporations.

(B) Distribution of securities to the public

We think that one other distinction must also be made, a distinction between corporations which distribute securities to the public and corporations which do not; another group of protective rules are, we think necessary for the distributing corporation. Many of these rules relate to the protection of investors in the capital markets as such, rather than to the protection of shareholders as such. Rules protecting investors are properly within the purview of securities legislation rather than the purview of business corporation legislation, but there are also some differences between distributing corporations and other corporations which are relevant to corporate legislation: the draft Act would accordingly make a number of distinctions between the two classes of corporations. The precise line between the two would be drawn by the definition of "distributing corporation" in s. 1(i) of the draft Act.

The CBCA also makes special provision for distributing corporations. It does not define the term, but refers from time to time to "a corporation any of whose issued securities are or were part of a distribution to the public and remain outstanding and are held by more than one person". The definition in the proposed s. 1(i) differs in two respects:

1. It excludes corporations which do not have more than 15 shareholders. That exclusion creates the possibility that a control group may convert a distributing corporation into a non-distributing corporation by buying out all but 15 shareholders, and it may be argued that they should not be able to change the ground rules in that way. However, the special provisions seem to us to be likely to be more of a burden than an advantage to a corporation with a small number of shareholders, and we think that the protection of the investor as such should be left to the Securities Act.

2. It does not include the holders of securities or debt obligations unless the securities can be converted into shares. We think that the special rules relating to distributing corporations are for the benefit of shareholders and not bondholders.

(c) Resulting classification

It will accordingly be found that for the purposes of some rules (e.g., mandatory solicitation of proxies) the draft Act distinguishes between corporations which have 15 shareholders or less and corporations which have 16 shareholders or more. It will also be found that for the purposes of other rules (e.g., numbers of directors and the requirement of an audit committee) it distinguishes between a corporation which distributes shares to the public and one which does not. We recognize that the distinctions necessarily involve arbitrariness--the management of a particular 10-shareholder corporation may be dominated by one shareholder to the utter exclusion of the rest, while all the shareholders of a particular 20-shareholder corporation may meet daily and go over the books and mail together; and a distributing corporation whose shares have come to be held by 16 shareholders may be much more closely knit than a non-distributing corporation with 50 shareholders. However, we think that the distinctions which would be made by the draft Act are valid for the great majority of Alberta corporations.

(b) Companies limited by guarantee

ACA s. 17 provides for companies limited by guarantee, with or without share capital. We are not aware of any consideration which would make this form of business corporation desirable for a profit-making business venture and the draft Act therefore does not provide for it. For the time being it will continue to exist in the ACA and will therefore be available for non-profit making companies under Part IX of that Act. Whether or not it should continue to be available for not-for-profit corporations under new legislation is a question that can be considered in connection with that subject.

(c) Specially limited companies

The specially limited company was apparently a form of corporation provided for use in connection with high risk mining ventures, under which a shareholder could turn back his shares if he did not want to pay a call. ACA s. 19 provides for it. However, since the advent of no par value shares, we can see no function to be performed by such a corporation and the draft Act therefore, would not provide for it.

III.

CONSTITUTION OF THE CORPORATION

1. Components

A business corporation necessarily has a constitution which establishes its essential characteristics. It also necessarily has rules which govern the management of its affairs; we propose to treat the latter as part of its constitution, though Gower is careful to segregate them from it (Gower, p. 16, 17). Our reasons for this treatment are, firstly, that it is not always easy to make the distinction between essential characteristics and rules of management, and, secondly, that strong reasons of expediency require the law to permit the mingling of both in the principal constitutional document.

The statutes themselves, the ACA and the CBCA, and the draft Act also, contain many provisions relating to the essential characteristics of the business corporation and to its internal management, and these in a sense form part of its constitution. We propose in this part of our Report, however, to discuss the parts of the constitution which are under the control of the corporation.

2. Constitutional Documents

The constitutional documents of an ACA company are the memorandum of association and the articles of association. The memorandum of association establishes the fundamental characteristics of the company (e.g., its objects and its capitalization); and it may also contain provisions which relate to its internal constitution and which usually appear in the articles of association but for which special entrenchment is desired (e.g., restrictions on share transfers). The articles of association set out the rules governing the internal workings of the company (e.g., voting, and the number and election of directors), but some of those rules affect third parties who deal with the company (e.g., the authority of directors to borrow, and the rules which determine the officials who must affix the corporate seal). The adoption of both a memorandum and articles of association is really mandatory under the ACA (though technically the adoption of articles might be avoided). While the ACA deals with some basic requirements considered necessary for the protection of shareholders and outsiders (e.g., the holding of annual general meetings and the prohibition of the payment of dividends from capital), it leaves the constitution largely within the control of the company; though if a change is to be made it usually requires a special majority of shareholders and sometimes a court order.

Under the usage we have adopted, the constitutional documents of a CBCA corporation are the articles of incorporation and the by-laws. (We leave for later discussion the unanimous shareholder agreement). The articles of incorporation are somewhat similar in concept to the ACA's memorandum of association, but there are important differences: instead of an objects clause which determines what the corporation can do the articles of incorporation are the place for setting out restrictions on the businesses which the corporation may carry on; they are the place to provide for restrictions on share transfers; they establish the number, or at least the range of

numbers, of directors; and they establish the capitalization of the corporation. The articles of incorporation may also be used to entrench provisions of importance relating to the internal management of the company; while the provisions of the by-laws may be entrenched, it is likely to apppear more convenient to put things requiring entrenchment into the articles. The articles of incorporation, however, do not include the formal statement made in the memorandum of association under the ACA that the liability of the members is limited, nor the provision that the subscribers wish to be incorporated and agree to take shares.

The by-laws of a CBCA corporation cover many of the things covered by an Alberta company's articles of association. They do not cover them all, however. For one thing, the CBCA itself deals with many of these things, to such an extent that a CBCA corporation might, we think, manage without by-laws. For another, the by-laws are usually subject to change for the short term by the directors and for the long term by the directors with the approval of a majority of the shareholders who vote at a general meeting, so that things considered to have an important effect upon shareholders or the corporation are likely to be put elsewhere.

The ACA is, of course, based on the pattern established by the English Companies Acts, which tended to leave the company largely in control of its own constitution, subject only to a minimum number of rules considered necessary for the protection of shareholders and outsiders. On the other hand, the CBCA, while it pays much attention to the modern American statutes, arose against the background of the previous federal and Ontario Acts, which enacted many rules left by the English and Alberta Acts to be dealt with in the articles of association, and which divided the remainder between the fundamental charter, i.e., the letters patent, which was public, and the by-laws, which were internal documents of much less importance and not public.

Should the proposed ABCA stay with a constitution composed of a memorandum and articles of association, or should it change to a constitution composed of articles of incorporation and by-laws? We do not see any innate superiority in either constitutional structure. We think that it would be quite possible to devise a satisfactory ABCA which would continue the memorandum and articles of association as the constitutional documents of the business corporation; and that course of action would enable the new Act to come into force with a minimum of cost to existing companies and without the upheaval and confusion which will inevitably be generated by the establishment of a new system. Those considerations might appear to dictate the continuation of the memorandum and articles system. But there is a countervailing consideration which we have already mentioned, that is, the great importance of attaining substantial uniformity between the federal and Alberta business corporations statutes, and among as many provincial business corporations statutes as is practicable. The greatest thing that the CBCA did, though it may appear mundane, was to abandon the antiquated system of incorporation by letters patent which was the insurmountable barrier to substantial uniformity between the federal and Alberta systems; the federal authority has accordingly moved away from governmental discretion to a system which embodies the basic principle that upon the filing of specified documents which are simple in concept (if sometimes complicated in detail), and upon payment of a fee based upon administrative cost, governmental

officials will issue a certificate of incorporation. We are convinced that it is imperative in the long-term interests of Albertans that Alberta abandon the existing form of corporate constitution, which is now the barrier to substantial uniformity, and to accept the new form, which preserves the old basic principle. In other words, we are convinced that the proposed ABCA should follow the CBCA in requiring articles of incorporation and in providing for, but not requiring, by-laws, and the draft Act would give effect to that view.

3. Contractual Effect of Articles and By-laws

Under ACA s. 29, the memorandum and articles of association are binding upon the company and the members as if they had been signed by the members and contained covenants to observe all the provisions contained in them, "subject to the provisions of this Act". According to Professor L.C.B. Gower (Gower, p. 261) the wording of the section "can be traced back with variations to the original Act of 1844 which adopted the existing method of forming an unincorporated joint stock company by a deed of settlement (which did of course constitute a contract between the members who sealed it) and merely superimposed incorporation on registration". Professor Gower also points out that much learning has been expended on the various counterparts of ACA s. 29, and that they have been the foundation of many decisions about the rights of shareholders among themselves and against the company; he shows also that the full implications of the provision have not been worked out.

We do not think that it is necessary or desirable to carry forward into the proposed ABCA any statutory contract between shareholders or between company and shareholders. The statute should set out the rights and obligations of shareholders, directors and officers, and should provide remedies when those rights are infringed. There is no need to resort to the artificial implication of a contract, and, indeed, the notion that there is a contract is likely to interfere with the proper working out of rights and obligations which arise because of relationships the nature of which is determined by law. The only exception which we would make to that proposition is the unanimous shareholder agreement; a device which is intended to be used where the parties wish to bind themselves to something which would depart from the general law, and to do so in a way which can be varied only consensually, unlike the memorandum and articles of association which can be varied in ways prescribed by the ACA.

4. Unanimous Shareholder Agreements

(a) Function of unanimous shareholder agreements

The CBCA does, and we think the proposed ABCA should, lay down many rules about the conduct of the affairs of a business corporation and about the relationships among the shareholders, directors and officers. They are the ground rules designed to balance the conflicting interests of those involved in the business corporation and to provide for the efficient conduct of its business. However, the shareholders of a corporation may want a different rule or an additional rule, and if they all agree, and if the change would not prejudice outsiders, we see no reason why they should not have it; the shareholders are able to

decide what rules will best protect their interests and promote business efficiency, and there is no apparent inequality in bargaining position which might require the law to protect shareholders who have addressed their minds to the subject and come to an agreement.

Shareholders of companies already enter into many private contracts governing various aspects of their relationship as such. To quote from a paper prepared for us by Professor Brian Hansen:

> The scope of such agreements is virtually unlimited. They may prescribe voting procedures, allocate the right to elect directors and officers to particular shareholders, govern the transfer of shares, provide for future financial contributions to the company by way of loan, and contain buy-sell agreements to deal with the contingency of shareholder death, with or without insurance funding. This list is not exhaustive but gives the most common inclusions in shareholder agreements.

The present law is that agreements among shareholders take effect only as personal contracts. What we propose to discuss in this part of our Report is the use of the unanimous shareholder agreement as an instrument having a direct effect on the internal constitution of the company itself, as well as upon the personal rights of the shareholders among themselves; i.e. as a constitutional document which may modify or supplement the articles of incorporation and by-laws, and which may modify even some rules which would be prescribed by the proposed ABCA itself, though it will not affect outsiders.

(b) Effect of unanimous shareholder agreements

(i) Present law--Alberta companies

As we have said, a unanimous shareholder agreement among the shareholders of an Alberta company is merely a personal contract and accordingly has a number of weaknesses as an instrument for regulating the management of the company and for shaping its internal organization. These weaknesses are as follows:

(1) The ultimate legal validity of an agreement interfering with discretion of the directors, even if the agreement is entered into by all the shareholders, is, at best, doubtful (see, e.g., Atlas Developments Co. Ltd. v. Calof & Gold (1963) 41 W.W.R. 575 (Man. Q.B.)). An agreement which attempts to obviate that difficulty by requiring the shareholders to do what they can to cause the directors and the company to act in accordance with the agreement may be effective, but the device is unsatisfactory.

(2) It is doubtful that the remedy of specific performance is available for much of what is contained in shareholders' agreements. In a case in which a breakdown of relations between shareholders is not serious enough to justify winding up the company, a

means of speedy enforcement of the rights conferred by a unanimous agreement is highly desirable.

(3) An act of the company which contravenes the agreement is valid.

(4) The rules of privity of contract apply, and the agreement may not bind a transferee of shares.

(ii) Present law--The CBCA

The CBCA introduced the statutory unanimous shareholder agreement to Canada. The principal elements in the CBCA's legislative scheme are as follows:

(1) It confirms the validity of a unanimous shareholder agreement which restricts the management powers of the directors (s. 140(1)) and, to the extent of the restriction, confers and imposes upon the shareholder-parties the powers, duties and liabilities of directors (s. 140(7)).

(2) It allows a unanimous shareholder agreement to make provision for the following, even in ways which override other provisions of the CBCA:

(i) the management of the business and affairs of the company (s. 97(1));

(ii) the making of by-laws (s. 98);

(iii) the appointment of officers and the delegation of powers to them (s. 116);

(iv) the fixing of the remuneration of directors, officers and employees (s. 120);

(v) additional financial information to be placed before the annual meeting (s. 149(1)(c));

(vi) the power to borrow and give security (s. 183(1));

(vii) circumstances under which a complaining shareholder is entitled to demand dissolution of the company (s. 207(1)(b));

(viii) entrenchment of the directors against removal by the shareholders (s. 6(3)).

(3) Except by taking away his powers, a unanimous shareholder agreement cannot relieve a director of his duty of good faith (because a unanimous shareholder agreement would be included in the word "contract" in s. 117(3)).

(4) A transferee of the shares is deemed to become a party to the agreement if he has actual knowledge of it or if a reference to it is conspicuously noted on the share certificate (s. 45(8); 140(3)).

(5) The court can require the company, its directors and officers to comply with the agreement, and can restrain

them from acting in breach of it (s. 240).

(iii) Proposals

(A) Scope of the unanimous shareholder agreement

We think that the CBCA has made a useful contribution to the law of Canada on the solution to the four problems we have mentioned at pages 22 and 23 of this Report. It provides a complete solution to the first (the doubt as to the validity of an agreement interfering with the directors' discretion) and, within its scope, it provides solutions to the other three (the unavailability of specific performance, the effectiveness of acts of the company in contravention of it, and the difficulty of binding the transferee of shares). The primary approach of the CBCA and its American precedents, however, appears to result from a desire to have the shareholders rather than the directors manage a close corporation. We think that there are some ways in which the proposed ABCA could make this most useful device more readily available for other purposes and thereby maximize its usefulness, and we think that there are some specific problems with it which the proposed ABCA could solve. We will now make proposals accordingly. S. 140 of the draft Act would give effect to them.

We start with one minor point. It has been suggested that the word "restricts" in CBCA s. 140(2) does not allow a unanimous shareholder agreement to withdraw all powers from the directors. We therefore propose to clarify the section so as to make it clear that all power can be withdrawn from the directors.

It will be noted that the principal element in the CBCA definition of the unanimous shareholder agreement, apart from unanimity, is that it is an agreement restricting the power of the directors to manage (s. 140(2)); and it is the unanimous shareholder agreement as defined in that section which is made binding upon transferees and enforceable. The specific things which may be included under the other provisions of the CBCA all restrict the directors' powers in some way, except the provision relating to the right to demand dissolution of the company which appears to be an exception to that general statement (unless a rather artifical reconciliation is made by saying that dissolution terminates, and therefore interferes with, the directors' power to manage). Many of the things which shareholders will want to deal with will restrict the directors' powers to manage, but some will do so only incidentally and indirectly or not at all (e.g., a provision that all the shareholders are to be directors, which would not affect their powers once elected), and some may be doubtful (e.g., options to acquire shares, which may or may not be regarded as affecting the directors' power to determine the validity of share transfers).

Although one member of our Board is strongly of a contrary view, we think, by a majority, that if all the shareholders are agreed, they should be able to make and to entrench any provision which they want to make about the internal affairs and organization of the corporation. We further think that, although provisions of the articles of incorporation can be entrenched, there are many things which would be more appropriately dealt with in an agreement than in the articles. S. 140(1) of the draft Act would therefore expand the CBCA's definition of unanimous shareholder agreement ("an agreement described in s.

140(1)"). It would include an agreement which regulates the rights and liabilities of the shareholders among themselves and the corporation, and which regulates the election of directors. It would include an agreement which provides for the management of the business and affairs of the corporation, including the restriction or withdrawal, in whole or in part, of the powers of the directors; and it would include an agreement which contains any other provision authorized by the proposed Act. Any unanimous shareholder agreement which does any of those things would be binding and enforceable to the same extent as a unanimous shareholder agreement which comes within the present CBCA definition. Such an expansion would, we think, give the shareholders the maximum power to regulate their own affairs in accordance with the needs of the particular corporation; and, by reason of other provisions of the Act, we do not think that the expansion would adversely affect third parties.

(B) Specific problems

i) Requirement of directors

CBCA s. 97(2) requires every corporation to have at least one director. So far as the corporation and its shareholders are concerned, we see no valid reason why the shareholders should not, if they wish, manage the corporation without directors, and it is quite arguable that no harm would be done to others by such a course of action. These considerations would suggest that s. 97(2) be made subject to an unanimous shareholder agreement. However, we are reluctant to suggest that change. Despite the literal wording of s. 18 of the draft Act, we think that the protection to a third party who deals with a corporation comes down to his right to rely upon an appearance of regularity created by the corporation; and we think also that the corporation should be required to provide the foundation for that appearance by naming one or more functionaries with the traditional appellation of director. Internally the directors might be deprived of powers to whatever extent the shareholders unanimously desire, but externally they would provide an apparent source of authority to which outsiders could turn. S. 97(2) of the draft Act would accordingly follow CBCA s. 97(2).

ii) Residence requirement for directors

A unanimous shareholder agreement can withdraw all power from the directors but under section 97(2) the corporation must still have at least one director. A foreign parent corporation could perhaps circumvent the effect of the residency requirement for directors by retaining all of the powers of the directors and appointing some individual, who meets the residency requirement, to be a nominal or dummy director. We do not think that such a possibility should prevent the implementation of so useful and important a device as the unanimous shareholder agreement. Firstly any liability will fall firstly upon the director and his right is a right over against the shareholder (the foreign parent). No one likes to be sued, particularly with the publicity presently given to litigation. Secondly there is nothing preventing the foreign parent from appointing tame resident directors who will do as they are told. If such can be found there is no need for a unanimous shareholder agreement in the first place.

(iii) Amendment

An argument can be made that it should be possible to provide in a unanimous shareholder agreement for its amendment by less than a unanimous agreement. A partnership agreement can do that. We are inclined to the opinion, however, that once the shareholders have adopted the principle of unanimity in relation to the ground rules under which they are to operate, the same principle should apply to changes. S. 140(8) of the draft Act would therefore require the consent of all the shareholders to an amendment.

(iv) Where agreement ceases to be unanimous

A new shareholder may acquire shares without knowledge of a unanimous shareholder agreement. It is, we think, obvious that such an event will occur rarely, if at all; but we think that if it does, the resulting legal situation should be clear.

The CBCA solution is to make the transferee of shares a party to the unanimous shareholder agreement (CBCA s. 140(3)), but only subject to CBCA s. 45(8), under which the agreement is ineffective against a transferee of shares who has no actual knowledge of the agreement unless the agreement or a reference to it is noted conspicuously on the share certificate. We have two difficulties with the CBCA solution:

1. CBCA s. 45(8) appears to protect any transferee, including a donee, and even (because CBCA s. 44(2) defines "transfer" to include "transmission by operation of law") a personal representative of a shareholder who was bound by the agreement. (S. 45(8) of the draft Act would protect only bona fide purchasers for value and would therefore avoid that difficulty.)

2. A unanimous shareholder agreement may contain provisions which cannot properly be at the same time effective against some parties (the previous shareholders) but ineffective against another (the new shareholder). For example, the agreement may provide that the shareholders may make the by-laws; it appears impracticable to have a by-law which is binding upon some shareholders (because it is authorized by an agreement which is effective against them) and not upon another (because it is authorized only by an agreement which is ineffective against him). Similar problems would arise if the agreement fixes the remuneration of the directors and officers or provides for the liquidation of the corporation or deals with any other matter of general application to the corporation or to all the shareholders.

We note also that the CBCA does not deal with the situation of the purchaser of treasury shares.

Our Preliminary Discussion Paper on the subject of the unanimous shareholder agreement suggested that, if a situation arises in which not all shareholders are parties to what has been a unanimous shareholder agreement, the agreement should cease to have effect except to the extent that it could be enforced without the support of the statute; in other words, the agreement would be binding upon the previous parties and the new shareholder only if and to the extent that the principles applicable to ordinary agreements would make it so. That

suggestion was intended to avoid the conceptual difficulties of the CBCA solution by invalidating those provisions which require statutory support, while leaving in force those provisions affecting the contractual rights of shareholders among themselves. It was recognized that that solution could in a particular case give rise to difficulties in sorting out the one kind of provision from the other, and to difficulty in deciding whether the partial ineffectiveness of a particular provision would destroy the whole substratum of the agreement.

While we are divided on the point, a majority of our Board have, however, concluded that, for two principal reasons, another solution should be devised. One of those reasons is that the effect of invalidating all or part of a unanimous shareholder agreement may be very serious for shareholder-parties who have committed substantial investment to the corporation upon the strength of the arrangements embodied in the agreement. The second reason is that the corporation and its directors may well, in ignorance of the supervening ineffectiveness of a provision in a unanimous shareholder agreement (if it is made ineffective), make business decisions and perform acts which are proper only because the agreement authorizes them and which, without its protection, will expose them to serious liability to the corporation and its shareholders or to actions for breach of warranty of authority by outsiders. We think that the interests of the innocent new shareholder can be sufficiently recognized by another solution.

The proposed solution (which would be effected by s. 140(2) to 140(6) of the draft Act) is as follows:

1. The unanimous shareholder agreement would continue in effect and the new shareholder would be party to it whether or not he knew of it (s. 140(2) and (3)).

2. If the new shareholder acquires his shares from the corporation itself, he would, within a reasonable time, be entitled to rescind the purchase (s. 140(2)).

3. If the new shareholder is a bona fide purchaser for value who acquires his shares from an existing shareholder without actual knowledge of the agreement, and if his transferor's share certificate does not contain a reference to the unanimous shareholder agreement, the new shareholder would within 30 days of his acquisition of knowledge of the agreement be entitled to object to it and to be bought out by the corporation at the fair value of his shares (s. 140(3) and (5)). He would also be entitled to recover from his transferor any amount by which the purchase price which he paid exceeds the fair value which he recovers from the corporation (s. 140(6)).

We think that that proposed solution would be fair to the corporation and the shareholders. They would have to do only two things. One is to prevent the corporation from issuing new shares without telling the purchaser about the agreement; that should not be difficult. The second is to ensure that all share certificates contain a reference to the unanimous shareholder agreement; except for certificates existing before the proposed ABCA comes into force, that should not be difficult either, and s. 261 of the draft Act would provide a means of getting in those existing certificates. If the corporation and the shareholders

fail to take those simple precautions, the corporation would only be subject to an obligation to buy back for the issue price new shares issued by it, or to an obligation to buy in at fair value old shares acquired by bona fide purchasers for value and without notice.

We also think that the solution would be fair to purchasers of shares. A purchaser without notice who buys treasury shares would be able to elect between keeping the shares and getting his money back. A purchaser who buys previously issued shares would be warned by a reference on his transferor's share certificate to the unanimous shareholder agreement. If there is no warning and he has no notice he would be able to elect between keeping the shares, on the one hand, and, on the other, getting fair value for them from the corporation and any balance of his money from his transferor. If the unanimous shareholder agreement prevents the purchaser from getting good title to the shares, he would not have an effective election to keep the shares, but his alternative rights would be adequate.

It should be noted that there is a body of opinion on our Board in favour of giving greater recognition to the interest of the transferee, either by requiring some form of public access to the unanimous shareholder agreement, or by protecting the purchaser againt being bound by the unanimous shareholder agreement, or both. However, as we have indicated, our majority view is that solution described above, which is embodied in s. 140 of the draft Act, would provide the better balance between the rights of old and new shareholders and would avoid the difficulties implicit in other solutions to the problem.

v) Duties and liabilities of directors and shareholders

The CBCA imposes upon directors the duty to comply with the Act, the regulations, the articles, the by-laws and a unanimous shareholder agreement (CBCA s. 117(2)), and it denies legal effect to any contract, presumably including a unanimous shareholder agreement, which would relieve a director from any part of that duty (CBCA s. 117(3)). It appears that the directors' duties cannot be waived by the corporation (though presumably the corporation can release a director from liability to it for a breach of duty once the breach has occurred).

However, CBCA s. 140(4) imposes on a shareholder the duties of a director "to the extent that the (unanimous shareholder) agreement restricts the discretion or powers of the directors to manage the business and affairs of the corporation", and relieves the directors of their duties and liabilities "to the extent that the agreement restricts the powers of the directors to manage the business and affairs of the corporation". That provision is consistent with the idea of the shareholders as managers; it appears to say that as a power is moved away from the directors, the duties attendant upon that power devolve upon the shareholders. The devolution takes place by operation of law, and, while it may be difficult in a particular case to decide whether it has taken place, it does appear that the CBCA inescapably fixes someone, either director or shareholder, with the duties usually imposed on directors.

One small point which arises from this is that if a unanimous shareholder agreement withdraws power from the

directors and confers it upon someone other than the shareholders, the duties associated with the power will devolve upon the shareholders; the effect of the CBCA s. 140(4) is not in terms limited to cases in which the shareholders themselves assume the power. It may be that the subsection will be given a limited interpretation, but until that is done shareholders should recognize the danger that the liquidator may try to hold them responsible for the acts of a third party who manages the business under a unanimous shareholder agreement.

Another question which arises is whether the adoption by the proposed ABCA of CBCA s. 140(4) would cause duties imposed on directors under other provincial laws to devolve upon the shareholders as well; probably they would, as the language is not restrictive. The ABCA, as provincial legislation, would not be able to affect duties imposed upon directors by valid federal legislation, and, if there are no directors, it would be necessary, for the purposes of the federal legislation, to determine who, if anyone, under the circumstances are included in the word "directors" as used in the federal legislation.

Having said all this, we think that some provision should be made to apportion the responsibilities between shareholders and directors in accordance with the effects of a unanimous shareholder agreement, and we do not see any better alternative than the CBCA s. 140(4). We would make one change. The directors are relieved of "duties and liabilities", while "duties", but not "liabilities" devolve upon the shareholders; and we suggest that both should devolve. S. 140(7) of the draft Act would give effect to our views.

IV.

NAME OF THE CORPORATION

1. Word Denoting Incorporation

ACA s. 16(1)(a) requires the memorandum of association of an Alberta company to give the company name with "Limited" or "Ltd." as the last word. CBCA s. 10 allows a corporation to use "Limited", "Incorporated" or "Corporation" in either official language, or the abbreviation of any of them, as the word denoting incorporation.

A corporation's name should show that it is a corporate body. The word "Limited" does that, and it also conveys, to anyone who stops and thinks about it, the notion of limited liability; for that reason it is probably somewhat better than "Corporation" and "Incorporated". Further, the word "Limited", because it has been the hallmark of a company incorporated anywhere in Canada, may be better known to the Canadian public than are the others and it may therefore be a more widely understood warning of limited liability.

We nevertheless think that the ABCA should follow the CBCA in allowing the use of "Incorporated" and "Corporation" and their abbreviations as identifying words. We think that those words are widely understood as denoting incorporated bodies; extra-provincial corporations using them can and do register in Alberta and carry on business; and corporations using them under the CBCA will be able to carry on business in Alberta. We think also that the French versions should be permitted where the danger that the general public will be confused is not too great.

Having some reservations about the use of "Incorporated" and "Corporation", however, we think that, except in the case of a professional corporation, the proposed ABCA should require the word denoting a corporate body to be the last word in the name in order to give it emphasis. That requirement would be a minor departure from the CBCA. In view of the importance of the word we would also depart from the CBCA by deleting the power which CBCA s. 10(2) gives the Director (our Registrar) to exempt a body corporate from the use of such a denoting word.

S. 10 of the draft Act would give effect to our proposals.

2. General Suitability

Corporate names present a vexing problem. On the one hand, its name, and therefore the right to choose its name, are very important to a corporation which deals with the public. On the other hand, its name should not mislead the public about the nature of a corporation or about its identity or relationship with another corporation; and one corporation should not be able to make away with the goodwill of another by choosing the same name or one which people are likely to think is the same one. With the number of active Alberta companies nearing 140,000, to say nothing of companies registered in Alberta and companies incorporated and registered in other Canadian jurisdictions, it is becoming very difficult to choose a name which will satisfy the wants of the incorporators without coming into conflict with the interests of others.

ACA s. 11(1) specifically prohibits the use of a name which is known to the Registrar to be the same as the name of an existing company, or which suggests a connection with the royal family or a government or governmental authority. It then goes on to prohibit the use of a name which the Registrar finds objectionable. The Registrar has developed same guidelines about what he finds "objectionable", e.g., he will not accept a name which would infringe a trade name or which would pre-empt a field of endeavour (such as "Sales and Services Limited") and he will refer names with a federal connotation to the federal government, names with a provincial connotation to the province in question, and names with a professional connotation (e.g., "Engineering") to the professional body in question. There are also other Acts which specifically prohibit the use of words suggesting that a company is carrying on a business regulated by one of them. CBCA s. 12(1)(a) merely prohibits the use of a name "that is, as prescribed, prohibited, or deceptively misdescriptive", but the regulations made under it are not unlike the Alberta Registrar's guidelines.

There is a threshhold question whether, apart from applying a number of specific rules, the Registrar should make any effort to control corporate names administratively, or whether incorporators of companies and competitors should be left to fend for themselves. The present practice has some bad results; searching and adjudicating upon names involves an inordinate drain upon the administrative resources of the Companies Branch; and obtaining the Registrar's approval is often the most time-consuming, and in some respects inhibiting, part of the process of incorporation. However, we think that the consequences of abandoning the present practice are likely to be worse than the consequences of continuing it. Incorporators of a new company would be likely to find that they have inadvertently adopted a name which will bring them into conflict with an existing company; this would continue to be true at least until it becomes practicable to include in the present federal computer records (or elsewhere) corporate names from across the country and from the beginning of the incorporation of companies. Incorporators might also deliberately choose names intended to enable them to take advantage of the good-will generated by an existing company's use of a similar name. An existing company would always be in danger of finding that a new corporation has been incorporated under an objectionably similar name, and that its only recourse would be expensive, troublesome and uncertain litigation. We have concluded that, subject to administrative practicality, the evils of the present system should be accepted in order to avoid the evils which would arise in its absence. We therefore propose in s. 12 of the draft Act legislative provisions which would preserve that system. They are somewhat more elaborate than CBCA s. 12(1)(a).

3. Designating Numbers

We need say nothing about the practice of allowing a corporation to incorporate with a number as the distinctive part of its name other than that it is a useful administrative device to facilitate quick incorporation; that it is a useful device which allows incorporators who do not have a practical or aesthetic need for a more euphonious or suggestive name to avoid the difficulties involved in having a name approved; and that we find the practice entirely unobjectionable. S. 11(2) of the draft Act would permit it.

4. Reservation of Name

It is obviously highly desirable that incorporators should be able to reserve a name while they attend to the details of incorporation. S. 11(1) of the draft Act follows CBCA s. 11(1) and would empower the Registrar to reserve a name for 90 days; this would allow more time for the incorporation process to be carried through than does the 45 day period in ACA s. 11(6), and we do not think that any public interest will suffer from reservations for such a period. S. 11(1) would not preclude the Registrar from granting a second reservation period; again, we do not think that any public interest is likely to suffer. Those views represent a change from the tentative views expressed in Preliminary Discussion Paper No. 3, which stressed the work load imposed upon the Registrar by careless and half-hearted name reservations. The Registrar could, however, establish a policy of granting extensions only in exceptional circumstances, such as the reservation of a name to be used following an amalgamation in which the proceedings are likely to be protracted.

It should be noted that the reservtion of a name does not protect the holder against the incorporation of a company with a conflicting name elsewhere in or out of Canada. The incorporators can therefore be refused incorporation if, between the time of the reservation and the time of the application for incorporation, the Registrar learns of the other incorporation.

5. Other Provisions Respecting Names

There are a number of subjects which we think are best dealt with in the draft legislation itself and in the annotations and which we will therefore not deal with here. These include changes of name at the instance of the Registrar, the name of a corporation formed by the amalgamation of corporations, the carrying on of business by a corporation under a name other than its own, and the setting out of a corporation's name on contracts, invoices and other documents. S. 12 and 13 of the draft Act deal with them.

V.

REGISTERED OFFICE AND RECORDS OF THE CORPORATION

1. Registered Office

The ACA requires every company to have a registered office, which serves four purposes. It is an address for service by mail; it is a place for service by delivery of documents; it is a place at which certain records must be kept; and it is a designated depository for documents relating to certain internal affairs of a company such as shareholders' requisitions of meetings, revocations of proxies, and documents dealing with the liquidation or revival of a company. We think that the last function can be treated as a particular case of the third and that it does not require special treatment.

Anyone who wishes to do so should be able to serve a corporation with a document at a stated address either by registered mail or by delivering the document. Persons in business should not, by incorporation, put others to the trouble and expense of deciding who are the proper persons to serve and of locating them; and they should have the obligation of choosing a place where someone will deal with documents delivered to the place or sent to it by mail. Sometimes convenience requires that others should be able to effect service by registered mail; sometimes the urgency of their affairs or their need for certainty requires that they be able to attend at a given place and serve a document by delivery. Therefore there should be available both a mailing address for service and a place for service by delivery. CBCA s. 247 provides for service by mail but not for service by delivery and we are therefore departing from it by proposing that the proposed ABCA should provide for both; ACA s.289 already does so. Service by mail would not be sufficient if the document is not received: see Comment 2 on s. 247 of the draft Act.

We see no reason, however, why the address for service by mail should be required by law to be the address of the place for service by delivery. We therefore propose that a corporation should be able to designate an address for service by mail which is different from the address of its registered office, the latter being the place for service by delivery.

CBCA s. 19 requires the "place" of the registered office to be shown in the articles of incorporation and the "address" to be shown in a notice. We find that usage somewhat confusing (e.g., is a city, town or village necessarily a "place" whose boundaries are its legal boundaries? What of an unincorporated settlement such as Sherwood Park? Is a farm a "place"?) Further, we do not see the need to entrench the "place" of the registered office in the articles of incorporation; the ACA does not entrench it against the will of the company (see ACA s. 33) and we have not heard any complaints that the resulting flexibility has been abused by the designation of inaccessible registered offices. We therefore propose that the directors of a corporation have power to designate and change the registered office and address for service. S. 19(6) of the draft Act would impose further requirements of accessibility and indentifiability.

2. Records and Records Office

(a) Location and notice of records office

The ACA requires the share register (ACA s. 56; though s. 57 allows it to be kept at a trust company's office), the mortgage register (s. 100), and shareholders' minutes (s. 146) to be kept at a company's registered office. CBCA s. 20 allows the specified records to be kept at the corporation's registered office "or at any other place in Canada designated by the directors". We think that the corporation should have the flexibility provided by the CBCA (e.g., a corporation may want documents served on its solicitors so that the documents will receive attention, while wanting to keep its records at its place of business); but we think that, unless it is the same as the registered office, there should be a notice of the records office at the office of the Registrar of Corporations, something that the CBCA does not provide for. Since that proposal, together with our proposals relating to the corporation's registered office and mailing address could result in a corporation giving 3 addresses, while the Registrar's computer can conveniently deal only with two, we propose that the legislation give way to the demands of technology and allow a corporation to have a separate records office only if it does not also have a separate address for service by mail. We think that the records office should be in Alberta. S. 19 of the draft Act would give effect to the views which we have expressed. S. 20 would accommodate the exigencies of a large corporation which maintains securities registers with one or more transfer agents.

(b) Records and access

CBCA s. 20(1) requires a corporation to keep at its registered office or designated place its constitutional documents, securities register (a register of both shareholders and the holders of debt obligations), shareholders' minutes, and notices of directors. It generally agrees with the provisions of the ACA referred to above, and we propose that the draft Act follow it. We also agree with CBCA s. 20(2) and 20(4) under which accounting records and directors' minutes must be kept, and made available for inspection by directors, at a place designated by the directors. S. 20 of the draft Act gives effect to our views.

S. 21 of the draft Act deals with access to the records required to be kept at the records office and we refer the reader to that section and to the notes appended to it. We draw attention, however to two departures which it makes from CBCA s. 21:

1. We think that the public should have access to the securities registers of non-distributing corporations, and not merely to those of distributing corporations. The public has that access in Alberta now, and we see no valid reason for change. CBCA s.21(1) allows such access only in connection with distributing corporations.

2. While we think that creditors should have access to the public documents of a corporation, we do not propose that they should have access to shareholders' minutes, as we do not see what legitimate interest their access would serve.

CBCA s. 21(1), gives such access to creditors.

We are concerned about one other question: should shareholders have access to the minutes of directors? The argument in favour of an affirmative answer is that the shareholders are the owners of a corporation and should be entitled to see what their servants, the directors, are doing. The arguments on the other side are, firstly, the desirability of uniformity with the CBCA, particularly where a departure from uniformity may militate against a decision to incorporate under the proposed ABCA; secondly, the general division of powers between directors and shareholders; and, thirdly, the desirability in everyone's interest of protecting the confidentiality of corporate information where publication would affect the business position of the corporation. We all find the third argument decisive. A competitor should not be able to buy a share in a corporation and gain access to all information available to the directors. We are accordingly satisfied that shareholders of distributing companies should not have access to directors' minutes. The majority of us think that, even in the case of closely held corporations, the interests of all are best protected by maintaining the confidentiality of directors' proceedings unless there is unanimous agreement to the contrary or unless the directors make the information available; for example, even in the case of a closely held corporation, a shareholder who sets up a competing business should not have access to the corporation's confidential information. Although some members of our Board feel that the reasons for confidentiality are not compelling in the case of smaller corporations, and would allow the shareholders to have access to minutes of directors' meetings, s. 21 of the draft Act would give effect to the majority view.

VI.

RELATIONS OF THE CORPORATION WITH OUTSIDERS AND OTHERS

1. Capacity and Powers

(a) Existing law

An Alberta company has no capacity to enter into a contract for a purpose which is outside the objects of the company as set out in its memorandum of association. An attempt to do so is ineffective and the purported contract is void even if ratified by all shareholders. The House of Lords so held in Ashbury Railway Carriage and Iron Company v. Riche (1875) 7 H.L. 653 with regard to an English memorandum and articles company, and that is the law of Alberta today with regard to a memorandum and articles company incorporated under the ACA. The effect of the rule is strengthened by the further rule that a person dealing with the company is deemed to have constructive notice of the contents of the memorandum and articles of association.

The effect of the rule of limited corporate powers was somewhat alleviated by the decision of the House of Lords in Attorney General v. Great Eastern Railway Company (1880) 5 A.C. 473, where it was held that the doctrine of ultra vires was to be applied reasonably and that the court would recognize that a company has implied powers to the extent that might be fairly regarded as incidental to, or consequential upon, the objects set out in its memorandum of association. The rule has also been somewhat alleviated by ACA s. 20 which confers powers upon a company, but that section provides that the powers can be exercised only "for the purpose of carrying out its objects", or, in the case of the power of sale of the company's undertaking, "as ancillary and incidental to" its objects.

Draftsmen have made continued efforts to evade the inconvenience of the rule. Their principal device is the drafting of long and complex clauses which include as objects the carrying on of almost every conceivable business, and which also include under the guise of objects what are really powers to be exercised in order to carry out the objects of the company. Their early efforts were hampered by a rule of interpretation under which a court would read the detailed objects clauses as ancillary to what it conceived to be the main objects of the company: see, for example, In re German Date Coffee Co. (1881) 20 Ch. D. 169, (C.A.). However, draftsmen evaded the effect of this rule of interpretation by including a provision in the objects clause that the objects were to be regarded as independent and were not to be limited or restricted by reference to or inference from any other provision in the objects clause, and the validity of such a provision was upheld in Cotman v. Brougham [1918] A.C. 514 (H.L.). Draftsmen found an even more effective tool in the form of a provision in the objects clause permitting the company to carry on any business which in the opinion of the directors can be carried on advantageously in connection with or ancillary to the business of the company, a provision which has been upheld in the United Kingdom (Bell Houses Ltd. v. City Wall Properties [1966] 2 All E.R. 674, (C.A.)) and in Canada (H. & H. Logging Co. Ltd. v. Random Services Corporation Ltd. (1967) 63 D.L.R. (2d) 6 (BCCA)). Some have gone even further and purport to include in the objects all the powers of a natural person, but there is not yet a sufficient

weight of authority to establish the validity of such a provision beyond question.

(b) Proposal for abolition of doctrines of ultra vires and constructive notice

A competent draftsman can now evade the rule of limited corporate powers by a properly drafted memorandum of association. The rule therefore rarely gives protection to creditors or shareholders, whom it was supposed to protect by ensuring that a company's capital was ventured only in the business for which the company was incorporated. On the other hand, however, some memoranda of association are drafted so that the rule applies, so that a person dealing with a company may find to his cost that an apparent contract entered into by him in good faith is not a contract at all. A modern example is Re Jon Beauforte (London) Ltd. [1953] 1 All E.R. 634. In that case the court held that a note on the company's letterhead gave the company's suppliers notice of the business carried on by the company, and that the doctrine of constructive notice fixed the suppliers with notice of the business described on the letterhead. Therefore the proposed transaction, was not within the company's objects, so that the suppliers were not entitled to be paid for what they had supplied to the company. We think, and we think that there is general agreement, that the rule is pernicious and should be reformed.

What form should the reform take? The rule of limited corporate powers could be abolished only in so far as it affects persons dealing with the company, leaving it open to shareholders to take steps to prevent the company from undertaking a business outside its objects; or it could be abolished altogether. An alternative would be the solution devised by Professor L.C.B. Gower and included as s. 247(2) of his draft Ghana Code under which the failure of a company to commence to carry on within a year of incorporation all of the businesses which it is authorized by its regulations to carry on, or the suspension of any such business for a year, would be grounds for winding up; but it appears to us that, while that solution might be effective, it is more draconian than is appropriate for Alberta today.

We think that the rule of limited corporate powers should be abolished entirely in so far as it affects persons dealing with a corporation. We think that the way to abolish it is to provide that a corporation has the capacity and the rights, powers and privileges of a natural person, and by refraining from including in the draft Act any counterpart of ACA s. 13 (which provides that an Alberta company does not have the power to carry on certain businesses). We think, however, that there should be some protection for shareholders. Part of that protection would be to allow the articles of incorporation to restrict a corporation from carrying on a particular business, though such a restriction should not affect third parties. What we have described is the effect of CBCA s. 15 and 16, and s. 15 and 16 of the draft Act would adopt those CBCA sections with necessary changes. We also recommend the adoption of CBCA s. 17 which abolishes the doctrine of constructive notice of the contents of the constitutional documents of the company filed with the CBCA Director (our Registrar), and s. 17 of the draft Act would give effect to that recommendation.

What if a person contracting with a corporation knows that its articles of incorporation preclude it from carrying on the business in the course of which the contract is made, or from exercising the power to make the contract? Neither the restriction nor the knowledge would take away the corporation's power to contract. However, a corporation cannot contract except through human agents, and those agents can bind it only to the extent that they have actual authority or to the extent that the corporation cannot deny their authority. The concluding words of s. 18 of the draft Act would make it clear that a corporation is not precluded from denying authority if the other party knows there is none, or even if his relationship to the company is such that he ought to know that there is none. Knowledge that the corporation is restricted from doing something would be tantamount to knowledge that it has not properly authorized its agents to do it. In the result, the party who knows of the restriction will be in much the same position as if the doctrine of limited corporate powers were to continue to be the law, and if he is an insider of the company he will be in much the same position as if the doctrine of constructive notice were to continue to be the law. We think that all this is appropriate enough: anyone who knows that an agent has no authority should not be protected, and no one who is in a special relationship with a company should be able to claim ignorance of those things which his relationship would bring to his attention.

2. Internal Management of the Corporation

(a) Existing law

A person dealing with an Alberta company is taken to have notice of the memorandum and articles of association and is therefore not entitled to rely upon the authority of any director, officer or agent of the company who is acting in a manner contrary to a provision of either of them. For example, a person dealing with the company cannot rely upon the validity of a document under the corporate seal attested by the signature of one officer if the articles call for the signatures of two officers. On the other hand the person dealing with the company is not obliged to enquire into the internal workings of the company and is entitled to assume that any necessary procedural preliminaries have been properly performed unless he has, or ought to have, actual knowledge to the contrary.

A special problem arises when there is a forgery by an agent of a company who has usual or apparent authority. In Ruben v. Great Fingall Consolidated [1906] A.C. 439, the House of Lords held that share certificates to which the secretary of the company had fraudulently affixed the corporate seal and forged the signature of two directors were nullities. More recently however the Court of Appeal of England in Panorama Developments (Guildford) Ltd. v. Fidelis Furnishing Fabrics Ltd. [1971] 3 All E.R. 16 held that a company was liable for the fraudulent acts of its secretary in hiring Rolls-Royce and Jaguar cars for weekend sprees, on the grounds that he was clothed with ostensible and usual authority and that the company should bear the loss because it had put him into a position in which he could commit the frauds.

(b) Proposals for statutory internal management rule

We think that the internal management rule should be strengthened, put on a statutory foundation, and made applicable to situations of forgery where the forged document is issued by someone with actual or usual authority. We are in general agreement with the way in which the CBCA has done so in CBCA s. 18 which, in so far as usual and apparent authority are concerned, is based upon Professor Gower's draft Ghana code. We propose some changes which appear in our comment on s. 18 of the draft Act.

3. Pre-incorporation Contracts

(a) Reasons for reform

For some reason--probably for a variety of reasons--contracts are made in the name of, or on behalf of, companies which have not yet come into existence. It is not necessary for a business corporations statute to step out into the law of contract to deal with such cases, and, it may be argued that modern incorporation procedures can be carried through so quickly that there is no need to make a contract before incorporation. However, the law reports show that pre-incorporation contracts present a practical problem to a significant number of people, and we therefore think that the present state of the law on the subject should be canvassed and made more satisfactory and more certain.

(b) Adoption of pre-incorporation contract by corporation

If A, purporting to act for X. Ltd., a non-existent company, enters into a contract with B, X. Ltd., upon coming into existence, is not bound by the contract and cannot adopt it or ratify A's actions; there is nothing which can be adopted or ratified. The only way for B and X. Ltd. to come into a contractual relationship is to make a new contract after X. Ltd. comes into existence. That result is awkward for all concerned. The first part of the remedy adopted by CBCA s. 14(2) is to provide that the corporation, for a reasonable time after coming into existence, may adopt the contract if the contract is in writing. That remedy leaves the other parties to the contract in doubt for some time (indeed, B is in much the same position as if he had made an offer which can be accepted by the corporation within a reasonable time after incorporation), but it does give some practical relief, and we think that it should be adopted. S. 14(3) of the draft Act would adopt it.

There may be a question whether a company should be held to have adopted the contract "by any action or conduct signifying its intention to be bound thereby", as CBCA s. 14(2) provides, or whether it should be held to have adopted it only if it followed a formal procedure. We prefer the CBCA provision. It will be necessary to show that "the corporation" in some way has formed the intention to adopt and has acted upon that intention, and we think that that is sufficient protection against the corporation finding that it has incurred an obligation without having had a chance to consider it.

(c) Relationship between agent and other parties

(i) Statutory contract or warranty

The next question is: what legal relationship, if any, should exist between A, who purports to contract for the non-existent X. Ltd., and B, the other party to the purported contract? That is a vexed question which has received different answers.

In the leading case of Kelner v. Baxter (1866) 2 L.R.C.P. 174, A contracted "on behalf of the proposed" X. Ltd., and was held bound by the contract. The case has been said to lay down a general proposition imposing liability on every person who contracts as agent on behalf of a non-existent principal (see, e.g., Brennan v. Berwick Fruit Ltd. [1928] 1 DLR 548 (N.S.S.C.)), but it has also been said to be founded on A and B's intention in the particular case and to be applicable where A and B mistakenly thought that the company was in existence (see, e.g., Newborne v. Sensolid (Great Britain) Ltd. [1953] 1 All ER 708 (CA); Black v. Smallwood (1966) 117 CLR 52 (H.C.); GMAC v. Weisman (1979) 96 DLR (3d) 159 (Ont. Co. Ct.) though cf. Hotel St. John's Limited v. Parsons (1978) 19 Nfld & PEIR 386 (Nfld. D.C.)). The Newborne case was the obverse case to that in which B wishes to fix liability upon A: in it, A wanted to enforce the contract personally, but it was held that he could not come forward and take the benefit of a purported contract which was not made with him. Black v. Smallwood has been cited with approval in Canada: Wickberg v. Shatsky (1969) 4 DLR (3d) 540 (BCSC); GMAC v. Weisman (1979) 96 DLR (3d) 159 (Ont. Co. Ct.); and Delta Construction Co. Ltd. v. Lidstone (1979) 96 DLR (3d) 457 (Nfld. S.C.). It appears that the more recent trend is to limit Kelner v. Baxter to cases in which A contracts on behalf of a company which both A and B know does not exist; in such cases, the view of the courts appears to be (though we can see a contrary argument) that it was the intention of the parties that there be a contract and that the intended contract must be between A and B. In cases in which B does not know that the company does not exist, the trend appears to be towards holding that B intended to contract only with X. Ltd. and not with A; if the contract is to B's advantage, he may therefore be in a better position if he knows there is no company than if he does not. There does not as yet appear to be binding Canadian authority on the question.

If A purports to contract for a non-existent X. Ltd., and if B contracts with him in the belief that X. Ltd. exists, it may be possible to hold A liable to B for breach of warranty of authority, or something resembling it. If B knows that X. Ltd. does not exist, that liability cannot arise, because his knowledge that the company does not exist is enough to tell him that it did not authorize A to act for it, and the warranty of authority will not be implied where the representation is one of law: Bowstead on Agency, 14th ed., p. 382. If B does not know that X. Ltd. does not exist, Bowstead recognizes a cause of action for breach of warranty of authority but thinks that the only damages would be the cost of any abortive proceedings brought against the principal: if the company does not exist and has no funds there could be no further loss arising from the lack of authority, and any effective liability would have to be in deceit or possibly in negligence. It should be noted that in GMAC v. Weisman (1979) 96 DLR (3d) 159, (Ont. Co. Ct.) Macnab Co. Ct. J. thought that it might well be argued that A warranted

that the company he purported to sign for was in existence; and that in Delta Construction Co. Ltd. v. Lidstone (1979) 96 DLR (3d) 457 (Nfld. S.C.) Noel J. held that A did warrant his authority but that it had not been shown that any substantial damage flowed from the breach: the warranty was only that X. Ltd. existed, not that it was solvent or would pay B's account for work done under the purported contract.

The second part of CBCA remedy is, in effect, to say that there is a contract between A and B, but that X. Ltd. upon adopting the contract is substituted for A. That remedy seems to us to be better than that enacted by s. 9(2) of the European Communities Act, 1972 (U.K.) which merely provides that there is a contract between A and B, and it is similar to the remedy proposed by Professor L.C.B. Gower in his draft Ghana Code; we therefore initially thought that the draft Act should follow CBCA s. 14. However, following consideration of Report No. 8, Pre-Incorporation Contracts, of the Law Reform Commissioner for the State of Victoria, we have by a majority decided to propose a different remedy, namely, that A should be deemed to warrant to B that X. Ltd. will within a reasonable time come into existence and adopt the contract. To explain our preference we will briefly set out the relevant considerations.

In the absence of a strong countervailing value, the law enforces bargains: that consideration suggests that B, who thinks he has a bargain, should be able to enforce it in some cases of pre-incorporation contracts because he has supplied goods or services or otherwise changed his position on the strength of it, and in others because his reasonable expectation of profit would otherwise be disappointed. If the corporation does not come into existence the law cannot enforce the bargain against it; and if it comes into existence but does not adopt the contract, the law should not impose upon it a bargain which it did not make. On the other hand, the law can impose some liability upon A. If A leads B to believe that X. Ltd. exists, it is only fair that A should make good any loss suffered by B because it does not. Even if A says that he is contracting on behalf of a corporation which is not yet in existence, it is likely that he will lead B to believe that it will be incorporated and will adopt the contract, so that it is again fair that he should make good B's loss (though in the latter case it should be noted that there is opinion on our Board that B's eyes are or should be open and that he should not receive any special protection).

If it is accepted that A should be liable to B, the law can achieve that result by declaring, as does CBCA s. 14, that A is bound by and entitled to the benefits of the contract, which is tantamount to saying that there is a contract between A and B. Our principal difficulty with that provision is that in the usual case the imposition of a contract will be contrary to the intention of both parties: B, who intended to contract with X. Ltd., will find himself bound by a contract with A, and A, who did not intend to enter into a contract at all, will find himself bound by a contract with B. We view with reserve the imposition upon A and B of a contract which neither intended, and we would not recommend that the law impose it unless there were no other way of imposing liability upon A (and, possibly not then). Further, there is the possibility and, indeed, likelihood, of practical difficulties flowing from examples posed by the Victorian Law Commissioner. If the contract is one of

employment, is B to be saddled with A as his employer? If the contract is that B is to turn properties over to X. Ltd. in return for shares and debentures of X. Ltd., is A to acquire the properties and issue something like shares and debentures? If the contract is that B is to construct a costly machine for X. Ltd. for use at a particular mine and in return is to receive royalties on production, or if B contracts because of the proposed principals in X. Ltd., must he perform his side of the contract for A, whom he never contemplated as a principal? It might be that in all these cases a court would hold that A cannot perform and that B therefore need not, but it does seem to us that the difficulties are real.

We think that the law will fit the realities of the situation better if it treats A as warranting that the corporation will within a reasonable time come into existence and adopt the contract. That B believes either that X. Ltd. is already in existence and will be bound by A's acts, or that he believes that it will be incorporated and adopt the contract, are the only likely explanations of what B does; and A, whose actions have induced that belief, may be expected to understand that B is acting upon it. By imposing such a warranty, moreover, the law will be able to impose upon A liability for B's loss according to whatever measure of damages is deemed appropriate. We accordingly think that the imposition of such a warranty would avoid the adverse consequences of the imposition of the contract, that it would be in accordance with the intentions of the parties, and that it would achieve the desired objectives. For these reasons, s. 14(2) of the draft Act would impose the warranty.

(ii) Measure of damages

If the proposed Act were to impose a contract upon A and B and A did not perform it, the usual measure of damages for breach of contract would apply. If, however, A is to be liable for breach of warranty, it is necessary to determine what the measure of damages should be.

The warranty imposed by s. 14(2) of the draft Act could be sued on only if the corporation does not adopt the contract, i.e., in circumstances in which B cannot obtain the benefit of performance of the contract and in which his only remedy is damages against A. The law might then say that B should recover from A the damages which he could have recovered from the corporation if it had adopted the contract and failed to perform it (which is the Victorian Law Commissioner's recommendation) or it could say that he could recover only his actual damage flowing from the failure to incorporate or from the failure of X. Ltd., once incorporated, to adopt the contract. Damage from failure to incorporate would usually be nominal if B did not stipulate that the corporation was to be incorporated with assets which would enable it to perform its obligations or to pay damages for failure to do so; and the damage flowing from X. Ltd.'s failure to adopt the contract would usually be nominal if X. Ltd. did not in fact have such assets.

S. 14(2)(c) of the draft Act is based on the premise that breach of the proposed statutory warranty would be closely analogous to breach of warranty of authority; the subsection would provide that the same measure of damages would apply, whatever that measure of damages may be. The first argument in

support of that provision is that the analogy does exist and that the courts and not the Legislature are the appropriate institution to settle the measure of damages and should be left to do so. The second is that the measure of damages so far adopted by the courts is appropriate; if B stipulates for a corporation of substance or if a corporation of substance is incorporated B will recover substantial damages; but if (as in the usual case he will) he takes his chances upon X. Ltd.'s solvency, there is no reason to give him more than he bargained for and more than he would have got if X. Ltd. had actually come into existence and adopted the contract. The argument against s 14(2)(c) is that the whole purpose of the provision is to protect B, and that a form of protection which will usually give him only nominal damages is not sufficient.

(iii) Exoneration provision

S. 14(6) of the draft Act would allow A to provide in the contract that he is not liable for damages for breach of the warranty imposed by s. 14(2). We do not think that fairness or public policy precludes exoneration; the liability is imposed only because of the likelihood that B will rely on A's representation, and an express exoneration will mean that B cannot reasonably rely upon it. CBCA s. 14(4) proceeds upon a similar principle, and the Victorian Law Commissioner recommends it also (though he would go on to require a specific acknowledgment of the exoneration by B).

(iv) Discretionary apportionment of liability

CBCA s. 14(3) goes on to provide that, whether or not X. Ltd. has adopted the contract, a party to the contract may apply to the court for an order "fixing obligations under the contract as joint or joint and several or apportioning liability" between X. Ltd. and A. The opinion of the drafters of the CBCA was that where the contract is not adopted the court will not impose liability upon the corporation "where the promoter has no effective control over it and the other party's sole basis for seeking an order is that he is stuck with an unsubstantial promoter" (Proposals, p. 23).

There is a view on our Board that if the corporation has not adopted the contract (bearing in mind that it can be held to have done so by any act or conduct signifying its intention to do so) there is no reason to impose any liability upon it; that the adoption of the contract by the corporation gives B all that he bargained for so that there is no reason to give B anything more by imposing joint liability upon A and X. Ltd.; and that it is not in anyone's interest to apportion a liability which was intended to be that of the corporation and should be shifted only when the corporation does not bear it at all, and then only in its entirety. The majority of our Board have, however, accepted the views of the drafters of the CBCA, and s. 14(5) of the draft Act follows CBCA s. 14(3).

(v) Restoration of benefit

The Victorian Law Commissioner proposed that when a company which does not ratify a pre-incorporation contract receives a benefit under it, the court should be able to order the corporation to restore the benefit or its value to the promoter or to the other party to the contract. While the knowing

acceptance of the benefit by the corporation is likely to be an act or conduct signifying its intention to be bound by the contract, s. 14(4) of the draft Act would give effect to the proposal so that this additional relief would be available if the corporation is not bound.

(vi) Relationship between CBCA and ABCA provisions

The relative rights of A and B under s. 14 of the draft Act would be different from the relative rights of A and B unders. 14 of the CBCA. It is unfortunate that the countervailing considerations which we have discussed override the desirability of uniformity on this subject between the CBCA and the proposed ABCA. It would be even more unfortunate to have the conflicting provisions of both the CBCA and the proposed ABCA apply to a particular case, and we now turn to a discussion of the relationship between the two provisons.

A major question is whether Parliament has the power to legislate about the relative rights of A and B; it does have the power to legislate about the incorporation of companies (because the provinces have power only to incorporate companies with provincial objects), but it appears to us doubtful that the power to incorporate companies carries with it the power to legislate about the relative rights of individuals in the absence of incorporation. The relative rights of A and B, whether under contract or warranty, appear to us much more likely to fall into the category of property and civil rights within the province, under which the provinces legislate about contracts and other civil rights generally. Even the contractual effect of the adoption of pre-incorporation acts by a CBCA corporation appears to us more likely to come under provincial jurisdiction, particularly when it forms part of a pattern in which the relative rights of A and B are inextricably involved.

We do not however wish to create a constitutional question, and we will therefore proceed on the assumption that Parliament does have the power to enact CBCA s. 14. The next question is: to what cases does CBCA s. 14 apply?

CBCA s. 14 applies "if a person enters into a written contract in the name of or on behalf of a corporation before it comes into existence". A "corporation" is defined by the CBCA as "a body corporate incorporated....under" the CBCA, and CBCA s 14 therefore applies "if a person enters into a written contract in the name of or on behalf of a corporation to be incorporated....under" the CBCA "before it comes into existence" Even if a CBCA corporation is afterwards incorporated a court might have doubts whether that was the corporation which was intended, and it might also have doubts whether it is A's intention or B's intention which is material. If no CBCA corporation is incorporated and the relative rights of A and B are in question, it is difficult to frame the question to which the court would have to address itself in order to decide whether or not the CBCA applies. The question can hardly be: under which statute is it that this imaginary corporate body was not incorporated? The question would probably come down in some way to the intention of the parties.

It seems to us that the thing to do is to have the proposed ABCA apply unless everyone involved thinks that the corporate body has been or will be incorporated under another statute. If

the law of Alberta applies to the dealings between A and B, s. 14 of the draft Act would apply unless both A and B intended that the corporate body be subject to another basic corporation law. If that other basic corporation law is the CBCA, CBCA s. 14 would apply. If the other basic corporation law is that of another jurisdiction, then the common law would apply unless the courts chose to apply the law of that other jurisdiction. It may be that the question should be thought of as one of private rights among the parties rather than as one of corporation law, but we think that the solution that we have proposed is the best one under the circumstances. S. 14(1) of the draft Act would give effect to it.

4. Corporate Seal

We do not think the company law should require a company to have a seal. General literacy has made the seal as a form of signature unnecessary. ACA s. 149 has long made it clear that the impression of a corporate seal is not an essential element of a corporate contract, and ACA s. 63 and 290 provide for the authentication of share certificates and other corporate documents without seal. We think that the state of the law brought about or confirmed by these provisions is satisfactory, and we see no reason for a legal requirement that a company have a seal.

On the other hand, we see no reason why a corporation should not have a seal if it wishes, and many corporations will come up against practical problems if they do not, including difficulties arising under statutes such as the Land Titles Act which provide for authentication of corporate acts by the seal. Our views are somewhat similar to those of the drafters of the CBCA (though we do not go quite as far as to follow them in calling the seal "an anachronism carried over from a less literate age" and "redundant ironmongery") but we think that somewhat more is involved than a recognition that "the law need not deprive people of such simple and harmless pleasures". We propose to follow the CBCA in principle, but we think that the ABCA should deal in a rather more substantial way with the subject, and with some more matters of detail, than does the CBCA. We refer the reader to s. 23 of the draft Act and the notes appended to it.

VII.

MANAGEMENT AND CONTROL OF THE CORPORATION

1. The Organs of the Corporation

The theory of English company law in the latter part of the 19th century as stated by Professor L.C.B. Gower (Gower, p. 130) was that "the general meeting was the company". In the case of memorandum and articles companies, an exception has in practice usurped the place of the general proposition. It is based upon a provision which appears in most articles of association to the effect that the directors are to manage the business of the company and may exercise all of its powers which are not required to be exercised in general meeting. In the face of such a provision, it has been held that the shareholders cannot exercise the delegated powers themselves, and the usual qualification purporting to make the delegation subject to "regulations . . . prescribed in general meeting" has been interpreted as having little, if any effect. The shareholders of Alberta companies, if they disapprove of the actions of the directors, are therefore generally relegated to their right to dismiss or to refuse to re-elect the directors and to their right to change the company's constitution. That statement must be qualified to some extent, as the shareholders do retain some residual powers to act in unusual circumstances, but it does, in general, state the law.

The CBCA itself effects the division of powers between shareholders and directors. CBCA s. 97(2) requires a CBCA corporation to have one or more directors and s. 97(1) vests the management of the business and affairs of the corporation in the directors subject only to a unanimous shareholder agreement.

The division of powers between the directors and shareholders of an Alberta company is therefore very similar to the division of powers between the directors and shareholders of a CBCA corporation, though in the latter case the division is statutory while in the former it flows from a general practice followed under a more permissive statute. We recommend that the ABCA follow the CBCA in this respect, a recommendation which would make a great change in form but little change in substance or in practice. In some respects the shareholders' residual rights would be restricted, but in others their rights would be enlarged, particularly since s. 104 of the draft Act would ensure that the shareholders can remove the directors by ordinary resolution at any time and would not have to wait until the expiration of their term of office.

Professor Gower points out (Gower, p. 19-20) that in large corporations much power is delegated to management, some members of which are members of the board of directors; it is impractical for the board itself to conduct the day-to-day administration of a large corporation's business, and the board's function is therefore likely to be restricted to deciding policy and supervising management. We recognize that such delegation is necessary, and must be permitted, though under s. 110(3) of the draft Act, a number of important acts would have to be carried out by the board itself. We also recommend that the proposed ABCA recognize the difference between directors who are and are not members of management by a requirement in s. 97(2) that a distributing corporation must have at least two directors who are not officers or employees of the corporation or its affiliates.

and by a requirement in s. 165(2) that a distributing corporation must have an audit committee the majority of whom are not officers or employees.

In summary, we recommend that a corporation continue to have two principal organs, the shareholders and the directors. The shareholders would have the power to change the corporation's constitution and to elect and dismiss the directors, while the directors would have the power to manage. The directors in turn would be able to delegate most of their powers to managing directors, committees of directors, and to officers, who might but need not be directors, so that the delegates could really become an additional organ of the company. The draft Act would give effect to our views.

2. Changes in the Constitution and Business of the Corporation

(a) Fundamental change

(i) What is "fundamental change"?

Part XIV of the CBCA deals with what are referred to as "fundamental changes", which include

1. Change of name of the corporation. (draft Act s. 167(1)(a), subject to s. 167(3)).
2. Change in the restrictions, if any, which the corporation's articles of incorporation impose on the business which it may carry on. (draft Act s. 167(1)(b)).
3. Important changes in the capital structure and rights of shareholders. (draft Act s. 167(1)(c) to (j)).
4. Any other change in the articles of incorporation (draft Act s. 167(1)(m)).
5. Changes in restrictions and constraints on transfer of shares. (Changes in restrictions are a particular case of #3; constraints are dealt with in draft Act s. 168).
6. Changes in number of directors. (draft Act s. 167(1)(k)).
7. Amalgamations. (draft Act s. 175 to 180 and 180.1).
8. Reorganizations and arrangements. (draft Act s. 185 & 186).
9. Transfer of registration to another jurisdiction. (draft Act s. 182).
10. "Continuance" of an existing company under the ABCA. (See draft Act s. 181, 261).
11. Sale or lease of substantially all the property of a company. (draft Act s. 183).

We will now discuss those subjects, except for "continuance" of existing companies under the proposed new Act, which will be discussed later, and changes of the corporate name and of the number of directors, which do not require discussion.

(ii) Policy of CBCA, Part XIV

The first important policy that the CBCA has adopted in Part XIV is to treat as one subject, and in one part of the Act, provisions relating to changes in the ground rules governing the operation of a company; the provisions dealing with similar subject matter are scattered through the ACA. We accept the CBCA's approach, for the sake of uniformity, for the sake of convenient reference, and because the rules relating to change are more likely to follow a consistent and rational pattern, if

they are juxtaposed to each other.

The second important policy that the CBCA has adopted in Part XIV is to provide procedures which facilitate the making of important changes in those ground rules. Generally speaking, a CBCA corporation can make the changes itself without resort to the courts. It can usually do so by "special resolution" which is a resolution adopted by 2/3 of the votes cast or signed by all shareholders entitled to vote. We agree with this approach also (including, for the sake of uniformity, the acceptance of the two to one majority instead of the ACA's three to one). S. 167 of the draft Act would give effect to our views.

The third important policy that the CBCA has adopted in Part XIV is to allow a shareholder, in certain cases of particular importance, to require the company to buy him out if it wishes to make a change to which he objects. That is the most important change to the present law which is made by Part XIV. We are also in general agreement with it. We deal with it in this Report under the heading "Appraisal Right" and in s. 184 of the draft Act.

The fourth important policy that the CBCA has adopted in Part XIV is to allow a voting shareholder to make a proposal to amend the articles of incorporation, rather than to require a directors' by-law for that purpose. Although this is a change in the federal law it is consistent with the ACA and does not require comment. It is embodied in s. 169 of the draft Act.

The fifth important policy is that the Director (our Registrar) is not given a discretion to prevent the making of a lawful amendment to a corporation's constitution. Again, this policy is consistent with the ACA and does not require comment here. It is embodied in s. 172 of the draft Act.

(iii) Specific fundamental changes

(A) Restrictions on business

It will be remembered that corporations incorporated under the CBCA have the capacity and, in general, the rights, powers and privileges of a natural person (CBCA s. 15), and we have already recommended that corporations incorporated under the proposed ABCA should be in the same position, i.e., that it should abolish the doctrine of limited corporate powers. However, it appears appropriate to allow a corporation to restrict the businesses which it may carry on, though the restriction should not affect the validity of its acts. CBCA s. 16 does this, and so would s. 16 of the draft Act. The removal, addition, or variation of such a restriction is obviously a change in an important ground rule and we agree with the CBCA that, although the corporation should be able to make the change by special resolution, a dissenting shareholder should be able to require the company to buy him out if it does so. S. 167(1)(b) of the draft Act would permit the change, and s. 184 would confer the appraisal right.

(8) Capital structure

CBCA s. 167 allows a corporation to do almost anything to its share structure, including the creation, subdivision, consolidation, exchange, reclassification and cancellation of shares and classes of shares and changing the rights attached to them. There are two safeguards. One is to require a separate special resolution of each class immediately affected by the change and a separate special resolution of each class to which shares whose rights are increased are or will become equal or superior; in some important cases the articles of incorporation can override the safeguard (CBCA s. 170) but in this instance we propose that the exceptions should not be carried forward and they do not appear in s. 170 of the draft Act. The second is to give shareholders entitled to vote under CBCA s. 170 the right to dissent and the right to be bought out if the corporation proceeds (CBCA s. 184(2)). Again, we are in general agreement, and s. 170 and s. 184(2) of the draft Act would give effect to that agreement.

(C) Restrictions and constraints

CBCA s. 167(1)(l) and (m) would allow a corporation to impose restrictions upon the transfer of its shares and to alter or remove the restrictions. CBCA s. 184 allows a shareholder of the affected class to dissent and to be bought out if the company proceeds. The imposition or change of a restriction is a change in the ground rules under which the share is held, and we agree with the CBCA treatment, which is reflected in the counterpart provisions of the draft Act.

Under CBCA s. 168, "constraints" against a class such as non-Canadians holding or voting more than a stated percentage of the shares may be imposed by a distributing corporation. The purpose of the section is to allow the corporation to qualify for licences or to carry on businesses in which the percentage of foreign ownership is restricted. The constraint is imposed by special resolution amending the articles of incorporation. Either the imposition or the removal of the constraint entitles the shareholder to dissent and be bought out under CBCA s. 184. We agree with these provisions also. The proposed ABCA should allow constraints for the purpose of complying with laws of the province as well as the laws of Canada. S. 168 of the draft Act would give effect to our views.

(D) Amalgamations

Under CBCA s. 175 to 180, any two or more corporations incorporated or continued under the CBCA may amalgamate. Under CBCA s. 176, the amalgamating corporations must enter an agreement setting out the "terms and means of effecting the amalgamation" and in particular establishing the constitution of the amalgamated corporation, setting out the method of converting shares of the amalgamating corporations into shares and securites of the amalgamated corporation and the method of compensating any shareholders whose shares are not converted, and providing for the cancellation without compensation of any shares held by one amalgamating corporation in another. The agreement must be adopted by each corporation under CBCA s. 177, and articles of amalgamation are then filed with the Director (our Registrar) and are then deemed to be articles of incorporation. A certificate of amalgamation is then issued. CBCA s. 178 provides a

simplified procedure for the amalgamation of a holding corporation with wholly-owned subsidiaries and for the amalgamation of wholly-owned subsidiaries of the same holding corporation.

The protections given to shareholders (except under CBCA s. 178) are as follows:

1. Each shareholder is to be sent a copy or summary of the amalgamation agreement with the notice of meeting (CBCA s. 177(2)).
2. The agreement must be adopted by special resolution (CBCA s. 177(5)).
3. If the agreement directly affects the rights of a class of shareholders, or if there is an increase in the rights of another class which is or will be equal or superior to the rights of the first, the agreement must be adopted by special resolution of the first class, whether or not it is otherwise entitled to vote (CBCA s. 177(4)).
4. A shareholder is entitled to dissent and be bought out (CBCA s. 184(1)(c)).

From the shareholder's point of view, the principal differences from the amalgamation procedure under ACA s. 156 are as follows:

(1) The ACA does not provide for a class vote.
(2) A special resolution under the ACA calls for a three to one majority.
(3) The ACA requires a court order. (It also requires the Registrar's approval, but that is really ministerial).
(4) The ACA does not provide for a dissenting shareholder to be bought out.

The main point here is that if the proposed ABCA follows the CBCA, the shareholder will lose whatever protection he receives from the ACA requirement of a court application at which he can ask the court to refuse to allow the amalgamation. On the other hand, he will gain the right to dissent and be bought out; and the oppression remedy under s. 234 of the draft Act is likely to prove a potent weapon for him (see the discussion at p. 138-150 of this Report).

The CBCA also deprives creditors of their right to complain to the court that the proposed amalgamation will prejudice them. CBCA s. 179(2), however, gives them some protection. A director or officer of each amalgamating corporation must file a statutory declaration that there are reasonable grounds for believing that each amalgamating corporation is, and the amalgamated corporation will be, able to pay its liabilities as they become due, and that the assets of the amalgamated corporation will cover its liabilities and stated capital. The declaration must also say that there are reasonable grounds for believing either that no creditor will be prejudiced or that notice to creditors has been given as provided in the section and no objection has been received. (CBCA s. 179(2), by indirectly imposing the liquidity and solvency tests, also gives some protection to shareholders).

We agree with the CBCA approach. We think that the appraisal right and the oppression remedy together provide reasonable protection to the minority shareholder (though we must

admit to some concern over the use of the amalgamation procedure to force out the minority). We think that creditors are sufficiently protected against an amalgamation designed to result in an insolvent corporation. S. 175 to 180 of the draft Act accordingly follow the sections of the CBCA bearing the same numbers.

CBCA s. 175 to 180 deal only with amalgamations between "corporations", that is, corporations incorporated or continued under the CBCA. In addition, CBCA s. 185.1 gives the court power to approve an amalgamation of CBCA corporations and an amalgamation of a CBCA corporation and a body corporate. S. 186 of the draft Act gives the court a similar power. The draft Act carries forward both provisions for amalgamation (and a further one which we discuss at pp. 54 and 55 of this Report).

(E) Reorganizations and arrangements

ACA s. 154 allows the court to sanction a "compromise or arrangement" between a company and its creditors or between the company and its shareholders if the compromise or arrangement is approved by a 3 to 1 majority of the affected class. The words "compromise" and "arrangement" are not defined, except that "arrangement" specifically extends to a reorganization of share capital by consolidation or subdivision, and the courts have construed them broadly so as to cover a wide variety of changes in the rights of shareholders and creditors.

The CBCA as originally enacted did not include any real counterpart to ACA s. 154. CBCA s. 185 applied only to a "reorganization", which was defined to include a court order in favour of a minority shareholder alleging oppression and an order approving a proposal under The Bankruptcy Act or any other Act of Parliament which affects rights among the corporation, its shareholders and creditors. However, CBCA s. 185.1 was later added by 1978-79 S.C. c. 9 s. 61. The court may now, upon the application of the corporation, "make any interim or final order it thinks fit", with some specific examples, e.g., when a solvent corporation wants to make a "fundamental change in the nature of an arrangement" and it is not practicable for it to do so under any other provision of the Act. "Arrangement" is defined to include:

> "(a) an amendment to the articles of a corporation;
> (b) an amalgamation of two or more corporations;
> (c) an amalgamation of a body corporate with a corporation that results in an amalgamated corporation subject to this Act (a provision that appears to provide for an amalgamation between a corporation or company incorporated elsewhere with a corporation under the CBCA);
> (d) a division of the business carried on by a corporation;
> (e) a transfer of all or substantially all the property of a corporation to another body corporate in exchange for property, money or securities of the body corporate;
> (f) an exchange of securities of a corporation held by security holders for property, money or other securities of the corporation or property, money or securities of another body corporate that is not a take-over bid as defined in section 187."

The policy of the CBCA, with which we agree, is generally to leave a corporation to manage its own affairs, subject to some protections for minorities which we discuss elsewhere in this Report. We think, however, that it is necessary to make some provision for unusual but legitimate adjustments of corporate structures and relationships which cannot effectively be foreseen and provided for in detail by the most meticulously drafted statute. We think, however, that the draft Act should in addition carry forward ACA s. 156.1, which was enacted by S.A. 1978, c. 48, s. 2. That section is designed to enable an extra-provincial company, if its corporation law permits, to bring itself under the ACA by amalgamating with an ACA company which is its wholly-owned subsidiary; s. 180.1 of the draft Act, which generally follows ACA s. 156.1, would provide a procedure which could be followed without resorting to the court under s. 186.

The first major issue is the scope of the availability of the procedure. CBCA s. 185 is, in our opinion, clearly too narrow, and, indeed we think that in the context of Alberta legislation it is largely a duplication of other legislation. We are inclined to think that CBCA s. 185.1 is still too restrictive. It would not cover an arrangement, for example, under which creditors' claims are postponed or subordinated in order to allow the injection of new money, or one under which the available cash may be shared in some appropriate way among different classes of creditors. We think it should be broadened to cover compromises with creditors; while provincial legislation cannot encroach upon Parliament's jurisdiction over insolvency, we think that over the years ACA s. 154 has proved its usefulness and has not caused difficulty. S. 186(1)(h) would therefore include in the scope of the section compromises with creditors as well as the things listed in CBCA s. 185.1(1). The opening words of the subsection would allow the courts to apply the section as broadly as they have applied ACA s. 154 and its English and Canadian counterparts.

The second major issue is the protection of minority shareholders. CBCA s. 185.1 allows the company to make a simple application to the court for approval of the arrangement, and does not make any special provision for notice to shareholders or for approval by them by special resolution or otherwise. While the court might well give directions for giving notice of and convening meetings, we think that, in view of the extraordinary nature of the relief proposed by that section or by the somewhat broader section we will propose, the relief should not be available at all without a special resolution of shareholders. Indeed, we think that if the proposed compromise or arrangement will affect the rights of a particular class of shareholders, approval of that class by special resolution should be required, as it now is under ACA s. 154. With that protection, and the discretion of the court to refuse approval of the proposal, we think that the additional protection of an appraisal right (other than one provided for in the arrangement itself) is not needed, and we do not propose to include in the draft Act a counterpart of CBCA s. 185.1(4)(d).

Professor Gower would provide a further protection. His view is that the courts have given somewhat less than adequate protection to minority shareholders, and he thinks that they would do better if guaranteed adequate information. Accordingly,

s. 231 of his draft Ghana Act would require the Registrar of the Court to "appoint one or more competent reporters to investigate the fairness of the said arrangement...and to report thereon to the Court" at the company's expense. We are not inclined to go so far, but we mention the point so that others may consider it.

Part of the issue of protection of shareholders and creditors is that of information. S. 207 of the English Act (s. 206 being much like ACA s. 154) requires the company to furnish each shareholder or creditor with a statement of the effect of the compromise or arrangement, a statement of any material interests of the directors, and any way in which its effect on them will be different from the effect on others. We think this section beneficial, and s. 186(5) of the draft Act would give effect to that view.

The next major issue is the protection of creditors. Again, CBCA s. 185.1 leaves it in the discretion of the court whether or not to require a meeting of creditors, and what degree of approval, if any, to look for (though proceedings under the section are less likely to affect creditors than those which we propose). We think, however, that if a proposal affects the rights of creditors, it should not be carried out unless it meets with their general approval, and that a meeting or meetings should be required.

A concern raised with us was that an arrangement under s. 186 of the draft Act might affect secured claims. That is true, just as it is true of ACA s. 154. Bond and debenture trust deeds customarily provide for the variation of the rights of the holders with the approval of an appropriate majority, and we think that s. 186 does not diverge too far from usual practice so far as they are concerned. Ordinary first mortgages on land are, we think, sufficiently protected by s. 186(4)(b), under which the Court must direct class meetings if they are needed; a first mortgagee of a parcel of land must, we think, constitute a class the rights of which cannot be affected without an affirmative vote of the class. A not unrelated concern which was raised with us was whether the term "class" is sufficiently clear or whether some definition should be attempted based upon a community of interest; we think, however, that a creditor is sufficiently protected by his right to apply to have appropriate classes determined, and we are doubtful that a definition would be helpful. By way of example of the approach which the courts have taken, see Re Alabama, New Orleans, Texas & Pacific Junction Railway Co. [1891] 1 Ch. 213, particularly per Bowen L.J. at p. 243; Sovereign Life Assurance Co. v. Dodd [1892] 2 Q.B. 573, particularly per Lord Esher, M.R. at p. 579; and Re Wellington Building Corp. Ltd. [1934] 4 D.L.R. 626 (Ont. H.C.). Re Kendon Development Corporation & Wall & Redekop Corporation Ltd. (1979) 103 D.L.R. (3d) 429 (B.C.S.C.) turned on its unusual facts.

The general approach which we think that the draft Act should take is as follows:

1. To allow a corporation to put forward a proposal for an arrangement as defined in CBCA s. 185.1(1) and also a compromise involving creditors and anything else that comes within the term "arrangement" as interpreted by the courts.
2. To require that affected shareholders receive information about the proposal and its special effect, if any, on the interests of the directors.

3. To require special resolutions of creditors and classes of shareholders, affected by the compromise or arrangement.
4. To require approval by the court on a discretionary basis.

S. 186 of the draft Act would give effect to our views.

(F) Sale or lease of property

CBCA s. 183(2) to (8) require the approval of the shareholders of "a sale, lease or exchange of all or substantially all the property of a corporation other than in the ordinary course of business". The approval is to be given by special resolution (CBCA s. 183(7)), but shares which are otherwise non-voting carry a vote, and shareholders of a class or series of shares are entitled to vote if they are affected differently from shareholders of other classes or series. A shareholder is entitled to dissent from the disposition under s. 184, and to be bought out.

We do not think that shareholders' approval of the sale of the undertaking is now required by Alberta law, though it is good practice to obtain it. We have been in some doubt about suggesting that such approval be made mandatory, but we think the maintenance of a difference between the CBCA and the proposed ABCA on the point would lay traps and tend to make the law more bewilderingly complex. We therefore propose that the CBCA provisions be accepted for the sake of uniformity. Otherwise the reasons for and against the change are obvious and appear to us to be fairly evenly balanced. S. 183 of the draft Act would therefore follow CBCA s. 183(2) to 183(8).

(G) Transfer of registration from one jurisdiction to another

ACA s. 157 provides for the transfer to Alberta of the basic registration of a company incorporated elsewhere under general legislation relating to companies. The Registrar must satisfy himself that the laws of the other jurisdiction authorize the application, but he then appears to have a discretion but no guidance as to how the discretion should be exercised. CBCA s. 181 allows any corporation to obtain registration under that Act if it is so authorized by its incorporating jurisdiction; the section requires it to send articles of continuance to the Director, who "shall" issue a certificate of continuance, upon which the corporation, though without any derogation from its existing rights and obligations, comes under the CBCA as if incorporated under it, with the articles of continuance as its articles of incorporation. It appears to us that the reasons why a company should have a legal right to move its registration to Alberta are the same as those why any corporation should have a legal right to incorporate here in the first instance. It also appears to us that the CBCA provisions give more guidance than do the Alberta provisions. For those reasons, and for the sake of uniformity, we think that CBCA s. 181 should be adopted. It is, we think, for the incorporating jurisdiction to take steps to protect existing shareholders and directors. S. 181 of the draft Act would give effect to our views.

ACA s. 156.1, which was added to the ACA by S.A. 1978 c. 48, allows a company incorporated elsewhere to amalgamate with an Alberta company if its own law permits. The section is intended to fit in with the transfer provisions of some American

jurisdictions, which allow a company to transfer out its registration to another jurisdiction only by amalgamation with a company incorporated in the other jurisdiction; it allows the extra-provincial company to incorporate a wholly-owned Alberta subsidiary and then to amalgamate with it Since an amalgamation is involved, the section provides protections for creditors and shareholders. Although the CBCA deals with the question by providing for a court order under s. 185.1 we think that the more extensive self-operated procedure under s. 156.1 is useful and unobjectionable and should be continued in the proposed ABCA. S. 180.1 of the draft Act would give effect to our views.

ACA s. 158 allows an Alberta company to transfer its registration elsewhere. It requires only that a special resolution and the laws of the other jurisdiction authorize it to do so, and the company becomes a corporation under the law of the other jurisdiction on the date of the "instrument of continuation" issued there. CBCA s. 182 is more detailed and protective. It requires a special resolution. It requires the corporation to satisfy the Director that the transfer will not adversely affect creditors or shareholders, and, if it is a corporation to which the Investment Companies Act applies, the corporation must secure the prior consent of the Minister of Finance. The corporation can transfer its registration only if its property will continue to be its property and if civil and criminal liabilities and actions will still apply to it. Probably most important of all, a shareholder who dissents is entitled to be bought out under CBCA s. 184; in view of the fact that the transfer of registration changes the whole basic corporation law of the corporation, we think that that protection is entirely appropriate and desirable.

The considerations involved in transfers of registration from Alberta law to the law of another jurisdiction are somewhat different from those involved in transfers in. We think that the province should take some responsibility for the protection of the shareholders and creditors of a corporation which is under its legislative jurisdiction. In order to provide that protection the province, through the Registrar of Corporations, should be assured that the laws of the new jurisdiction will recognize all existing claims against the corporation which are recognized by the law of Alberta, including the right of shareholders to dissent from the transfer and to be bought out under s. 184 of the draft Act. S. 182(9) of the draft Act would accordingly prohibit transfer unless the laws of the new jurisdiction will recognize all claims, and s. 182(1) would require the Registrar to satisfy himself that a proposed transfer would not adversely affect shareholders or creditors.

A majority, though by no means all, of our lawyer consultants thought that the Registrar's approval of transfers out should not be required; they were concerned about the possibility of delay and complexity in the procedures involved. It seems to us, however, that the protection of shareholders and creditors must be the overriding consideration, and that before too long the Registrar will accumulate sufficient knowledge of the laws of popular jurisdictions and will be able to give his approval without undue delay.

In our Draft Report and in the draft Act which accompanied it we suggested that the the authority to approve transfers out should be the Director of the Securities Commission. In the

opinion of the Director, the Registrar and our lawyer consultants, the approving function is one which might more quickly and efficiently be performed by the Registrar and we have accepted that advice and drafted s. 182(1) accordingly.

It may also be thought that there is some public policy involved in the question whether or not a corporation should be able to take its basic corporation law out of the province's legislative jurisdiction (though it must be remembered that the transfer of its registration does not of itself transfer its property and activities, or remove them from provincial legislative jurisdiction), and that some provincial consent should be obtained from a minister or administrator based upon policy grounds broader than protection of shareholders and creditors. We do not, however, propose that such consent should be necessary; we think that a corporation incorporated under a general business corporations Act should be free to transfer its registration, subject to safeguards for shareholders and creditors. If there are special policy considerations relating to corporations engaged in special activities, they should be embodied in legislation dealing with those activities.

For all the reasons which we have given, our view is that the provisions of CBCA s. 182 for the transfer of registration to another jurisdiction are satisfactory and should be adopted, with the exception of s. 182(2) which contains the requirement of ministerial consent for transfer of registration by corporations to which the Investment Companies Act applies. S. 182 of the draft Act would give effect to our views.

(b) Changes in by-laws

The by-laws of a corporation incorporated under the draft Act would cover some subjects which are customarily dealt with by the articles of association of a company incorporated under the ACA. The draft Act's treatment of by-laws would, however, be different from the ACA's treatment of articles of association.

The principal difference is that, under the ACA, the articles of association are adopted and amended by the incorporators or by special resolution of the shareholders, while under s. 98 of the draft Act by-laws would customarily be adopted and amended by the directors, subject only to the approval of the shareholders by ordinary resolution at their next meeting. A by-law would have full effect from its enactment until the shareholders' meeting, though, if not approved, it could be re-enacted only with the approval of a subsequent meeting of shareholders. The shareholders would have power to amend a by-law when it is presented for approval, and a shareholder might, under s. 98(5) make a proposal to make, amend or repeal a by-law.

We think it appropriate to adopt s. 98, which follows CBCA s. 98. We have some concern about depriving minority shareholders of the protection given by the ACA requirement of a special resolution to change the articles of association, but have concluded for two reasons that it is safe to do so. The first reason is that the subject matter of the by-laws, unlike some of the subject matter of the articles of association, does not affect the fundamental rights of the shareholder such as his right to vote, the preference given his share, or restrictions upon its transfer; the contents of the by-laws tend to be things

of less importance. The second reason is that the by-laws of companies incorporated elsewhere, notably companies incorporated by Canada and Ontario, have for years been adopted and amended in much the same way as that which is now proposed, and the system has worked satisfactorily.

The second great difference between the treatment of by-laws by the proposed ABCA and the present treatment of the articles of association by the ACA is that the articles of association must be filed with the Registrar of Companies while the by-laws would not have to be. We have already discussed this difference at pages 11-12 of this Report and given reasons for recommending that the ABCA not require the by-laws to be filed.

We might say in passing that we are somewhat doubtful about the effect of s. 98(5), that is, we are not entirely sure whether, if the shareholders were to adopt a proposal to make, amend or repeal a by-law, the by-law would be made, amended or repealed or whether the proposal would merely be advice to the directors; we have concluded however that if the question does not prove academic a court would hold that the adopted proposal would be effective, and we do not think it desirable to depart from uniformity with the CBCA by adding a provision to that effect.

(c) Unanimous shareholder agreement

We have already recommended at p. 26 of this Report that the amendment of a unanimous shareholder agreement require the unanimous agreement of the shareholders: see s. 140 of the draft Act.

3. Directors

(a) Qualification of directors

CBCA s. 100(1) disqualifies as directors of corporations minors, persons of unsound mind so found, corporations and bankrupts. There are no similar disqualifications in the ACA with respect to Alberta companies; while Article 61 of Table A provides that the office of director shall be vacated if the director becomes bankrupt or of unsound mind or is found lunatic, the article applies only if not displaced, and the subject may be dealt with by the articles of association in any way that the incorporators or shareholders see fit. We are inclined to agree with the CBCA, and we propose that the proposed ABCA contain a provision similar to CBCA s. 100(1). It seems reasonable that individuals who lack legal capacity to manage their own affairs should not have legal capacity to manage other people's. We also feel that a corporation is not an appropriate person to discharge the fiduciary obligations of a director.

BCCA s. 138 imposes two additional kinds of disqualification. The first is a five year disqualification following a conviction for fraud or for an offence in connection with the promotion, formation or management of a company, and may be dispensed with by a court. The second, which applies only to reporting companies, is a five year disqualification following cancellation of registration under securities legislation, and may be dispensed with by a securities official. We are not inclined to include these additional disqualifications but we mention them for the purpose of drawing attention to the fact

that they have been included in one piece of modern company legislation in Canada.

CBCA s. 100(2) provides that a director need not be a shareholder unless the articles so provide. That appears to us to be an appropriate provision and s. 100(2) of the draft Act follows it. We do not think it necessay to include in the proposed Act anything like ACA s. 76, which deals with the consequences of the lack of a share qualification. We also agree with CBCA s. 97(2) which requires a distributing company to have at least two directors who are not employed by a company or its affiliates, and a counterpart provision appears in the draft Act.

Unless a corporation is a holding company and less than 5% of its revenues are earned in Canada, CBCA s. 100(3) requires a majority of its directors to be resident Canadians, and CBCA s. 109(3) provides that the directors shall not transact business unless a majority of the directors present are resident Canadians (though, under CBCA s. 109(4), an absent Canadian director's approval of the business done at a meeting is a substitute for his presence). ACA s. 76.1 goes further and provides that half the directors of an Alberta company (other than a non-resident company as defined), and half those present at a director's meeting, must be resident Albertans. It is necessary to stop to consider these provisions.

It should be noted, to start with, that a Canadian or Albertan qualification for some directors does not give effect to any policy against foreign ownership or control of Alberta companies or Alberta properties; the shareholders of an Alberta company are collectively entitled to the ownership and control of the company and, through it, to the benefit of its assets. If the public policy of the province were to prevent foreign ownership of Alberta corporations the Legislature could legislate directly against the holding by non-Albertans of shares in Alberta corporations, and there are already legislative precedents in Canada for so doing.

What ACA s. 76.1 does is to ensure that the votes of resident Albertans (i.e., persons ordinarily resident in Alberta who are Canadian citizens or admitted to Canada for permanent residence) will be included in the votes taken on every matter of business done by the directors of Alberta companies, and that the voices of resident Albertans will be heard during the discussion that precede the votes. Resident Albertans, like other directors, will speak from their knowledge, experience and background, and their knowledge, experience and background will therefore go into the making of corporate decisions, something that might otherwise not happen. Corporate decisions will therefore be more sensitive to the business and economic climate of Alberta and to the interests of Albertans generally. That is the argument in favour of ACA s. 76.1.

From the point of view of a corporation, however, the requirement will in some cases impose hardship. At the least, it militates against the ability of the owners of the corporation to entrust their business affairs to those in whom they have confidence. Then, a large Alberta corporation whose affairs transcend provincial boundaries into other provinces and other countries may find it desirable for business reasons to draw directors from the areas in which it operates to an extent which is inconsistent with an obligation to have half its directors

resident Albertans. At the other end of the scale, the proprietor of a private Alberta corporation who wishes to spend his retirement years elsewhere will have to have an Albertan as director and to have him take part in every piece of business, that may not be an intolerable burden, but it is a burden nevertheless, and one which is not relevant to the conduct of his affairs.

There are two ways of avoiding the effect of the requirement. One is to have dummy directors or directors who will follow the instructions given by those who control the corporation; the increasing obligations being imposed by law upon directors may result in an increasing reluctance on the part of resident Albertans to assume dummy directorships, but it seems likely that a company whose operations are substantial enough to affect Alberta will be able to find employees or others who will do what they are told. The second way to avoid the requirement is either to incorporate a new company elsewhere and to register in Alberta as an extra-provincial corporation, or to cause an existing Alberta corporation to "migrate" to another jurisdiction, thereby giving up its Alberta registration, and then to register here as a foreign corporation. The province may be able to discourage this kind of escape by treating extra-provincial corporations less favourably for the purpose of taxation, but, if so, we think that it is in the taxation legislation that the requirement of resident Albertan directors should appear.

We think that ACA s. 76.1 is likely to have adverse effects which outweigh any benefit which it does confer, and we recommend against its inclusion in the ABCA. With some doubt, we do recommend a provision similar to that in the CBCA and in the Saskatchewan and Ontario Business Corporations Acts, that an Alberta corporation should have a majority of resident Canadian directors and that all directors' business should be done or approved by a majority of resident Canadian directors; such a provision would not be as likely to be unduly onerous, and a provision similar to that in other Acts would not induce a corporation to migrate to a jurisdiction in which one of those Acts is in force. We would, however, include a provision such as ACA s. 76.1(5) providing, in effect, that business inadvertently done without a Canadian majority will not be invalidated, so that those dealing with an Alberta corporation on a formal basis will not feel impelled to require proof that the corporation has a majority of resident Canadian directors and that the transaction was approved at a director's meeting at which the majority of the directors present were resident Canadians. S. 100(3), 109(3), and 111(2) of the draft Act would give effect to our views.

(b) Election and removal of directors

(i) Nature of cumulative voting

In the absence of cumulative voting, each shareholder who has a vote may vote for each director, and the holders of a majority of the votes can and do elect all the directors. Because it seems to many to be unfair that the holders of a substantial minority of the votes (even up to one less than the number held by the majority) may be deprived of any representation whatsoever on the board, there is much current sentiment in favour of cumulative voting, which gives a sufficient minority a chance to elect a director or directors of

their choice.

The essence of cumulative voting is that, instead of having one vote on the election of each director, the holder of a voting share has as many votes as there are directors to be elected, and that he may allocate those votes among the directors in such manner as he sees fit. The system will guarantee a minority which takes proper advantage of it the power to elect a number of directors appropriate to the number of votes held by the minority; for example, if there are 5 directors to be elected, a minority holding 1/5 of the votes, by allocating them all to one candidate, will be able to cast more votes for that one director than all the other shareholders can cast for each of 5 candidates and can therefore procure the election of the one candidate. A number of incidental provisions are of course necessary to ensure the integrity of the system.

(ii) Mandatory and permissive cumulative voting

The main argument for cumulative voting is that the present system enables a majority, and often a majority secured by management's control of the proxy solicitation machinery, to exclude the minority from access to information and from the decision-making process. Particularly in view of the separation between the management and ownership which has taken place, the principle of corporate democracy and the principle of accountability of management to ownership require that a minority be able to obtain representation on the board. An additional benefit is that a director who is not a member of the corporate establishment may well unearth bad practice, sloppiness, negligence, and even wrongdoing, in the board and in management.

Arguments of this kind have persuaded almost half the American States, and the province of New Brunswick, to impose mandatory cumulative voting upon business corporations, and have persuaded others (Parliament (CBCA s. 102), Ontario (OBCA s. 127), Saskatchewan (Saskatchewan BCA s. 102 and Manitoba (Man. CA s. 102)) to provide a system of cumulative voting to be accepted or rejected by a corporation's articles of incorporation; indeed, the drafters of the CBCA went so far as to suggest that cumulative voting apply unless the articles of incorporation expressly exclude it, though the CBCA as enacted makes it optional.

The Lawrence Report, para 8.2.5, thought that "the most persuasive argument against cumulative voting is that it encourages the election of directors representing particular interest groups who, by virtue of their partisan role, encourage disharmony in the management of a company." The drafters of the CBCA thought that "cumulative voting "is somewhat controversial and may be thought more appropriate to small closely-held corporations where shareholder control is considered important than to large publicly-held corporations where stability and harmony in management is considered the dominant interest" (though, as we have mentioned, they thought that cumulative voting should apply unless expressly excluded). We can see that there may well be cases in which it would be useful to have directors on the board who are not associated with management, but we do not see a sufficient advantage to be gained by cumulative voting, or a sufficient evil to be remedied by it, to justify imposing it upon all corporations or upon all of a class of corporations. We recommend that the proposed ABCA adopt the

CBCA provisions for optional cumulative voting. As those who prepare corporate constitutions do not usually do so upon the instructions of minorities, it may well be that the use of cumulative voting will not become widespread while it remains optional, but an optional provision will at least introduce the system to Alberta and cumulative voting will be available to those who want it. S. 102 of the draft Act would give effect to our views.

(iii) Election of directors in the absence of cumulative voting

Under CBCA s. 101, the first directors are named in a notice filed with the articles of incorporation, and thereafter directors are elected by ordinary resolution at annual meetings for terms which may be staggered and which may be up to 3 years. The ACA does not deal with directors' terms of office, which are usually governed by the articles of association, but we think the CBCA provisions satisfactory for the proposed ABCA. The CBCA does not require a formal consent from the person to be elected director as does OBCA s. 125(3), and as does ACA s. 75 for public companies. We incline to the opinion that the consent of the directors should be required: if a person is elected or held out as a director without his consent he might find himself under liability or faced with the necessity of taking legal proceedings to extricate himself from the directorship. If he is present at his election, or acts as a director, no formal consent should be required, but otherwise he should consent in writing. S. 100(5) of the draft Act would give effect to these views.

The CBCA gives the shareholders control over the number and identity of the directors through CBCA s. 107 (under which the shareholders can amend the articles to change the number) and CBCA s. 104(1) (under which the shareholders may at a special meeting by ordinary resolution remove any director or directors from office, other than one who is elected by the holders of a special class or series of shares). CBCA s. 6(4) provides that the articles may not require a greater number of votes to remove a director than the number required by s. 104, so the right is protected against anything but a unanimous shareholder agreement. Under s. CBCA 97(2) there must be at least one director. We have included similar provisions in the counterpart sections of the draft Act.

The qualification and election of directors of Alberta companies is, except for a few specific provisions, left to the articles of association, and it is therefore possible to provide for the election of directors by groups other than shareholders, such as debenture holders or employees. The CBCA does not appear to contemplate election of directors by any group who are not shareholders, and may preclude it: CBCA s. 101(3) requires the shareholders to elect directors, and CBCA s. 106(3) and s. 104(2) contemplate election by the holders of a class or series of shares, and that is all. We think that the proposed ABCA should allow a corporation, if it so desires, to provide for the election of a director by a class other than shareholders, and we so recommend: see s. 101(9) of the draft Act.

(iv) Election of directors under cumulative voting

Under CBCA s. 102 the adoption of cumulative voting is optional, but if cumulative voting is adopted the statutory scheme is mandatory.

The basic provisions are contained in CBCA s. 102(b) and (c). At an election of directors, each shareholder has the right to cast a number of votes equal to the number of votes attached to his shares multiplied by the number of directors to be elected and may allocate the votes as he wishes; and there must be a separate vote for each director. The result is that if a sufficient minority chooses to allocate all or a sufficient number of votes to a candidate they can ensure his election against the wishes of the majority.

The protection of the integrity of the scheme requires the enactment of certain other provisions. The effect of cumulative voting depends upon the number of directors being voted upon, so that CBCA s. 102(a) requires that the articles of incorporation specify a fixed number of directors and not merely a maximum number and a minimum number, and s. 102(h) prohibits a reduction in the number if the votes against the reduction would have been enough to elect a director. The same consideration requires all directors to be voted on at once, so that s. 102(f) precludes staggered or varying terms. It would be pointless to allow a minority to elect a director and then allow the majority to remove him, so that s. 102(g) prevents the removal of a director if the votes againt his removal would be enough to elect him at an election.

We think that the CBCA provisions are satisfactory, and we recommend that they be followed; s. 102 of the draft Act does so.

(v) Appointment of additional directors

Upon occasion, it is expedient for a corporation to make a seat on its board of directors available to a lender or to another participant in a major transaction which the corporation wishes to enter into. It is likely to be inconvenient for the corporation to arrange for the resignation of an existing director in order to create a casual vacancy to which the directors may appoint the newcomer; and it is inappropriate for the directors to use such an indirect means to facilitate a legitimate business transaction. Our lawyer consultants accordingly suggested that the proposed ABCA should follow BCCA s. 134(3), which allows the memorandum of association to empower the directors to appoint additional directors up to one-third of their number. We have accepted this suggestion, and s. 101(4) of the draft Act would so provide. The additional directors could serve only until the next annual meeting.

It may be thought that the appointment of a director by directors would be an infringement upon corporate democracy and upon the right of the shareholders to elect the directors. The power, however, would have to be provided by the articles of incorporation, which are under the control of the shareholders; and the appointments would be made by directors under a duty of good faith to the shareholders. It should be noted that appointments under such a power could water down the representation of minority interests where cumulative voting applies. The minority, however, would still have its

representation; and, since it is the articles of incorporation which must provide for both cumulative voting and the power of appointing additional directors, we see no reason to be fearful that the latter will be used to subvert, or rather to derogate marginally from the effect of, the former. We think that business flexibility would be served by allowing a corporation to provide for the power if it wishes to do so, and that the risk of abuse is not great.

(c) Defective appointment of a director

CBCA s. 111 provides that "an act of a director or officer is valid notwithstanding an irregularity in his election or appointment or a defect in his qualification." We do not think that this provision is needed for the protection of outsiders, as we think that CBCA s. 18, of which we generally approve, allows an outsider to rely on the appearance of regularity. So far as the internal affairs of the company are concerned, we agree that business done should not be upset merely because of some technical defect (e.g., a procedural irregularity in an election of directors which clearly did not affect the expression of the shareholders' wishes, or the fact that a necessary share qualification had been applied for but the shares had not been issued). We are somewhat more doubtful about the policy which should be followed where the irregularity or defect is substantial (e.g., where the election of a director is based upon a refusal to count valid adverse votes, or where a person who is completely disqualified is elected as a director) and we are doubtful also about the interpretation which the courts may place upon the words of the section. However, despite our doubts, we think that the CBCA provision should be accepted on two grounds: the desirability of uniformity and the difficulty of finding better words to draw the distinction between the facts which should invalidate a vote and the facts which should not. S. 111(1) of the draft accordingly follows the CBCA.

(d) Court review of elections of directors

CBCA s. 139 allows a corporation, a shareholder or a director, to apply to the court to settle any controversy over the election of directors. The court has power to declare the result, to order a new election, and to determine voting rights. It may also restrain a director from acting pending determination of a dispute over his election. The same provisions apply to the appointment of auditors.

The drafters of the CBCA, discussed the subject at p. 98-99 of their Proposals. The general effect of their discussion is that the propriety of the prerogative writ of quo warranto, which was the traditional remedy invoked to review the contested election of a director, was questioned in common law Canada; that a derivative action in the name of a corporation for the review of a contested election is in the usual case procedurally difficult and in some circumstances practically ineffective; and that the authority for a representative action for the same purpose, though it may be recognized in England, is at best doubtful in Canada. The object of CBCA s. 139, according to the Proposals, is to furnish a remedy available on summary application and free of the conceptual and procedural problems of the writ and the distinctions between personal, derivative and representative actions. We agree that there should be a clear and efficient remedy, and we agree that the CBCA section provides

one. We therefore recommend the adoption of the section. S. 139 of the draft Act follows it.

(e) Proceedings of directors

CBCA s. 109 leaves the control of the proceedings of the directors to the by-laws and to the directors themselves, except for the requirement that if the meeting is to deal with any of a number of important matters, the notice of the meeting must so specify (though a director may waive notice). Under CBCA s. 109(8) the sole director of a company may constitute a meeting. We find CBCA s. 109 satisfactory and recommend its adoption; we have already dealt with s. 109(3) which requires that a majority of the directors who transact a piece of business be resident Canadians. S. 109 of the draft Act would follow CBCA s. 109.

CBCA s. 112 makes specific provision for a written resolution signed by all the directors. CBCA s. 109(9) allows a director, with unanimous consent, to participate in a meeting by telephone or other communication facility allowing all participants to hear each other. We think that both of these provisions should be adopted with some changes intended to improve their flexibility. Their counterparts in the draft Act are drafted accordingly.

(f) Duties and liabilities of directors

(i) Duties

(A) Disclosure

CBCA s. 115 makes fairly elaborate provision for written disclosure by a director that he is, or that he is a director or officer of or has a material interest in, a party to a "material" contract or proposed "material" contract with the corporation, and it goes on to prohibit him from voting on all but a few contracts in which he has such an interest. We agree with these provisions as far as they go, and recommend acceptance, with some changes; see s. 115 of the draft Act and the comments on that section.

An important question is whether disclosure to the other directors is sufficient, or whether disclosure should be made to the shareholders. Professor L.C.B. Gower's view is that "disclosure to one's cronies is a less effective restraint on self-seeking than disclosure to those for whom one is a fiduciary," (Gower, p. 530), and his Ghana Code (Gower, draft Ghana Code s. 207(7)) requires more detailed disclosures to be put in a special book which is then made available for inspection by shareholders. The South African Act requires particulars of all contracts in which directors have declared an interest to be given at each general meeting. We are inclined to the opinion that something more should be done than is required by the CBCA. We accordingly recommend that a note of the disclosures made under s. 115 of the draft Act be available for inspection at the records office by shareholders; see s. 20(1)(f) and s. 21(1) of the draft Act. While we are in general reluctant to suggest the imposition of additional procedures, it does seem to us that shareholders should know what interests their directors have in corporate transactions over and above their interests as shareholders and directors of the corporation. We think, however, that it should be open to the shareholders, by unanimous

shareholder agreement, to provide otherwise, and s. 115(9) of the draft Act would so provide.

(B) Good faith, care and skill

The common law treats directors as fiduciaries and imposes upon them a very high duty of honesty and good faith towards the company. A recent example is Abbey Glen Property Corporation v. Stumborg [1978] 4 W.W.R. 28, where the Appellate Division held that directors who originally acted for a company in negotiating for the acquisition of land must account to it for the profits realized through buying the land for themselves, even though the evidence was that they acquired it privately only after the company's prospective partner, the participation of which was necessary for the transaction, had declined to deal with the company. In so doing the court applied the rigorous standards of Regal (Hastings) Ltd. v. Gulliver [1942] 1 All E.R. 378 (H.L.) and Can. Aero v. O'Malley [1974] S.C.R. 592. So far as care and skill are concerned, however, the common law requires only that a director act to the standard that could reasonably be expected from him, and the courts have not applied even that standard rigorously.

CBCA s. 117(1) requires a director to "act honestly and in good faith with a view to the best interests of the corporation." That appears to embody the general duty of good faith as imposed by the common law. The drafters of the CBCA, however, were of the view (Proposals p. 81-82) that it abolishes what is known as the "collateral purpose" or "abuse of power" doctrine, under which directors may not exercise their powers for purposes other than those for which the powers were conferred (e.g., for the purpose of enabling them to maintain control of the corporation), and applies only the more simple and direct test embodied in the words which we have quoted from CBCA s. 117(1). We are in agreement with the CBCA provision, and we agree with Professor Gower who said (Gower, draft Ghana Code, p. 146) that, rather than trying to define the best interests of the corporation, it is better to leave the law to develop in the hands of the judges.

There is a related question which is not dealt with in the CBCA and which has caused us some concern. It is the question whether or not the directors should be set at liberty to consider the interests of the corporation's employees. That power is usually there, as the directors are usually entitled to form the opinion that the proper conduct of the corporation's business requires the conferring of benefits upon employees so that the employees will serve the corporation better; but there may be an occasional case in which the directors cannot consider employee's interests and which may be thought to be hard, such as Parke v. Daily News, Ltd., [1962] 2 All E.R. 929 (Ch. D) where the directors were prevented from making a cash distribution to employees upon termination of the company's undertaking as there was no interest of the company which the distribution could promote. Professor Gower argued strongly for such a power in his discussions with us and persuaded us to include it in the draft Act which we circulated for discussion with our Draft Report. Strong adverse representations were made to us by our lawyer consultants, however, and in the result we have changed our views, though with some regret. We start by noting that what is under discussion is the conferring of a liberty on the directors, not a duty. As we have said, it is only the exceptional case in which directors cannot decide that the corporation should confer

benefits on its employees; and, upon reflection, we do not think that the principle that the directors should act in the interests of the corporation should be endangered (as we think it would be) by a provision suggesting either that the interests of the employees are the interests of the corporation or that the directors are at liberty to act in favour of an interest which conflicts with that of the corporation. If there is a public policy which suggests that all employers, or employers whose decisions are socially significant should be taken with specific regard to the interests of employees, this is not the place to give effect to it.

There is a further question, and one which we are inclined to deal with, arising from the fact that the constitution of some companies allows the election of a director of a company by a special constituency of creditors or employers (see this Report, p. 61) or preferred shareholders. If such a director is elected, the CBCA, and probably the present Alberta law, imposes upon him the same duty to advance the company's interests as is imposed upon the other directors. It may well be argued that the director's fiduciary duty prevents him from reporting to his constituency and from taking its interests into account, so that the purpose for which he is appointed is stultified. Our inclination is to adapt a suggestion made by Professor Gower in connection with another subject and to recommend that the proposed Act provide that, in considering whether a transaction or course of action is in the interests of the corporation, such a director "may give special but not exclusive consideration" to the interests of the special constituency, and s. 117(4) of the draft Act would so provide. We do not think that the Act should go much further in the direction of allowing the director to act against the interests of the corporation, and we think that this provision, despite its vagueness, will be of some assistance.

We now turn to care, diligence and skill. CBCA s. 117(1)(b) requires a director to "exercise the care, diligence and skill that a reasonably prudent person would exercise in comparable circumstances," a requirement which in the view of the drafters of the CBCA significantly raises the standards to which directors must conform. We have little difficulty in agreeing with the standard insofar as it relates to care and diligence: we think that the law has applied much too low a standard in this area, and that the introduction of a standard which the court should try to apply objectively is a significant improvement. We have more difficulty about the reference to skill. Firstly, we think that there may be some difficulty in the interpretation of the provision; for example, is the standard applicable to a specially qualified professional person or businessman the same as that applicable to one who does not have the special qualification? Secondly, the imposition of each additional requirement is likely to inhibit persons from accepting directorships, and a requirement of the possession and application of a degree of skill which will effectively be defined by a court after the event is likely to be more inhibiting than some other requirements might be. Having said all that, however, we recognize the advantages of adopting the CBCA standard: in a matter of this importance it is best that the statute law be uniform so that the standard will be generally known and so that the practical and judicial experience in several jurisdictions can be brought to bear upon its interpretation and evaluation. Further, it is likely that any alternative drafting which we might propose would suffer from similar drawbacks of vagueness or

would fall into the difficulties attendant upon undue specificity. Finally, we think that judicial interpretation is the best process for the further development and application of the standard and that the disadvantages of that process are outweighed by its advantages. Accordingly, we recommend the adoption of the CBCA standards, and s. 117(1) of the draft Act would adopt them.

(C) Exculpation

Under CBCA s. 117(3) the corporation cannot relieve a director of the duties imposed by the CBCA or regulations or from liability for a breach. The only exception is that a unanimous shareholder agreement which withdraws powers from the directors relieves them from the related obligations, but the obligations of which the directors are relieved then devolve upon the shareholders.

We accept the policy of the CBCA. The duties of directors are among the fundamental ground rules determining the relationship among the various elements in the corporation and should not be capable of being changed. Once a duty has been breached the corporation would be able to release a director from liability on appropriate terms, but that could only be done by directors who are themselves under the duties of honesty, good faith, care, diligence and skill, and, an improper release would give a shareholder a right to apply to bring a derivative action under s. 232 of the draft Act or would give him a right of action against those other directors under s. 234. S. 117(3) of the draft Act therefore follows CBCA s. 117(3).

(D) Dissent by director

CBCA s. 118(1) provides that a director who is present at a meeting is "deemed" to have consented to a resolution unless his dissent is recorded in the minutes, or unless he requests that that be done, or unless he gives immediate notice of dissent. We are in agreement with this provision as a matter of evidence, if the ambiguity in the word "deemed" is removed by making it clear that the deeming is rebuttable. S. 118(1)(d) of the draft Act would therefore allow a director to rebut by other evidence his consent to a resolution.

We are troubled, however, by CBCA s. 118(3) which treats an absent director as consenting to things done at a meeting unless he objects within 7 days of becoming aware of them. Presumably the provision is intended to prevent a director from avoiding liablity by absenting himself from meetings.

S. 9.16(5) of the draft CBCA would have imposed the obligation upon the directors only with regard to matters referred to in s. 9.24(2), which are similar to those referred to in s. 113(3) of the draft Act. The explanation given by the drafters (Proposals p. 78) is as follows:

> 224. Section 9.16(5) is new. Gower, in Modern Company Law, 3rd, ed., 1969, at p. 551 remarks that "Though it is said that (directors) ought to attend these meetings (of the board) whenever they can, the cases suggest that this is little more than a pious hope. As in other walks of life, if anything

> is going wrong there are great advantages in 'not being there.'" See also Re Dominion Trust Co. (1917) 32 DLR 63. Subsection (5) is designed to make it clear that absence from meetings at which important decisions affecting the corporate financial structure are made will not per se relieve the absent director of his statutory liability under this section.

We sympathize with the intention, but, particularly when the provision extends to all actions of the directors, we question its fairness and its effectiveness in performing its intended function.

We start from the proposition that the absence of a director from a meeting is not itself evidence of culpable lack of diligence; no director can be expected to avoid or to overcome all illness, to avoid all conflicting business engagements, or to refrain from taking all vacations. A director should therefore not be put at a disadvantage merely because he did not attend a meeting, and if loss results from his lack of diligence s. 117(1) of the draft Act already would impose an obligation which involves a remedy. We go on to say that directors' meetings are for the purpose of allowing directors to review and to discuss materials and debate issues, and that it is not fair to a director to require him, without the benefit of the review and the debate, to make a decision on important issues, and then to impose liability upon him if he comes to the wrong decision upon such partial information as he can obtain after the fact. The director's ex post facto approval or rejection is irrelevant to what actually happens, there being nothing in the CBCA to suggest that his vote will be counted retroactively and strong reason why it should not; liability is therefore to be imposed if he fails to do something, even though it would not advance the corporation's interests if he did do it. Finally, a director will be able to avoid all liability imposed by the subsection by filing a dissent from the business done at the meeting, and we do not think that financial liability should, in effect, be imposed upon a director merely because he is not suffiently versed in the art of self-protection to file dissents as a matter of routine. For these reasons we have not included a counterpart CBCA s. 118(3) in the draft Act.

(E) Remuneration of directors

Professor Gower in his draft Ghana Report advocated a provision that all remuneration of directors is to be determined by ordinary resolution, i.e., by the shareholders. His purpose was "to prevent one of the most common abuses, namely, running companies for the sole benefit of the directors who take everything by way of remuneration, leaving nothing for the shareholders." His view was that in the absence of such a provision the shareholders have nothing to say about the directors' remuneration and do not even know about it.

CBCA s. 120 allows the directors to set their own remuneration and that of the officers and employees, subject to the articles and a unanimous shareholders' agreement. That results in an obvious conflict of interest. The present Alberta law is that the directors as such have no right to remuneration unless it is provided for in the articles or by shareholders'

resolution (see Re George Newman & Co. [1895] 1 Ch. 674 (C.A.)), and Article 53 of Table A, when applicable, requires their remuneration to be fixed by ordinary resolution; but the directors have power to fix the remuneration of officers and employees, who may, of course, include some or all of the directors.

We sympathize with Professor Gower's view, and we recognize the opportunities for abuse under the CBCA provision. We do not think, however, that we are prepared to go so far as to require the remuneration of director-officers to be fixed by ordinary resolution. For one thing, such a provision would make it very difficult for a company of substantial size to recruit a member of senior management who is unwilling, until he is assured of his terms of employment, to publicize or even to form, an intention of leaving his current employer; and in general it does not seem to us that the shareholders are the best judges of necessary salaries or that they are themselves free of self interest.

In our Draft Report, we suggested that a corporation should disclose to its shareholders the aggregate amount of the direct remuneration paid to each director and officer of the corporation. We are still of the opinion that that disclosure would be salutary. We have however been persuaded that Alberta should not under present circumstances require greater disclosure than other Canadian jurisdictions require. S. 120(2) of the draft Act therefore provides for regulations to prescribe the amount of disclosure to be required. Minority shareholders will otherwise have to be left to their remedy for oppression.

(ii) Liabilities

(A) For breach of duty

It is clear that under the CBCA a director who does not act honestly and in good faith with a view to the best interests of the corporation, or who does not exercise the requisite care, diligence and skill, will be liable in damages for any resulting loss to the corporation, and will be liable to account to it for any benefits wrongly received by him. S. 117 of the draft Act would have the same effect.

(B) For specific contraventions of the Act

CBCA s. 113 imposes what amounts to absolute liability upon directors who take part in specified acts which are contrary to the statute (subject to s. 118(3) which allows them to rely on financial statements and reports). The specified acts include issuing shares at an undervalue for consideration other than money and the approval of various payments when a relevant liquidity or solvency test is not satisfied, including the payment of dividends, the buy-back of shares, the making of loans to shareholders, directors or officers, the indemnification of directors, and even the making of payments directed by the court under s. 184 and s. 234. They include the payment of more than a reasonable commission on the sale of shares and the issue of shares for a deficient consideration other than money. In some of these cases, a similar liability is imposed by the ACA, and in all of them we think that the imposition of liability is needed in order to avoid abuse and to ensure that directors give proper consideration to the requirements of the Act. Therefore, though recognizing that they may upon occasion make it difficult for

directors to decide when they can act, we recommend the adoption of the CBCA provisions and s. 113(1) and (3) of the draft Act would follow the CBCA, subject to two changes. Firstly, we have added s. 113(8) to protect a director who approves financial assistance in contravention of s. 42 unless he does so knowingly or unless he could reasonably have known that he was doing so. Secondly, at the suggestion of our lawyer consultants we have added s. 113(2) so that it would not impose liability with respect to shares which are, upon allotment, required by the Securities Commission to be held in escrow and which are subsequently surrendered for cancellation under the escrow agreement; if the shares are cancelled without ever being effectively issued, the corporation does not lose merely because they were technically issued at an undervalue.

A director who is liable under CBCA s. 113 is entitled to contribution from other directors who are also liable, and may apply for an order requiring recipients of the money to repay it to him. We think that these provisions are satisfactory, though we think that the repayment provision should allow the court to compel repayment to the corporation instead of the director. S. 113(5) and (6) of the draft Act would give effect to these views.

(C) For wages

Directors have long been liable in Alberta for wages of employees: see ACA s. 77. There are arguments against the imposition of that liability: in the case of a company with large numbers of employees the liability could be crushing and the actual benefit to employees small; and the potential liability might, to the detriment of the employees as well as to the detriment of the shareholders and creditors, cause the directors to shut down a business which still has a reasonable chance of survival, so that wages will stop accruing while the corporation has enough assets to meet them. We think, however, though not unanimously, that the benefits of the provision outweigh its disadvantages; the existence of the liability will cause the directors to take care that the wages of employees are provided for. We also think, though again not unanimously, that although s. 44 and 45 of the Alberta Labour Act, 1973, provide a quasi-criminal procedure under which a director who acquiesces in a corporation's failure to pay wages can be compelled to pay them, the proposed ABCA should still impose a civil liability. We have accordingly carried forward CBCA s. 114 with changes made to protect directors who act reasonably or are not in a position to control the corporation. See the comment on s. 114 of the proposed draft Act.

(iii) Indemnification of directors

CBCA s. 119(1) allows a corporation to indemnify a director against third party claims if he acts honestly and in good faith with a view to the best interests of the corporation, and (in the case of a criminal or administrative proceeding for a monetary penalty) if he had reasonable grounds for believing that the conduct was lawful. CBCA s. 119(2) allows the corporation, with the approval of the court, to indemnify such a director against the costs and expenses of a derivative action. CBCA s. 119(3) requires the corporation to indemnify against costs and expenses a sufficiently honest and careful director who is substantially successful. CBCA s. 119(4) allows a corporation to insure its directors against liablity for breach of any duty or obligation

other than the duty of honesty and good faith. These provisions appear to us to be appropriate, though we recommend the addition to s. 119(3) of a provision like that in Saskatchewan BCA s. 119(3) which would leave it open to the court to decide that a director who complies with the conditions of the subsection is nevertheless not fairly and reasonably entitled to indemnity. S. 119 of the draft Act would give effect to these views.

4. Shareholders

Part XI of the CBCA deals primarily with proceedings of shareholders though in passing it deals with some lesser subjects. This is, in general, an area of comparatively little controversy (though some may think that the provisions for circulation of shareholders' proposals in CBCA s. 131 and the reduction of the share qualification for requisitioning a meeting under CBCA s. 137 do not fall within that description). We have accepted most of the CBCA provisions both in the interests of uniformity and because they appear suitable, though with some reduction in the harness for closely held corporations and with some changes in detail. We refer the reader to the comments on s. 126 to 139.1 of the draft Act. (S. 140 deals with the unanimous shareholder agreement and is discussed in this Report under that heading.)

5. Officers

The directors of a large corporation necessarily delegate much power to its senior officers, some of whom may be directors, and "management" may well dominate the corporation. As we have already mentioned, the CBCA recognizes that those facts may lead to some undesirable effects; CBCA s. 97(2) requires that a distributing corporation have at least two non-management directors, and CBCA s. 165(1) requires a majority of non-management directors on the audit committee.

The appointment of officers of a closely held corporation is more likely to be made for formal purposes; and the office held is more likely to reflect the importance of the officer as shareholder or director.

The CBCA does not deal extensively with officers. The effect of CBCA s. 116 to 120 is to leave the control of the officers of the corporation to the directors unless the articles of incorporation or a unanimous shareholder agreement otherwise provide; and a director may be an officer. Under CBCA s. 117, an officer is under the same duties of honesty, good faith, care, diligence and skill as a director, and CBCA s. 119 makes the same provisions for the indemnification of officers as it makes for the indemnification of directors. We think that in the existing state of the law and practice, these provisions are adequate and satisfactory, and we have followed them in the draft Act.

VIII.

CAPITAL AND SHARES OF THE CORPORATION

1. Shares

(a) Par value and no par value shares

An Alberta company may have shares with par value, shares without par value, or both. Par value shares were instituted by English company law and therefore came into Canadian company law first. According to Professor L.C.B. Gower (Gower p. 122) "the law tries to ensure that a company with a share capital raises it and subsequently makes no return to its shareholders unless net assets are retained which equal or exceed the value of that capital. The fund of credit thus created acts as a substitute for the personal credit of a private trader or partnership and enables the company to have a chance of survival in the harshly competitive world of commerce." However, the law does not require that a company raise a substantial amount of capital by way of shares, nor does it ensure that a company will not lose the capital so raised. The original purpose of requiring shares to have a nominal or par value has never been realized, and we do not think that shares with a nominal or par value serve any useful purpose.

No par value shares came into Canadian law from the United States. Their use recognizes that a share is simply a share in all or some of the rights of ownership of a company, which include the right to vote, the right to receive dividends, and the right to participate in distribution of capital.

We now turn to the question: Should the proposed ABCA provide for par value shares and also for no par value shares? There is also a second question: If not, which should be abolished?

At this point we will quote extensively from the Proposals for a New Business Corporations Law for Canada at pp. 36-37:

> 97. Section 5.01(1) is new and departs radically from the present Act as well as from the legislation of most other jurisdictions. Most corporation legislation permits the issue of both par value and no par value shares.
>
> 98. Section 5.01(1) prohibits the issue of shares with par value because par values are arbitrary and misleading. If an investor buys 1,000 shares of $1 par value in a corporation with an issued capital of 10,000 shares of $1 par value the true measure of his investment is not $1,000 but a 10% share in the business, the value of which must necessarily fluctuate as the fortunes of the business change. He is unlikely to have paid exactly $1,000 for his shares, nor will $1,000 represent their current market value or liquidation value. A share is simply a

proportionate interest in the net worth of a business. Par values obscure this reality, while the concept of a share without par value precisely embodies it (though the words no par value are, strictly, redundant). What matters to an investor is the proportionate size of his investment in a corporation, not the arbitrary monetary denomination attributed to that investment. Par value may be especially misleading to an unsophisticated investor. A share with a par value of $5 might well appear to be a bargain at $2, even though the share is in fact worthless....

99. No par shares also give greater flexibility in arranging a corporation's capital structure. A corporation with no par shares trading at so high a price as to hinder their marketability can easily split these shares into a larger number of shares, each of which will still be of no par value. Correspondingly, if the market price has fallen below the issue price, a corporation can raise additional capital by issuing additional shares at the current market price without running into obstacles against the issue of shares at a discount, such as those contained in s. 16(2)of the present Act.

100. Another reason for abolishing the concept of par value is our wish to eliminate the accounting and disclosure problems which result from it. Much confusion has been caused in the past by such terms as "paid-in surplus", "contributed surplus" and "distributable surplus" which have been used to reflect the amount in excess of par value received by a corporation upon the issue of its shares. Terms like these have cluttered and confused many a corporate balance sheet. Par value leads to a great deal more confusion when corporations are allowed to purchase their own shares. Each such purchase leads to problems of accounting for and reflecting the "profits" or "losses" arising when the shares are purchased at prices different from par. As will be seen later in this Part, we have relaxed the traditional prohibitions against corporations purchasing their own shares. We have decided that this progressive step should not be marred by the accounting confusion which would result from retaining the archaic and meaningless concept of par value.

101. Section 12(6) of the present Act permits all shares, except redeemable shares or those having a priority as to return of capital on liquidation, to be without par value. Normally, shares which are redeemable or which give the holders a priority in

> liquidation provide for the payment of a sum no greater than the arbitrary par value or, sometimes, par value plus an additional "premium" expressed as a percentage of par value. In fact, the concept of par value is not needed to create redeemable shares or shares having a preference in liquidation. What is paid to a holder of such shares is, after all, a sum of money, not a legal concept. There is no reason why shares without par value cannot be created with the same terms. It is merely necessary to specify in the articles of incorporation the redemption or liquidation price, or the manner in which that price will be determined, upon redemption or liquidation.

Professor Gower (Gower p. 124) puts the proposition this way: "The real case for no-par is that it renders the true nature of a share more intelligible and prevents people from being misled". To all this we would merely add that the time of law schools and law students, and the time of lawyers and clients, should no longer be wasted upon acquiring an understanding of the mysteries of par value shares. Our recommendation is that par value shares be abolished, and s. 24(1) of the draft Act would give effect to that view.

Concerns have been expressed to us that the abolition of par value shares would also abolish certain procedures under which business affairs can be arranged so as to minimize taxation; and, while we do not as a general matter think that the basic law of business corporations should be warped to allow for ephemeral provisions in a taxing statute, we want the proposed ABCA to permit, rather than to restrict, legitimate business activities. We have satisfied ourselves by our consultation, however, that, if there is a problem, it arises from the rule that a corporation must add the full proceeds of the sale of shares to a stated capital account, a problem to which we will return; and we are confirmed in our opinion that the abolition of par value shares will not interfere with business efficiency. S. 24(1) of the draft Act would therefore require all shares of a corporation to be without nominal or par value.

(b) Common and preferred shares

We do not think it necessary to discuss at length the nature and relationship of common and preferred shares.

If there is only one class of shares, we think that the shares should be equal in the right to vote, the right to receive dividends, and the right to share in property upon dissolution. CBCA s. 24(3) so provides. In Jacobsen v. United Canso Oil & Gas Ltd., June 12th, 1980, Q.B. 7901-10596, Calgary, Mr. Justice Forsyth held that s. 24(3) invalidates a provision in the articles of continuance of a CBCA corporation (and we think that the same reasoning would apply to articles of incorporation) which would restrict a shareholder to voting 1,000 shares no matter how many shares he holds. We think that the law should be as the judge has held it to be. If the case should go to appeal, and if the appeal should be successful, we think that consideration would then have to be given to the insertion of

stronger affirmative wording in the proposed ABCA.

Mr. Justice Forsyth's decision however, insofar as it relates to the CBCA, is founded entirely upon CBCA s. 24(3) which applies only "if a corporation has only one class of shares". The judge did not expressly say so, but it appears that if the corporation before him had had more than one class of shares, his decision might have been different. In the present state of CBCA s. 24, it is easy to see why the judge might hold that view, as CBCA s. 24(4) which allows the articles to provide for more than one class, does not say that the shares of a class are equal. However, while the CBCA draws a distinction between a corporation having one class of shares and a corporation having more than one class, we do not think that that distinction is based upon any policy considerations. It appears to us that the relationship of United Canso's common shareholders among themselves should be the same whether or not the corporation had issued another class of shares. S. 24(5) of the draft Act would therefore apply to corporations having more than one class of shares the rule that the rights of the holders of the shares of a class are equal. S. 22(5) of the proposed Ontario BCA contains the same provision.

We recognize however that it is not uncommon for the shares of a class to be issued in different series. We recognize also that the use of series is a legitimate business procedure, and that practical considerations make it necessary for the directors of a corporation which floats an issue of shares to be able to determine the price and dividend rate of the offering. To require the holding of a meeting of shareholders to create a new class of shares would make public flotations difficult, and in a particular case might stultify a flotation. S. 27 of the draft Act would therefore permit shares to be issued in series with the rights and privileges of each series to be determined by the directors.

CBCA s. 27(3) provides, in effect, that a series of a class cannot be given priority in respect of dividends or return of capital over any previous series. It appears to us that the fundamental characterisitics of each share in the class should be the same as the fundamental characteristics of each other share, and it appears to us that the right to vote is as fundamental as the right to receive dividends and return of capital. S. 27(3) of the draft Act therefore includes the right to vote among the aspects in which one series cannot be given priority over another.

(c) Sale of shares

CBCA s. 25(1) leaves it to the directors to decide when, to whom, and for what price, shares should be issued, though it would allow the constitution of the company to restrict those powers. CBCA s. 25(2) to (5), however, go on to impose some requirements. The shares must be issued as fully paid and non-assessable, and the consideration must be received before the share is issued. If the consideration is property or past services, its value must be not less than the fair equivalent of the money that the corporation would have received if the share had been issued for money. A promissory note or promise to pay is not a satisfactory consideration. These provisions do away with partly paid shares, which should be abolished along with par value shares. S. 25 of the draft Act follows the CBCA.

2. Stated Capital

The CBCA introduced to Canada the term "stated capital". The essence of the provisions with regard to stated capital is that there must be a stated capital account for each class and series of shares (CBCA s. 26(1)) and that the appropriate stated capital account must include the full amount of any consideration which the corporation receives for any shares it issues (CBCA s. 26(1.1)); that is subject to CBCA s. 26(1.2), which we have already mentioned and which allows the corporation to include in its stated capital account less than the full amount of the consideration where the transaction is not at arm's length and in certain other cases that need not be mentioned here. The CBCA provisions relating to stated capital do not apply to mutual funds, where they are not necessary and would indeed prevent the fund from carrying on its business effectively. We have included similar provisions in s. 26 of the draft Act.

We now digress to discuss the problem the existence of which we mentioned in our discussion of the abolition of par value shares. A corporation may want to issue shares in payment for property or for shares of another company; it may want to be able to redeem the shares later from a surplus account rather than from stated capital. CBCA s. 26(1.2) accommodates that desire if the owner of the property, or the other company the shares of which are involved, does not deal at arm's length with the corporation. Our consultants thought that the subsection is satisfactory as far as it goes, but that it should go on to make similar provision for a case in which the owner or other company deals with the corporation at arm's length; but we thought that that extension would go far towards stultifying the use of stated capital. We recommend instead that a corporation be allowed to add to its stated captal accounts less than the proceeds of the sale of redeemable shares created for the purpose of the exchange. We think that that provision would meet the problem without impairing the usefulness of stated capital. S. 26(3) of the draft Act would give effect to that view, and would also accommodate CBCA s. 26(1.2)(b), which is similar in purpose and covers an additional kind of transaction.

We now return to a discussion of stated capital generally. The ability of the corporation to pay dividends is tied to its stated capital accounts: under CBCA s. 40(b), the corporation must not declare or pay a dividend if the realizable value of corporation's assets would thereby be less than the aggregate of its liabilities and stated capital of all classes. The retention of the amount of the consideration received from the sale of shares is, on the face of it, an additional protection for creditors. The value of that protection however is limited by the fact that the corporation is not obliged to obtain any substantial amount of capital from the sale of its shares, and by the fact that the CBCA allows the corporation to reduce the stated capital account. We do not propose that a minimum capitalization be established, as it has in some jurisdictions, and we accordingly have in general accepted the CBCA provisions with regard to stated capital, which appear in s. 26 of the draft Act.

The principal provision in the CBCA for reduction of stated capital is CBCA s. 36. Under CBCA s. 36(1), a corporation has power to reduce its stated capital by special resolution for any purpose. The subsection then goes on to give three examples of

purposes for which the reduction may be effected: the first is extinguishing or reducing a liability in respect of an amount unpaid on any share (which would apply only to shares issued before the corporation continues under the CBCA); the second is distributing capital to a shareholder up to the amount of the stated capital account relating to the class or series of shares which he holds; the third is declaring its stated capital to be reduced by an amount that is not represented by realizable assets. These provisions carry out the CBCA policy of leaving a corporation's affairs in its own hands; the requirement of confirmation by the court which appears in ACA s. 38(1)(b) has no counterpart in the CBCA. On the other hand, the CBCA does establish liquidity and solvency tests which must be satisfied, and it allows creditors to apply for orders compelling shareholders to make restitution. We are in agreement with the policy of the CBCA, and s. 36 of the draft Act follows its CBCA counterpart, though s. 36(1)(b) has been changed to provide for the payment to the holders of a class of shares, rather than to a holder, an amount up to the amount of the stated capital.

There are a number of other detailed rules for adjustment of the stated capital account in CBCA s. 37. We do not propose to discuss these and various other matters of detail in this Report but will deal with them in the comment on the counterpart sections of the draft Act.

3. Dividends

Under CBCA s. 40, the corporation must not pay a dividend unless a liquidity test and a solvency test are satisfied. The liquidity test demands that there must be reasonable grounds for believing that, after the payment, the corporation will be able to pay its liabilities as they become due. The solvency test is that there must be reasonable grounds for believing that, after the payment, the realizable value of the corporation's assets will be greater than the aggregate of its liabilities and stated capital of all classes. Those requirements, here as well as elsewhere in the CBCA, impose a heavy burden upon the directors, as they are liable under CBCA s. 113 if they vote for or consent to a resolution authorizing the payment of a dividend contrary to CBCA s. 40. We think however that the burden is justified, as any minimum standard of fairness requires that those who obtain the benefit of limited liability should not be able to take money out of the corporation when the corporation is not able to pay its creditors or return their stated capital to all classes of its shareholders.

Under CBCA s. 41, a dividend may be paid in stock, money or property. If it is paid in stock, the stated capital account for the class must be increased by the declared amount of the dividend. The dividend must, under CBCA s. 40, be paid out of retained earnings or some other equity account, and not out of stated capital; that appears on the face of it to be somewhat more rigid than the English company law rule, as stated by Gower (Gower, p. 117), that fixed assets need not be made up before a dividend is paid; but the power of the corporation to reduce its stated capital by special resolution under CBCA s. 36 enables it to achieve the same results by reducing its stated capital to the extent that the stated capital is not represented by existing assets. Again, we agree with the CBCA provisions, and s. 40 of the draft Act follows the CBCA.

4. Financial Assistance

The making of loans by corporations to directors and shareholders, and the making of loans by corporations to enable borrowers to buy shares of the corporation, is a subject which gives rise to many problems.

ACA s. 14 prohibits a public company from making loans to shareholders or directors or for purchase of shares in the company. It then makes a number of exceptions: a loan in the ordinary course of a money-lending business; loans to employees to buy houses; and loans to or for the benefit of employees for the purchase of shares in the company. The section does not say anything about private companies.

CBCA s. 42 is very different. The prohibition in CBCA s. 42(1) is only against making loans of the kinds in question if the corporation cannot meet a liquidity test and a solvency test, though the latter is unusual in that the corporation must be solvent without taking into consideration the asset created by the loan. CBCA s. 42(2) then goes on to list a number of kinds of loans that can be made without even the safeguard of these two tests; these include loans in the ordinary course of a money-lending business, advances on account of expenditures; loans by a parent to a subsidiary; loans by a wholly owned subsidiary to its parent; and loans to employees for buying houses or (where there is a trustee) for buying corporate shares.

In general, we think that creditors do not need extra protection against loans or guarantees for the benefit of present or prospective insiders. It does seem to us that loans and guarantees by a subsidiary to its parent on improvident terms could be used to abuse creditors of the subsidiary; but we were persuaded that a prohibition of such loans and guarantees would, to meet a largely theoretical danger, inhibit legitimate transactions in which related groups of companies, for their common benefit, join in obtaining common lines of credit from their financers.

The position of shareholders outside the control group is different. If a loan is made which oppresses or unfairly discriminates against a shareholder, the shareholder would be able to apply for leave to bring a derivative action under s. 232 and would probably have a personal action under s. 234 on the grounds that there was oppression or unfair disregard of the interests of the shareholders not in the control group; in one proceeding or the other the court could compel the directors to repay to the corporation the money which they wrongfully advanced. These remedies appear to us to be sufficient. However, before a shareholder can exercise them he must know that there is something which requires a remedy, and we think that he should have more information on this point than the law now allows him. We therefore think that the proposed ABCA should require the corporation to make individual disclosure of financial assistance of the kinds described in CBCA s. 42(1), with individuals identified and particulars of the assistance given. If a loan is given for a legitimate reason and upon legitimate terms, we see no reason why disclosure should cause any difficulty, and the mere fact that disclosure is required should exert some pressure upon the corporation to be sure that the transaction is legitimate. Our lawyer consultants took issue with that proposal, but we think that financial assistance to

insiders or prospective insiders is extraordinary and different from ordinary remuneration and should be disclosed.

For the reasons which we have given, though with some doubts, we recommend that the proposed ABCA follow CBCA, with two variations. Firstly, we do think that the prohibition in CBCA s. 42 should not extend only to loans to officers and employees, as the ultimate decision making power is not vested in them, but in the directors. Secondly, we think, as we have said, that the corporation should make disclosure to its shareholders of each case of financial assistance to the persons listed in s. 42(1). S. 42 of the draft Act would give effect to these views.

5. Pre-emptive Rights

The draft CBCA provided that upon the issue of shares, the holders of existing shares of the same class would have a pre-emptive right to acquire the offered shares in proportion to their existing holdings, unless the articles of incorporation said that there would be no such right. The drafters of the CBCA had the following to say on the subject:

> 114. Section 5.05 is new and reverses s. 32 of the present Act under which there appears to be no shareholders' pre-emptive right in the absence of express provision therefor. Under s. 5.05 a pre-emptive right is presumed in the absence of express provision in the articles limiting or excluding it. If there is no such provision, this section limits the powers conferred upon directors under s. 5.02(1).
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> 115. The change is doubtless a controversial one. It is obvious that in the absence of a pre-emptive right (the better view being that there is no such right at common law: Harris v. Sumner (1909) 39 NBR 204; but see Martin v. Gibson (1908) 15 OLR 623 and Bonnisteel v. Collis Leather Co. (1919) 45 OLR 195) the power of directors can be used to dilute not only the voting strength of existing shareholders but, to the extent that directors have control over the price at which new shares are issued, their interest in the net assets of the corporation. While few would deny that existing shareholders are entitled to protection against such dilution, there are differences of opinion as to how that protection should be achieved. One view is that existing rules as to the fiduciary obligations of directors in issuing shares--for example those statutorily declared in s. 5.02(1)--afford adequate protection. Moreover, it is argued, flexibility in financing decisions demands that there should be no such condition imposed upon the power to issue shares, and the doctrine of pre-emptive rights, while arguably appropriate in days of simple capital structures, is quite inappropriate to complex modern corporations. Accordingly, it

> is argued, there should only be a pre-emptive right if shareholders, having deliberately directed their minds to the problem, so decide. (See generally, Drinker, The Pre-emptive Right to Subscribe to New Shares (1930) 43 Harv. L. Rev. 586). Acceptance of this view would mean retaining the principle of s. 32 of the present Act.
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> 116. The counter argument, which has motivated the adoption of the principle embodied in s. 5.05(1), is that the equitable restraints to which directors are subject are notoriously imprecise, as any attempt to reconcile the authorities on this question shows--see the authorities cited above and Hogg v. Cramphorn [1967] Ch. 254; Bamford v. Bamford [1969] 1 All ER 969--and the determination of their applicability is a costly and uncertain process. If a shareholder is to abandon his conceded right to certain protection against direct dilution of his voting power, this should be by deliberate exclusion of that protection. It should be noted here that shareholders have some protection against indirect dilution by virtue of the provisions of s. 14.03.
>
> 117. Subsection (2) of s. 5.05 merely makes it clear that the right conferred by subsection (1) does not apply in the cases listed, in all of which, for obvious reasons, it would be quite inappropriate.

In our Draft Report, we recommended that there should be a pre-emptive right unless the articles say otherwise, i.e., we preferred the view of the drafters to the view which is embodied in the CBCA. Our lawyer consultants were strongly of the view that a presumptive right of pre-emption would create a trap for the unwary, and we have somewhat reluctantly accepted that view. S. 28(1) of the draft Act would therefore merely allow the articles of incorporation to give existing shareholders a right to acquire treasury shares in proportion to their existing holdings. S. 28(2) would follow CBCA s. 28(2) by excluding from such a general pre-emptive right some kinds of issues in which the right would usually be inappropriate and unintended.

6. Purchase and Redemption By a Corporation of Shares Which it Has Issued

(a) Purchase

In our Report 21 of January, 1977, we discussed at some length the then existing prohibition against a company trafficking in its own shares. We concluded that the law should be changed and that a company incorporated under the ACA should be permitted to purchase shares which it has issued. We thought however that there should be a number of safeguards. The most important of these was a requirement that the purchase be unanimously approved or that the offer be made to all shareholders of the class, along with an information circular and a provision for pro rata purchase in the event of

over-subscription. To that requirement we suggested an exception, namely, that a public company might purchase not more than 1% of its issued shares per month. We later suggested that the Securities Commission should be able to grant exemptions from the statutory requirements which would not be prejudicial to the public interest, and the Companies Act Amendment Act, 1980 substituted a new ACA s. 45.1 to give the Commission that power.

In addition, we suggested that the civil liability imposed upon an insider buying shares in a company be imposed upon the company buying its own shares. We also suggested that the directors should be liable if there is a breach of the solvency test or the liquidity test. We thought also that disclosure should be made by private companies to the Registrar of Companies and by public companies through the filing of insider reports.

In our Report 21 we were considering engrafting a new power to buy shares upon an old statute. In this Report, we are considering the power in connnection with proposals which in our opinion would give the shareholders sufficient remedies against abuse through the right to apply to bring a derivative action under s. 232 and the right to apply for relief against oppression or unfair treatment under s. 234. In view of the availability of these remedies, we think that the proposed ABCA should follow CBCA ss. 32 and 33 which impose by way of specific safeguard only liquidity and solvency tests, the intricacies of which are dealt with in the comment on s. 32 and 33 of the draft Act. We do however think that one additional precaution should be taken; the remedies which would be conferred by the proposed ABCA would be of value only to shareholders who know the facts which would bring the remedies into play. We have therefore included notice provisions in the draft Act as s. 32(3) and (4), though these are made subject to the articles of incorporation as well as to unanimous agreements.

We think also that the civil liability of an insider, though not an insider's obligation to report, should be imposed by the ABCA upon non-distributing corporations: See the discussion at p. 116-119 of this Report.

(b) Redemption

CBCA s. 34 recognizes the existing power of a corporation to issue and redeem redeemable shares. The section imposes the usual liquidity test. It also imposes a solvency test under which the realizable value of the corporation's assets, after the payment, must not be less than the aggregate of the liabilities of the corporation and the amount of capital necessary to pay the holders of shares that have a right to be paid on redemption or liquidation ratably with or prior to the holders of the shares to be redeemed. The corporation may, instead of redeeming the shares, purchase them, and the same rules apply. The section does not include any provision such as that of ACA s. 70, under which, if shares are not redeemed from the proceeds of a fresh issue, a "capital redemption reserve fund" must be set up in an equivalent amount.

We believe that the CBCA section is satisfactory, and s. 34 of the draft Act follows it.

(c) Other acquisition

CBCA s. 35 carried forward the power of the corporation to accept a surrender of shares, though not so as to extinguish or reduce a liability in respect of an amount unpaid on the shares. This is in accordance with established practice, and s. 35 of the draft Act follows the CBCA provision, but also includes escrow shares surrendered pursuant to an escrow agreement.

IX.

SECURITY CERTIFICATES AND TRANSFERS

1. Introduction

We now turn to a discussion of corporate shares and corporate obligations, and of the share certificates, bonds, debentures, and similar instruments which companies issue with respect to them. The inclusion of all these in the term "security", and the consideration of them all as one category, corresponds with the usage of CBCA Part VI and with that of UCC Article 8 on which Part VI is based. Both kinds of "security" are used to raise capital, and the maintenance of a properly functioning market for capital depends upon the easy transferability of both. (The term "security" is used here in a sense which does not necessarily involve any security in the lawyer's sense; it may, for example, include one of a series of unsecured notes).

Bills of exchange and promissory notes are within the legislative jurisdiction of Parliament, and are governed by the Bills of Exchange Act. An Alberta Business Corporations Act therefore cannot affect the ownership or transferability of securities which fall within the definition of promissory note or within the definition of bill of exchange, which accordingly must be excluded from this discussion.

CBCA Part VI is very complex. We will discuss here only what appear to be the major points of general importance, and there are many important details which the reader will follow only from a reading of Part 6 of the draft ABCA and of the comments appended to the sections.

2. The Nature of a Security

John L. Howard[1] has the following to say about the nature of a "security," focussing on the share:

> Before the introduction of the UCC Article 8 model, the concept of a security and, more particularly, of a corporate share, was extremely nebulous at common law, resulting largely from the slow evolution of the concept of a company out of trust doctrine, which, technically, could not easily accommodate a corporate share that gave the holder at least residual power over the business and affairs of the corporation that issued it. Compounding this confusion, both the courts and the legislatures, instead of attempting to develop an overall concept of a corporate share, characterized the share in different cases in a different way in order to rationalize the desired conclusion.

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[1] Mr. Howard was one of the principal drafters of the CBCA and served as Assistant Deputy Minister of Consumer and Corporate Affairs while it was enacted and put into force. The quotations in this part of our Report are, with the kind permission of the author and publisher, taken from materials to be published by Prentice-Hall of Canada Ltd.

For example, a court has referred to a share as real property where a corporation held substantial real property, as goods, as tangible personal property, and more vaguely as a bundle of legal rights distinct from the share certificate. And in other cases a share certificate has been characterized as a chattel, as mere evidence of title to shares, and, in constrast, as a negotiable instrument.

Seeking to block any inference that the nature of a share of a corporation depended upon the kind of property held by the corporation, legislatures have expressly declared that shares are personal or moveable property. While this kind of provision achieved its immediate goal of precluding shares issued by land holding corporations from being characterized as real or immoveable property, it largely begged the fundamental question by assuming that the only distinction required was between real and personal property. In fact the problem is more complicated, for in order clearly to resolve the issue it is necessary to deal with two additional questions. First, if a share is personal property or a moveable, is it corporeal property or a chose in action? Second, if a share is a chose in action, is it simply an assignable claim or is it a negotiable instrument? The common law has never given an unambiguous answer to either question.

That is not to say, however, that the courts and the legislatures have not refined the concept of a corporate share, but this refinement has been achieved largely by indirection, by decisions or statutory provisions that point out what a share is not rather than what it is. Clearly it is no longer real property or an immoveable. Equally clearly it is not a contract. It is not tangible personal or moveable property. And it is not a "good" in the sale of goods acts of the common law jurisdictions. Thus a share of a corporation does not fit comfortably into any existing conceptual category. It is neither property or a contract in any conventional sense. Rather it is a unique legal institution that is for all practical purposes the embodiment of the shareholder's rights, reflecting aspects of both property and contract, and having free transferability as a traditional attribute. Although not often articulated in these terms, this view is widely held by commentators and was at least implied in the reasons for judgment in a leading Canadian case conerning a stockbroker's bankruptcy.

> In sum, therefore, although not definitively settled, a corporate share at common law is essentially a unique legal institution that embodies the shareholder's rights and duties in relation to the three basic elements that inhere in any interest in a business organization - control, profit and risk. In connection with a corporate share these three elements are characterized as the right to vote (control), the right to receive dividends (profit), and the right to share profits - or the duty to share losses - upon sale of the share or liquidation and dissolution of the issuer corporation (risk). Without changing these basic elements, Part VI attempts to dispel the fog that envelops the concept of a share or a debenture at common law by expressly characterizing a security certificate as a negotiable instrument, which even at common law means that the instrument is the embodiment of the rights, duties, privileges and liabilities attached to the securities mentioned in it.

3. Nature and Desirability of Negotiability

If an instrument is negotiable, it is transferable by a comparatively simple procedure, and a purchaser in good faith and for value will generally acquire good title to the instrument and the right to enforce obligations evidenced by it, free and clear of adverse claims other than a claim that the instrument or a necessary endorsement on it is not genuine.

Present business practise treats corporate securities as if they are negotiable. It is common for them to pass from hand to hand by endorsement or the signing of a simple transfer form, together with delivery of the security. Much of the business is done through brokers who often maintain stocks of fungible securities the ownership of which changes without registration. Treating securities as virtually negotiable facilitates, and indeed is probably necessary for, the working of capital markets, and it seems clear that recognition of negotiability by law is desirable to facilitate business and to bring the law into conformity with business practice.

It might be as well to set out here, in the words of John L. Howard[2] the effect of the CBCA provisions:

> In contrast, ss. 44(3) of the CBCA expressly declares a security to be a negotiable instrument, meaning that the security certificate is not only evidence of ownership but is also the embodiment of the rights and privileges attached to the securities mentioned in it, therefore when a security certificate is transferred the ownership of the underlying securities is also transferred to the purchaser. More specifically, where the purchaser is a bona

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[2] See note 1, supra p. 83.

fide purchaser, that purchaser obtains the two fundamental benefits that flow from the concept of negotiability: (1) the bona fide purchaser - even a purchaser from a thief - takes the security free of any claims or defences of the issuer; and (2) that purchaser takes the security free of any adverse claim of a previous owner based either on an alleged interest in the security (e.g., as a beneficiary under a trust) or an impropriety or formal defect relating to its transfer. The one exception is the unauthorized endorsement, for under ss. 68(2) the original owner is entitled to recover a security bearing an unauthorized endorsement at any time before the transferee obtains registration of transfer.

The objective of characterizing a bill of exchange as a negotiable instrument is clearly to separate the obligation to pay from the obligation to perform the underlying contract, so that the transferee of the instrument is required to evaluate only the credit risk and not any performance obligations. For example, where a promissory note is given for a machine in connection with a contract of sale and the seller later negotiates the note to a bona fide purchaser, even if the machine is totally defective the bona fide purchaser of the note is immune from any claim the buyer may have against the seller or any defence the buyer could have invoked in an action by the seller for the price had the contract been an ordinary instalment credit contract without an ancillary negotiable instrument. Similarly, by characterizing a security as a negotiable instrument, the rights embodied in the security are completely separated from the underlying contract of sale, and hence if the purchaser later transfers the security to a bona fide purchaser or pledgee, that subsequent purchaser or pledgee takes the security free of any claim the original seller may have against his purchaser based on a breach of the sale contract, for example, a claim based on default of consideration, mistake or misrepresentation.

That is not to say, however, that a security, because it is a negotiable instrument, is identical with a bill of exchange. Usually it is not, except that a debenture drawn payable to bearer is in effect a bill of exchange and has accordingly long been treated at common law as a negotiable instrument. A registered security under Part VI, however, differs from a bill of exchange in two fundamental respects: (1) an endorser of a security by endorsing does not warrant to his transferee or any

> subsequent holder of the security that the issuer will fulfil its obligations under the security; and (2), where a transferee holds a security that the owner is entitled to recover under ss. 68(2) on the ground that the security bears a forged or unauthorized endorsement, if the transferee succeeds to obtain registration of transfer because the issuer inadvertently fails to detect the improper endorsement, the transferee is entitled to retain his new certificate and the original owner is entitled to claim a like certificate or damages from the issuer for improper registration of transfer.
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> The UCC model thus creates a unique, hybrid institution, a registrable security that is a negotiable instrument between registration dates that can, even if it is not formally perfect, be perfected by re-registration and issue of a new security that is unqualifiedly a negotiable instrument, the ownership of which can be transferred simply by endorsement and delivery. The purpose of this institution is to obviate any scrutiny of the transferor's title, so that securities transfers can be effected in the market place quickly, efficiently and free of adverse claims.

We recommend that the ABCA make security certificates of Alberta corporations negotiable, and Part 6 of the draft Act would do so.

It should be noted that the considerations supporting the adoption of negotiability of share certificates relate only to corporations whose shares are intended to circulate freely from hand to hand, that is, corporations who require access to the capital market for the raising of capital through the sale of shares and accordingly distribute their shares to the public. They do not relate to small corporations to the same extent, if at all, and, indeed, negotiability of share certificates is directly contrary to the interests of shareholders where the personalities of the other shareholders are important, that is, in corporations which amount to incorporated partnerships. We will deal separately with the share certificates of small corporations and with non-negotiable debt securities.

4. The Existing Law: Alberta Companies

If security issued by an Alberta company falls within the definition of a bill of exchange or promissory note it is negotiable. If the obligation is not unconditional--and most issues of corporate securities are not--the instrument is not a bill of exchange or promissory note and is probably not negotiable. Share certificates, even share certificates endorsed with a blank transfer signed by the registered shareholder, have not achieved full negotiability. Under the ACA, it appears that for a transfer to be fully effective it must be entered on the share register.

The CBCA has conferred negotiability on the corporate securities to which it applies. The extent to which it has done so and the ways in which it has done so appear in CBCA Part VI.

5. Canada Busness Corporations Act, Part VI

(a) Application of Part VI

The application of CBCA Part VI is founded on the definition of "security" in CBCA s. 44(2). The definition in that subsection (unlike that in CBCA s. 2) relates only to the instrument itself, rather than to the share or obligation of which it is evidence. It must be "of a type commonly dealt in upon security exchanges or markets or commonly recognized in any area in which it is issued or dealt in as a medium for investment." It clearly includes share certificates and other instruments evidencing rights to shares, and it clearly includes bonds and debentures and other forms of debt obligations. An argument might be made that shares of non-distributing corporations are not of the type mentioned above and that the definition does not include them; but that argument is met by CBCA s. 45(8), which provides for restrictions on transfer of shares and CBCA s. 45(9) which is a transitional provision dealing with private companies.

(b) Protection against invalidity of security

The rule in the Royal British Bank v. Turquand protects a purchaser of a security against a claim by the issuing company that an irregularity took place in the authorization of the security, and that rule has been given statutory effect by CBCA s. 18 (see this Report p. 38-39). However, if a necessary signature on an instrument is forged by a company official or is otherwise fraudulently issued by him the prevailing view appears to be that the issuing company can rely upon the invalidity of the instrument unless there is an estoppel or a ratificaion. S. 18 provides a statutory estoppel even in some cases of fraud and forgery, but not all.

Under CBCA s. 51(3), the fact that a security is not genuine is a complete defence even against a purchaser for value and without notice. That is subject to s. 53, under which a signature is effective if done by a person entrusted by the issuer with the signing of the security or similar securities, or with their immediate preparation for signing, or by an employee who handles the security in the ordinary course of his duties. If more than two years has elapsed from an event requiring payment of the money or delivery of securities on presentation, the purchaser is fixed with notice of defects, and the period will be one year if the company had the necessary funds or securities available (CBCA s. 52).

In general, the purchaser for value who takes under an appearance of regularity is protected by the CBCA if the issue of the security can be brought home to the issuing corporation, its transfer agent, or an employee having anything to do with the issue of the security. That imposes a heavy obligation on the issuing corporation but it is the corporation which is in a position, firstly, to see that forged or unauthorized securities are not issued, and, secondly, to obtain insurance or indemnity bonds against that happening. It is appropriate that the cost of discharging that obligation and the cost imposed by any failure

to do so be treated as a cost incidental to ensuring the efficiency of the capital market as a source of capital and that it be spread among shareholders generally through their corporations. We recommend acceptance of the CBCA provisions we have mentioned.

The relationship between the purchaser and the issuer of a security is dealt with further in the commentary on s. 51 of the draft Act.

(c) Protection against adverse claims

Under CBCA s. 56(1) "a purchaser" of a security acquires any rights which his transferor had. "Purchaser" includes "a person who takes" by any voluntary transaction, including a gift. The only exception is that if the purchaser has been a party to a fraud or illegality affecting the security, or if he previously held it and had notice of an adverse claim, he does not improve his position by taking from a later bona bide purchaser, notwithstanding that the bona fide purchaser had good title. CBCA s. 45(3) provides for negotiablity of securities: a security is a negotiable instrument unless a restriction on transfer is noted on it. S. 56(2) goes on to give effect to the principle of negotiability: "a bona fide purchaser, in addition to acquiring the rights of a purchaser, also acquires the security free from any adverse claim."

The definition of "adverse claim" in CBCA sec 44(2) is "a claim that a transfer was or would be wrongful or that a particular person is the owner of or has an interest in the security." That definition is broad enough to cover a claim that the transfer of the security to the purchaser was induced by fraud or entered into in breach of trust, or even that the transferor had no title, and s. 56(2) protects the bona fide purchaser against all such claims. "Adverse claim" also includes a claim of a registered owner whose endorsement has been forged or made without authority, but s. 56(2) does not protect the purchaser of a registered security against such a claim because he cannot come within the definition of "bona fide purchaser" as the term is defined in s. 44(2) unless the security was endorsed to him or in blank, and an "endorsement" made without authority is not an endorsement: see s. 61(3). (The use of the term "bona fide purchaser" in CBCA s. 68(2), where it obviously includes a purchaser who takes under an unauthorized endorsement militates against this interpretation, but we do not see any other way of reconciling s. 56(2) with s. 64(1)).

There are some specific cases in which the purchaser cannot take advantage of negotiability. CBCA s. 57(1) fixes a purchaser with notice of an adverse claim if the security is endorsed for some purpose not involving transfer, such as collection or surrender, or if it is a bearer security and has on it a statement that it is the property of a person other than the transferor. S. 58 also affects the purchaser with notice if he purchases the security more than one year after a date set for presentation or surrender for redemption or exchange, and the period is reduced to six months if at that date the company had the funds for payment or the securities for exchange. These exceptions are in accordance with the idea of negotiability, which requires that negotiable instruments be current and apparently regular.

There are two other provisions in the CBCA protecting the bona fide purchaser. Under s. 57(2), even though he knows of a trust the bona fide purchaser does not have any duty to inquire into the rightfulness of the transfer, and he has no notice of an adverse claim unless he knows that the transfer is in breach of the fiduciary duty. Under s. 54, if blanks in a signed security or endorsement are wrongly filled out, the purchaser may enforce it as filled out, and if it has been improperly altered he may enforce it according to its original terms. See also the comment on s. 56(2) of the draft Act.

(d) Protection against unauthorized endorsements

As has been said, a "purchaser" of a security in registered form whose title depends upon a forged or unauthorized endorsement is not a "bona fide purchaser" within the meaning of CBCA Part VI (s. 68(2) notwithstanding) and is therefore not within the protection of CBCA s. 56(2). However, the effect of CBCA s. 64(1) is that "a purchaser for value and without notice of an adverse claim who has in good faith received a new, reissued or re-registered security on registration of transfer" obtains good title. By protecting the purchaser without notice who gets a certificate in his own name s. 64(1) departs substantially from both the common law and the general law of negotiable instruments. S. 64(2) then goes on to render the issuer, that is the company, liable for the improper registration. As Howard puts it:[3]

> ...registration of transfer under Part VI effects fundamental changes of the obligations among the transferor, transferee and issuer and is therefore more correctly characterized as a statutory novation of those obligations.

And later:

> Where, however, the security presented for registration of transfer bears an unauthorized endorsement, if the issuer inadvertently fails to detect the unauthorized endorsement and effects the registration of transfer, the legal results are radically different. Assuming the transferee who presented the security had no knowledge of any unauthorized endorsement, the transferee becomes absolute owner of the new security obtained upon registration of transfer and is immune from any claim by the issuer. The owner of the security that was presented is entitled to claim a like security or damages from the issuer under ss. 64(2) and 74(2) on the ground that the issuer was in breach of its duty to detect the unauthorized endorsement. The issuer's recourse is against the person who verified the endorsement by guaranteeing the signature of the unauthorized signer and who is expressly liable for breach of his warranties

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[3] See note 1, supra p. 83.

> under ss. 65(1). If the issuer accepted the security without requiring a guaranty of signature, its only recourse is to seek an assignment of the original owner's claim against the wrongdoer for damages for conversion or, in case of a forgery, for damages for fraud. Thus where an issuer accepts for transfer a security bearing an unauthorized endorsement that is presented by a bona fide purchaser, after registration of transfer the issuer is liable to recognize the transferee as the absolute owner of the new certificate and is also liable to the original owner. Had the original owner moved quickly he could have recovered the security under ss. 68(2), and had the issuer detected the unauthorized endorsement it could have refused registration of transfer with impunity because the presenter could not meet the conditions of ss. 71(1). But since registration of transfer was obtained, the previous owner was deprived of the security, the transferee became absolute owner of the new security, and the issuer became liable to both the previous owner and the new owner. It is in this sense that registration of transfer effects a novation of the obligations among these parties.

Is this the way it should be? Why should an owner lose his security upon a forgery? Why should an issuer, who is required by the CBCA to follow business practises which do not guarantee against forgeries, be held liable for accepting one? The first main reason is to be found in the desirability of facilitating the purchase and transfer of securities. It is in the interests of investors that they be able to buy securities through simple procedures and with the greatest possible protection against finding that they have paid their money and not got good title to the securities. It is in the interests of the issuers of corporate securities that investors be persuaded to buy corporate securities, and one important element in that persuasion is giving them the greatest possible assurance against loss of the kind under discussion. Then, imposing the liability on the issuer is a form of spreading the loss since the issuer represents the aggregation of shareholders and, to some extent, creditors; losses due to forgery are relatively infrequent and are likely to be much more serious to the investor than to the issuer. The second main reason for imposing the burden of the loss upon the issuer is that the issuer does have an effective remedy in that it can under CBCA s. 72 require a guarantee of the genuineness of the signature and the capacity and identity of the endorser. It should also be noted that the issuer is not affected by an adverse claim (other than one based upon an unauthorized endorsement) unless it has notice in writing of it.

It should be noted that it is sometimes difficult to interpret the provisions of CBCA Part VI. Under s. 74, the issuer is not liable to the owner or any other person who incurs a loss as a result of the registration of a transfer of a security if "the necessary endorsements were on or with the security" and if the issuer had no duty of inquiry into adverse claims or had discharged its duty. That might appear to relieve

an issuer who has accepted a forged endorsement. However, s. 61(3) defines an endorsement as being signed by "an appropriate person" ("appropriate person" is defined in s. 61(1)), and the definition accordingly would not include a forged endorsement, so that s. 74 would not exonerate the issuer who relied on a forged endorsement.

(e) Procedure on transfer

The CBCA attempts to facilitate the transfer of securities. CBCA s. 71 requires the issuer to register a transfer if the security is endorsed by an "appropriate person" as defined in s. 61(1); if there is reasonable assurance that the endorsement is genuine and effective; if the issuer has no written notice of an adverse claim; if the transfer is rightful or is to a bona fide purchaser; and if any fees allowed by the Act have been paid. There is some inducement to the issuer to be reasonable in its requirements, as it is liable under s. 71 for unreasonable delay in registration; its liability for registering is limited by s. 74 if the necessary endorsements were on or with the security and it has no notice of an adverse claim or has discharged its duty of inquiry; and s. 72(7) fixes it with notice of the contents of various kinds of excess documentation which it demands.

6. Rights and Liabilities of Parties

(a) Issuer

As has been said, the issuer must register a proper transfer of a security and is liable in damages if it does not (CBCA s. 71). If it has gone through a simple process with regard to an "adverse claim" of which it has written notice, the issuer is protected against the claim if it registers the transfer (CBCA s. 74(1)). If it accepts an unauthorized endorsement, it is liable for so doing under CBCA s. 64(2), and its liability is not removed by s. 74; the liability is to replace the security if possible or to pay an amount equal to the price the last purchaser for value paid for the security (CBCA s. 48). If the issuer is liable for accepting an unauthorized endorsement, it is not, under CBCA s. 59(1), able to claim over against the endorsee if he is a purchaser for value without notice who has become registered unless the endorsee had knowledge of an unauthorized signature in a necessary endorsement. The issuer is entitled to insist upon a guarantee of the signature under CBCA s. 72, and that is probably its most effective safeguard. The draft Act incorporates these provisions.

(b) Transfer agent

Under CBCA s. 55 a person signing a security as authenticating trustee, registrar, transfer agent or other person entrusted with the signing of the security, warrants the genuineness of the security, the authority of the person signing, and that he has a reasonable belief that the security is proper in form and within the amount the issuer is entitled to issue. The transfer agent will of course be responsible for carrying out the duties of the issuer and under CBCA s. 76 has a specific duty of good faith and reasonable diligence.

(c) Bona fide purchaser

As we have said, a purchaser of an apparently regular security in good faith and for value without notice receives a good title clear of "adverse claims" (CBCA s. 56(2)). The issuer may be able to set up against him the invalidity of a signature on the security, but can do so, in effect, only if the signature cannot be brought home to the issuer or some person entrusted with some authority relevant to the securities (CBCA s. 53). If the purchaser for value in good faith and without notice is able to become registered, he is also protected against unauthorized endorsements, including forgeries (CBCA s. 64(1)). He is protected against seizures of the security unless possession has been taken (CBCA s. 70). He is not liable on any warranty that the transfer is valid unless he had knowledge of the invalidity (CBCA s. 59(1)). If he buys through a broker, he is taken to have received delivery of a security if the broker identifies a specific security in his records and issues a confirmation of purchase, and if there is a "fungible bulk" of which the security is part, the purchaser has a proportionate interest in the bulk (CBCA s. 66 and 67). He is entitled to further assurances from the transferor under CBCA s. 69.

(d) Owner

In order to encourage facility of transfer the CBCA deprives the owner of some of his common law security of ownership. Once the security passes into the hands of a bona fide purchaser for value without notice, the owner will lose his right to recover it unless his claim is based on the fact that his endorsement is forged or made without authority, and even if an unauthorized endorsement is involved, he will lose his claim as against a purchaser for value without notice who becomes registered, though he then will have a right to obtain damages from the issuer unless he fails to give the notice required by CBCA s. 75. By transferring a security to a purchaser for value he warrants that the transfer is effective and rightful, that the security is genuine and has not been materially altered, and that he knows of nothing that might impair the validity of the security (CBCA s. 59(2)).

(e) Guarantor

Under CBCA s. 65 a guarantor of the signature of an endorser warrants that at the time of signing the signature was genuine, that the signer was an "appropriate person" under s. 61 and had legal capacity. The warranty that the signer was an "appropriate person" seems to involve warranties that he is the registered holder and that, if he signs as an attorney or fiduciary, he had authority to do so. Otherwise the guarantor does not warrant the rightfulness of the transfer. CBCA s. 65 also provides for a person who "guarantees an endorsement of a security"as differentiated from one who guarantees the signature of the endorser. The guarantor of an endorsement warrants both the signature and the rightfulness of the transfer in all respects, but an issuer is not entitled to demand such a guarantee.

(f) Broker

CBCA s. 59(5) provides that "a broker gives to his customer, to the issuer and to a purchaser, as the case may be, the warranties provided in this section." We have some difficulty

with this, as the section provides a number of warranties and it is not entirely clear to us which are intended. We therefore propose that the section be clarified so that it will be clear that the broker gives warranties as follows:

1. To the issuer, the warranties of a purchaser under s. 59(1).

2. To his own customer or to a purchaser the warranties given by a transferor to a purchaser under s. 59(2). (This can only apply if his customer is a purchaser).

CBCA s. 59(5) goes on to provide that the broker also has the rights and privileges of a purchaser under s. 59, and that the warranties by and in favour of the broker are in addition to the warranties by and in favour of his customer. The purpose appears to be to put the broker in the same position as a principal for these purposes.

(g) Infant holders of securities

Under CBCA s. 47(5) it appears that an infant who exercises any rights of ownership of the security is bound by his actions, presumably including a transfer, at least insofar as the corporation is concerned.

7. Recommendations

(a) In general

We recommend that the substance and most of the form of CBCA Part VI of the CBCA be adopted. Our draft Act suggests some changes in form, but these are basically for clarification only.

(b) Non-negotiable share certificates: Corporations whose shares are not a medium for investment

The argument in favour of negotiability of share certificates is that shares will not properly perform their function as a medium for investment unless they can be dealt with easily and safely. That argument does not apply to shares which are not intended to pass from hand to hand, and facility of transfer is the last thing that is wanted by the shareholders of closely held corporations who rely heavily on the personality of the other shareholders.

We will first deal with share certificates issued by closely held corporations after the proposed Act comes into force. Since share certificates have not achieved negotiability at common law there is not at present any legal compulsion upon an Alberta corporation to take steps to make them non-negotiable, and it might be thought that the proposed ABCA should not exert a new compulsion upon closely held corporations in order to achieve an objective which has no relation to their needs, i.e., the efficiency of the capital market. However, that objective is one of public importance, and, in order that it may be achieved, we think that it is not too much to require a corporation which does not want negotiable shares to use a form of share certificate which clearly shows it to be non-negotiable, or alternatively to show on it any restrictions on transfer. Accordingly, it is our recommendation that s. 44(3) of the draft Act provide that a share certificate is negotiable, subject to restrictions noted on

it, unless it is clearly marked "non-negotiable", and that a corresponding change be made in s. 45(8). We would expect that stationers would quickly provide share certificate forms for closely held corporations which would satisfy the requirements of the proposed subsection.

The second problem is that of share certificates issued before the proposed ABCA comes into force. It is a more serious problem, firstly, because getting in existing share certificates to make them non-negotiable will be much more of a nuisance than using a different form for new shares, and secondly because there would be no inducement to shareholders, or to others with claims against shares, to bring in the certificates for that purpose.

We have considered recommending that the proposed ABCA declare non-negotiable all private company share certificates in existence at its inception, but have concluded that the maintenance of a class of apparently negotiable but actually non-negotiable shares throughout the lifetime of all existing private companies would cause difficulties which in the long run would outweigh the disadvantages of requiring closely held companies to get in their certificates at the beginning. We have also considered recommending that the proposed ABCA allow closely held companies at the time of its continuance under it simply to cancel existing share certificates and issue new non-negotiable ones. We have concluded, however, that it would be wrong, on the one hand, to leave the existing ones apparently in existence and, on the other, to make invalid certificates relied upon as security by lenders.

Our conclusion is that the proposed ABCA should not make any exception from negotiability for pre-existing private company share certificates but that it should instead provide a legal mechanism by which a company may, at the time of continuance, call in its share certificates for cancellation and re-issue them in non-negotiable form. By so doing, the Act would allow closely held companies to elect to do nothing about its existing share certificates, with the result that the certificates would be legally negotiable; or to call them in and replace them with non-negotiable ones. Some will probably choose to take a chance, in the expectation that any purchaser will know or be told that share transfers are restricted; others will follow the path of prudence and call in their share certificates. The actual mechanism will be provided by s. 261(5), under which the shareholders could adopt by-laws authorizing the directors to require the shareholders to bring in their share certificates for replacement with non-negotiable ones, and s. 240, under which the directors could apply for an order requiring a shareholder to comply with the by-laws.

(c) Non-negotiable debt instruments

A corporation, closely held or otherwise, may wish to issue debt obligations which are non-negotiable. If the instrument falls within any of the definitions of bill of exchange, promissory note or cheque, it is of course, for constitutional reasons, outside the scope of provincial legislation, and a corporation which wishes to avoid negotiability would take whatever steps the Bills of Exchange Act would suggest. If a debt obligation does not fall within any of the definitions, e.g., if it is conditional, the proposed ABCA would apply to it. We think that the same rules should apply to debt instruments as

to share certificates, and Part 6 the draft Act, like Part VI of the CBCA, accordingly uses the word "security" throughout.

X.

CORPORATE BORROWING

1. Trustees and Trust Indentures

(a) General

Part VII of the CBCA deals with the duties and qualifications of a trustee under a trust indenture. It also deals with evidence of compliance with requirements of trust indentures and provides for the furnishing of lists of holders of debt obligations for certain purposes. It applies only where debt obligations under the trust indenture are part of a distribution to the public.

The draft Act follows CBCA Part VII closely, but makes it Division 1 of Part 7, (Division 2 of Part 7 having to do with registration of corporate mortgages and charges, see page 101 for discussion).

(b) Trustees

(i) Qualifications

We think that where a public issue of securities is involved, the trustee under a trust indenture should be a registered trust company. S. 79 of the draft Act would so provide.

(ii) Duties

(A) Honesty and good faith

A trustee by the nature of his office is under a duty of honesty and good faith to the beneficiaries of the trust. S. 86(a) of the draft Act attempts to set out that duty in simple words and is the counterpart of s. 117(1)(a) which would impose a similar duty upon directors. S. 86(a) would not interfere with the obligations owed by the trustee, as mortgagee, to the distributing corporation, as mortgagor.

(B) Care, diligence and skill

S. 86(b) of the draft Act would require the trustee to "exercise the care, diligence and skill of a reasonably prudent trustee," and is the counterpart of s. 117(1)(b) which would impose a similar duty upon directors. Argument can be advanced against the inclusion of that duty, and we are not unanimous on the point. Those contrary arguments are that a short statement of this kind is likely to overlook elements of or qualifications upon the duty of trustees; that the standard of the "reasonably prudent trustee" is novel and vague; and that it is best to leave the courts to develop and shape the obligations of trustees under trust indentures in the same way as they develop and shape the obligations of other trustees. Our majority view, however, is that a short and simple statement of the law will be useful for the guidance of trustees and those who deal with them, and that the standard is one which trustees should be able to apply without undue difficulty. We think also that this is an area in which uniformity is very important, as trustees dealing with corporate finance should not be subject to varying duties across

the country.

(C) Conflicts of interest

S. 78(1) of the draft Act would prohibit the appointment of a trustee with a "material conflict of interest between his role as trustee and his role in any other capacity". S. 78(2) would impose upon a trustee who becomes aware of a conflict a duty either to resolve it or to resign within 90 days. The only sanctions would be, firstly, that the trustee would be guilty of an offence if he should accept appointment with knowledge of the conflict or fail to resolve or resign as required by the section, and, secondly, that he would be under civil liability for any loss resulting from his failure to comply.

The standard of the "material" conflict of interest may cause some difficulty. A trustee which, as executor of an estate, holds a few shares in an issuing corporation, may be said to be in a position in which its duties conflict, but it may not be easy to decide whether the conflict will be "material" in the eyes of a court. We are in agreement with the principle, however, and we think it better to follow the CBCA rather than to establish a different standard which would cause different problems for trustees of trust indentures issued by Alberta corporations and which would require the establishment of a separate jurisprudence. S. 78 of the draft Act therefore follows CBCA s. 78.

(D) Notice of default

A trustee's general duties of good faith, care, diligence and skill would often require it to give notice to the holders of the debt obligations of default by the corporation under the trust deed. S. 85 of the draft Act would however go farther and impose upon the trustee a specific duty to give such notice within 30 days after it becomes aware of an event of default, which is defined in s. 77(1) as an event which makes the security enforceable or which accelerates the obligation to pay the money secured by the trust indenture. As the obligation under s. 85 is to give the notice only if the default continues to the time of the notice, the section would allow the trustee to give the corporation 30 days to cure the default, at least if the default is not serious enough to bring into play the trustee's general duty to take action. It appears to us that the holders of the debt obligations are entitled to know of any event which is serious enough to trigger their enforcement rights and which is not cured within 30 days. S. 85 would make an exception if "the trustee reasonably believes that it is in the best interests of the holders of the debt obligations to withhold the notice" and informs the corporation of the decision. The exception would not apply merely because the giving of the notice would not be expected to assist the holders of the debt obligations. Instead, it would apply only if the notice would be likely to do some positive harm to the holders of the debt obligations, e.g., if, in a case in which the debt obligations are not adequately secured, the notice might be expected to cause the issuer's other creditors to close in and deprive the issuer of an opportunity of working out its difficulties. Again, we think that the holders have a right to know that an unremedied event of default has taken place.

(E) Reliance on statements

S. 87 of the draft Act would exonerate from liability a trustee who "relies in good faith" upon statements that comply with the draft Act or the trust indenture. We think that that is the correct policy. If a trustee were required to apply its own judgment to the statement, it is very likely that it would want the statement verified by its own experts, if the statement is an expert opinion, or by its own officials if the statement relates to verifiable facts. The purpose of s. 81 to 83 of the draft Act relating to evidence of compliance is, and provisions in trust indentures relating to opinions and statements to be required will usually be, to prescribe the kind of evidence which the trustee should have in order to provide reasonable safety while avoiding delay and unnecessary expense. The "good faith" requirement would make it necessary for the trustee to take further steps if it knows or strongly suspects that a statement is false or fraudulent, but in the absence of such knowledge or grounds for suspicion it would not make it necessary for the trustee to second-guess the maker of the statement.

(F) Exculpatory clauses

S. 88 of the draft Act would preclude the trustee from contracting out of the general duties of honesty, good faith, care, diligence and skill which would be imposed by s. 86. We think the provision desirable: where their interests conflict, there is no one to protect the interests of the holders of the debt obligations against the trustee when the terms of the trust deed are settled, and we think that the holders should be protected against exculpatory clauses where there is a conflict.

(c) Trust Indentures

(i) Evidence of compliance

S. 81 to 83 of the draft Act deal with the subject of evidence of compliance with the terms of trust indentures. Our discussion of these sections appears in the comments following them.

(ii) Lists of holders of debt obligations

S. 80 of the draft Act would require a trustee under a trust indenture to furnish lists of the names of, and other information about the holders of debt obligations issued under the trust indenture. Our discussion of that section appears in the comment upon the section.

2. Receivers and Receiver-Managers

Part 8 of the draft Act follows Part VIII of the CBCA with some minor exceptions. The reasons given by the drafters of the CBCA (Proposals, p. 66) for inclusion of Part VIII were as follows:

> 183. Although not critically important in a corporations Act, we thought it was desirable for two reasons to adopt Part 8.00, which is roughly parallel to Part VI of the United Kingdom Companies Act, 1948. First, it clarifies the position of the receiver who is

> appointed by a court order or under a trust indenture to take over the assets of or to administer a corporation; and second, it makes uniform across Canada the law applying to receivers of corporations incorporated under the Act, particularly those appointed by virtue of a trust deed governing a debenture issue.

We agree with these reasons, though in this context the reference to uniformity relates to the desirability of uniformity of the law applying to receivers of corporations incorporated under the CBCA with the law relating to receivers of corporations incorporated under the proposed ABCA, and also to the desirability of uniformity between Alberta law and that of other provinces which follow the CBCA.

We would go further than the drafters of the CBCA, however, and say that Part 8, which follows CBCA Part VIII, would introduce some desirable reforms.

One reform which Part 8 would introduce would be the imposition upon a receiver or receiver-manager appointed under an instrument of a duty to act honestly and in good faith and a duty to deal with the corporation's property "in a commercially reasonable manner". We do not think that these duties would preclude the receiver or receiver-manager from doing whatever is necessary to realize upon a security granted by the corporation; but we do think that it would require him, in the course of doing so, to take reasonable steps to obtain benefits for the corporation which are not inconsistent with the rights of the creditors who are entitled to the security. The rigors of instruments providing for the appointment of receivers and receiver-managers should be relaxed to this extent in fairness to the corporation and its shareholders, as well as to unsecured creditors; and the relaxation will not, we think, prejudice the creditors who are entitled to the protection of such instruments.

A second reform is that s. 95 would allow the court to supervise a receiver or receiver-manager, whether appointed by the court or under an instrument. The power extends to appointing, replacing or discharging a receiver, fixing his remuneration, approving his accounts, and giving directions generally (see s. 95 of the draft Act). Again, we think that this is a desirable relaxation of the rigors of instruments granting corporate securities, and, so far as court appointed officials are concerned it does not confer any new power.

A third reform is that s. 95(d) would allow the court to impose upon the receiver and receiver-manager, or the person by or on whose behalf he is appointed, liability to make good any default in connection with the receiver's or receiver-manager's custody or management of the property. Instruments providing for security often purport to make the receiver the agent of the corporation, with a view to imposing upon the corporation the burden of loss resulting from a wrongful act or neglect of the receiver. It appears to us that the whole policy of the law has long been and should continue to be against the use of such devices.

S. 89 to 95 of the draft Act follow the CBCA and give effect to the views which we have set out.

3. Registration of Corporate Mortgages and Charges

ACA s. 97 to 102 require registration of mortgages and secured debentures created by Alberta and extra-provincial companies. Failing registration, the security granted by the mortgage or debenture is made void against a protected class which includes liquidators, assignees and receivers of the company, and purchasers and mortgagees of the property acting in good faith and for valuable consideration. The CBCA does not provide for such registration, but provincial law should do so.

We understand that the Government of Alberta has under consideration a proposed Personal Property Security Act, and that it is likely that such an Act will be enacted and will provide for registration of corporate mortgages and debentures. That being so, there are two reasons why we do not think that we should revise the existing ACA provisions. The first reason is that a revision now, followed by a Personal Property Security Act later, would cause two successive upsets in a substantial area of law within a fairly short time. The second reason is that the time and effort which we would expend would be too great if the revision were to have effect only for a short time. For these reaons, our original intention, which we still maintain, was to bring forward the ACA provisions with as little change as practicable.

In the course of our consultation, however, we were strongly urged to recommend that two changes be made without delay. The first is to provide that mortgages and debentures take effect in favour of the protected class (i.e., take priority) only from registration. The second is to provide that the court order required for late registration be dispensed with. We agreed with both suggestions in principle, and ultimately agreed to make recommendations to give effect to them, though with some reluctance because of our desire not to become entangled in the law of property security registration.

S. 88.1 to 88.8 of the draft Act accordingly follow ACA s. 97 to 102 and the relevant ACA definitions, subject to the two changes we have mentioned, and to minor drafting changes. If a Personal Property Security Act covering corporate mortgages and debentures is enacted before, or at the same time as, a new ABCA, these sections, and s. 88.8, should not be enacted, and if such an Act is enacted later, these sections should be repealed. We have considered whether the Registrar of Corporations or the Registrar of Land Titles should maintain a separate register of floating charges after the enactment of a Personal Property Security Act, but have concluded that there is no interest to be served which would justify the legal machinery and the administrative burdens which would be involved.

XI.

PROTECTION OF SHAREHOLDERS AND OTHER INVESTORS

1. Financial Disclosure

(a) Financial statements

(i) Disclosure to shareholders

(A) Obligation to disclose

Under CBCA s. 149, the directors must place before the shareholders, at every annual meeting, financial statements relating to the preceding financial year and the auditor's report. In addition, under CBCA s. 153 copies of financial statements and report must be sent to every shareholder at least 21 days before the annual meeting. Those are absolute requirements which, essentially, can only be waived unanimously: see CBCA s. 136(1), 153(1) and 157. We recommend that these rules be adopted, and they have been included in the counterpart provisions of the draft Act. They do not differ substantially from the present rules under the ACA.

(B) Information which much be disclosed

ACA s. 121 to 128 lay down detailed rules about the preparation and content of corporate financial statements. The CBCA leaves the content of financial statements to the regulations. The drafters of the CBCA had this to say (Proposals, p. 108):

> 326. In recent years there has been an increasing awareness of the need to improve the quantity and quality of financial disclosure required of corporations. The question of corporate financial disclosure has been prominent in studies such as the Kimber and Lawrence Reports, and the need for improved disclosure was also stressed by Mr. Justice Hughes in the Atlantic Acceptance Report (see, for example, p. 1442). Recent amendments to corporation and securities legislation in Canada have embodied many of the recommendations contained in those reports. History indicates, however, that legislation on matters such as financial disclosure is changed only infrequently, sporadically and usually because some dramatic financial catastrophe or fraud revealed how outmoded the law had become.
>
> 327. In addition, accounting practices and financing techniques are always evolving and they have usually been well in advance of the law. The state of current financial reporting is as good as it is because in large measure the accounting profession--spurred to some extent by the demands of the financial community--has been willing to go beyond the demands of the law. It should not be left to the persuasive powers of the accounting profession to see to the implementation of improved financial reporting practices, because the unscrupulous will tend to observe only the minimum legal requirements.

328. Another reason why we believe that a more flexible and responsive form of legislation is required in the area of financial disclosure is that the Draft Act contemplates that many different kinds of corporations will be governed by it. Even under the present Act there is reason to doubt that the provisions of ss. 116 to 121D are entirely suitable for all the corporations affected by them. This is recognized, to a degree, in ss. 116(4), and 121I which grant exemptions from some of the rules in certain circumstances. If the concept of the Draft Act, that all federal corporations should be incorporated or continued under it, is accepted, the range of corporate activity covered by the Act will be much wider and the required financial statements will be much more diverse.

We agree with the approach of the CBCA, and s. 149 of the draft Act embodies it, as it provides for financial statements "as prescribed" (though it departs from the CBCA in connection with the comparative financial statements required). The Institute of Chartered Accountants of Alberta suggested that the draft Act go further and leave to the regulations even those things which s. 149(1) would require. While that suggestion would give maximum effect to the considerations of flexibility and responsiveness to change, we are inclined to the view that the basic provisions should remain in the governing Act, and we have therefore merely made some changes in the terminology of s. 149(1) which the Institute suggested.

CBCA Regulations 44 to 46 are very simple. They prescribe a minimum number of statements by name, and establish the standards of the current CICA Handbook as the standards to be applied. Regulation 47 makes special provision for a corporation which carries on a diversified as distinct from an integrated business. We think that the preparation of the regulations under the proposed ABCA can be left at least until the government decides to introduce a bill.

(b) Exemptions

The Securities Act makes provision for the filing of financial statements by companies which are subject to it, and we expect that a new Securities Act will do so as well. A corporation should not be subjected to two Acts covering the same subject matter. We have therefore, at the suggestion of one of our lawyer consultants introduced into the draft Act s. 150(1) which would exempt from s. 149 corporations which are subject to and comply with the Securities Act.

There are instances in which publication of financial information will prejudice the corporation. CBCA s. 150 empowers the Director under that Act to permit a corporation to omit information or a statement under those circumstances. The proposed ABCA should have a similar provision conferring a similar power upon the Director of the Securities Commission, and . 150(2) of the draft Act would do so.

(c) Disclosure to public

Companies which distribute securities to the public are required by the Securities Act to file financial statements with

the Alberta Securities Commission. ACA s. 146(3) requires companies other than private companies to file financial statements with the Registrar of Companies along with their annual returns. CBCA s. 154(1) requires two classes of corporations to send financial statements to the Director appointed under that Act. One class is corporations which distribute securities to the public. The other is corporations whose gross revenues exceed $10,000,000. or whose assets exceed $5,000,000. The question of public disclosure is an important one.

We do not doubt that distributing corporations should be required to send financial statements and interim financial statements to the Alberta Securities Commission in order that the Commission may have the information necessary to perform its functions in connection with the protection of those who invest in public issues. The Securities Act contains such a requirement and Bill 76 of 1978 does so as well. We think that the proposed ABCA should however contain a provision to the same effect to cover distributing Alberta corporations which do not distribute their securities in Alberta. S. 154 of the draft Act is such a provision, and it would require the financial statements to go to the Director of the Alberta Securities Commission before the annual meeting of shareholders which will consider them.

Should the law require public financial disclosure by other Alberta corporations? That is a more difficult question. It is necessary to consider the purposes which such disclosure might serve and the disadvantages it might bring with it.

Public disclosure of a corporation's financial statements might be useful for employees who wish to engage in collective bargaining with corporations. Disclosure to government may be necessary for specific governmental purposes such as the encouragement of competition, the encouragement of exports or the control of prices and wages. Finally, public disclosure might be of interest to various sections of the public such as consumers' associations, environmentalists, scholars and researchers. It appears to us, however, that disclosure for the benefit of employees is a matter to be considered in the context of labour law, that disclosure for the benefit of government is a matter to be considered in the context of legislation giving effect to each particular governmental policy, and that there is no reason to think disclosure for the benefit of the public generally will bring advantages which will outweigh the interest of corporations and their shareholders in keeping their affairs to themselves. Disclosure for the purposes mentioned has no apparent relation to the objectives of business corporation law.

We should pause to note one argument. It is that a requirement of public disclosure would improve compliance with the statutory requirements relating to financial statements and would therefore protect shareholders. The application of sanctions for failure to file statements would help to ensure that statements are prepared; the Registrar of Corporations would check to see that the statements are filed in proper form; the knowledge that statements would be public might tend to encourage those preparing them to do better; and making information public may upon occasion bring it to the attention of someone who knows that it is wrong and will take steps to correct it. We do not think however that the protection of shareholders would be significantly enhanced by public disclosure, and we do not think

that such enhancement as would be achieved would justify the administrative burden on the Registrar of Corporations or that it would outweigh the detrimental effect of disclosure on the interests of the corporation and its shareholders. We do not recommend that ACA s. 146(3), which requires public companies to file financial statements with the Registrar, be carried forward into the proposed ABCA; and we do not recommend its extension to kinds of corporations corresponding to ACA private companies.

We pause also to consider CBCA s. 154(1)(b), which extends to corporations with net income of $10,000,000. or assets of $5,000,000. the requirement that financial statements be sent to the Director appointed under that Act. Again, we do not see the objective of business corporation law which is to be achieved. If there is a governmental need for information about corporations which may have an important effect upon the economy, that need can be satisfied in other ways. We therefore do not recommend that this provision be carried forward, and we have not included it in s. 154 of the draft Act.

2. Auditors

(a) General

One of the great protections for shareholders of a company in matters of financial management of the company is the existence of an independent and properly qualified auditor. His function has long been recognized by law, and ACA s. 116 to 118 already guarantee him access to an Alberta company's records and to meetings of its shareholders. The CBCA has strengthened the auditor's position, however, in a number of ways. These include giving him access to an audit committee of directors (CBCA s. 165(4)); strengthening his right to have his remuneration fixed by the shareholders (CBCA s. 156(4)); and giving him the right to require the corporation to circulate to the shareholders his reasons for resigning or for resisting removal or replacement (CBCA s. 162(5) and (6)). The CBCA also enables a shareholder to require the auditor to attend a shareholders' meeting (CBCA s. 162(2). We agree with these provisions and have included counterpart provisions in the draft Act.

(b) Requirement of auditor

The basic position of the CBCA is that there must be an auditor; CBCA s. 156(1) requires the shareholders to appoint one at each annual meeting. The only exception to that requirement is contained in CBCA s. 157, which allows the appointment to be dispensed with from year to year by unanimous vote of all voting and non-voting shareholders. If the corporation is a distributing corporation, or if it has revenues in excess of $10,000,000. or assets in excess of $5,000,000, CBCA s. 157(1) excludes it from the dispensing power. We agree with the CBCA position, except that we think that only distributing companies should be precluded from dispensing with the auditor, and the counterpart sections draft Act would give effect our view.

(c) Qualification of auditor

CBCA s. 155(1) requires that the auditor be independent of the corporation and its affiliates, and of the directors and officers of both. Independence is a question of fact, but CBCA s. 155(2)(b) lists a number of circumstances which, unless the

court exempts the auditor under s. 155(5), will be deemed to take away his independence, e.g., partnership with or employment by the corporation or those involved with it, ownership of a material interest in the corporation or its affiliates, and a recent position as receiver or trustee of the corporation or an affiliate. The requirement is that a corporation have an independent auditor or none at all. The draft Act would carry out that policy, and would, at the suggestion of the Institute of Chartered Accountants of Alberta, strengthen it by disqualifying an auditor who has any interest in the corporation or its affiliates and not merely one who has a material interest.

The CBCA does not prescribe any other qualification for the auditor. Strong reasons can be advanced for legislating professional qualifications without which the auditor cannot adquately perform his function, and we understand that the question has been raised with the government by the Institute of Chartered Accountants of Alberta, who also raised it with us. On the whole, we are inclined to think that in the context of a business corporations Act, the choice of auditor should be left to the shareholders, subject to the requirement of independence.

(d) Appointment and removal of auditor

The appointment of the auditor is generally under the control of the shareholders, as CBCA s. 156(1) provides that the shareholders are to appoint an auditor at each annual meeting to hold office until the close of the next annual meeting. Under CBCA s. 99(1), the directors are able to appoint an auditor to hold office until the first annual meeting, and under s. 160(1) they are required to fill vacancies until the next annual meeting; but otherwise they have no part in the power of appointment and removal. The draft Act folows the CBCA in these respects.

3. Audit Committee

The purpose of the audit committee appears from the following statement from a paper prepared for us by Professor A.J. Easson:

> A common criticism levelled against the modern public company is that the Board of Directors tends to be composed of, or dominated by, the full-time "managers" of the corporation who, by means of majority election and the proxy systems, are able to perpetuate their control over the corporation and are essentially answerable only to themselves. This absence of any real supervision of management by the elected representatives of the shareholders has led to the institution in Germany, and elsewhere in Europe, of a formalized two-tier system of Supervisory Board and Management Board. Elsewhere it has led to the appreciation that "outside" directors, provided they genuinely represent the interests of the shareholders as a whole rather than some purely sectional interest, perform a valuable function. The German approach may be regarded as too inflexible and institutionalized to be appropriate in companies which have evolved in the Canadian or Anglo-American tradition and a simple board of directors, comprising both full-time "managers" and part-time "supervisors" is probably preferable. The

two-tier system is also inextricably bound up with the question of worker representation, though logically there is no reason why it should be.

S. 165 of the draft Act follows the CBCA in proposing that a distributing corporation be required to have an audit committee of directors and that a majority of the audit committee be required to be directors who are not officers or employees of the corporation or of any of its affiliates. It also follows the CBCA in proposing that the function of the audit committee be to "review the financial statements of the corporation".

The function of reviewing the financial statements may seem somewhat limited. However, the auditor is given access to the audit committee, and the audit committee is given access to the auditor; and it seems clear that the directors will have a duty to ask the auditor, and the auditor will have a duty to inform the audit committee, about any lack of information or explanations given to the auditor, and about any deficiencies which the auditor has perceived in the financial management of the corporation. We have considered recommending an expansion in the legislative definition of the function, but have concluded, firstly, that the CBCA definition is likely to achieve its objectives and, secondly, that it would be unwise to depart from uniformity in this fairly new and very important area; we think that it would be wise to let the uniform provision be tested across the country under the CBCA and under the provincial law in those provinces which follow the CBCA, and to make changes only as that common experience suggests that they should be made. S. 165 of the draft Act accordingly follows CBCA s. 165.

It has also been suggested that the audit committee's approval of the financial statements should be required. We are not persuaded that that would be good policy. The members of the audit committee, as part of their duty as directors, have a duty to report to the board any misgivings which they have and any discrepancies which they find. The approval of the financial statements is then a function of the whole board, who are unlikely to proceed in the face of material objections from the audit committee, but who will be under an obligation to form their own opinions, taking into account what is said by the auditor and the audit committee among other things.

4. Proxies & Proxy Solicitation

(a) Introduction

(i) General

The proxy is a device of business corporation law and is properly dealt with in a business corporations statute. However, proxy solicitation came to be used as a means of ensuring the control of large corporations by management, an objective which is not always consistent with the interests of investors in those corporations; and regulation in the interests of investors was instituted. Among the regulatory tools are: the mandatory solicitation of proxies for specific purposes; the mandatory disclosure of substantial amounts of information as part of the solicitation; and the mandatory provision of a proxy form by which the shareholder can easily require that his proxy be exercised for or against a resolution which is to be considered at the meeting for which the proxy is solicited.

(ii) History and description of legal situation

English law does not provide for mandatory proxy solicitation, and Canadian law has done so only recently. The Canadian departure from the English law and practice concerning the proxy form and proxy solicitations resulted from the recommendations in the Kimber Report. The Kimber Committee's terms of reference included a review of business corporation and securities laws, with a specific reference to proxy solicitations because capital investors both domestic and foreign were demanding more adequate information as well as greater statutory protection and because there was considerable pressure on Ontario to upgrade its securities laws along the lines developed by the American Securities and Exchange Commission; a method of proxy solicitation which would provide additional investor information on corporation changes and management was of particular interest to American investors. The S.E.C. has described the proxy rules as "the single most effective disclosure device in our whole statutory arsenal". The Kimber Report signified its agreement with the S.E.C. position and recommended statutory changes accordingly.

The Kimber Committee recommended amendments to the Ontario Corporations Act to embody new requirements concerning the proxy form and mandatory proxy solicitation. It also recommended that the Ontario Securities Act be amended to confer authority upon the Ontario Securities Commission to obtain undertakings from companies incorporated outside the province but raising funds through a prospectus filing in Ontario, to comply with the proxy requirements applicable to Ontario corporations.

Amendments were made to the two Ontario Acts, the Securities Act and the Corporations Act. The Corporations Act provisions applied only to Ontario corporations but the Securities Act provisions applied to all corporations filing under the Securities Act subsequent to October, 1969, and to all corporations whose shares were listed for trading on the Toronto Stock Exchange, other than Ontario corporations. The only material difference between the requirements in the two Acts is found in the description of those from whom the corporation must solicit. OBCA s. 117 requires management, concurrently with sending a notice of a meeting, to send to each shareholder a form of proxy. The comparable section in the Securities Act requires management to send the notice and form of proxy only to all shareholders whose last known address is in the province of Ontario. It is obvious that the Securities Act could not require, say, a New York company, to send proxy forms to its shareholders, apart from those residing in Ontario. The mandatory solicitation provision in OBCA s. 117 and the information circular provision in OBCA s. 118 only apply to corporations that are offering their securities to the public. This means that any corporation which has filed a prospectus and has shares outstanding or which has shares listed on a stock exchange in Ontario must send a prescribed form of proxy and comply with mandatory solicitation requirement. Thus there are self-contained proxy and proxy solicitation requirements.

This same situation exists in Alberta. The present Alberta Securities Act followed its counterpart in Ontario in the proxy area; and the ACA was amended in line with the Ontario Corporations Act. If Bill 78 is enacted in its present form it will apply proxy and proxy solicitation requirements to all

"reporting issuers"; a term which includes Alberta corporations which have issued voting securities since October 1, 1967 (and other categories). There is therefore duplication of requirements, though this is relieved by provisions in the Securities Act and Bill 76 which we will discuss later.

We now turn to the question whether mandatory solicitation and the form of proxy should be considered and dealt with as part of business corporation law or whether it should be considered and dealt with as part of securities legislation, or whether it should appear in both.

The use of a proxy has been recognized from the inception of modern company law. A shareholder has always been entitled to nominate a person to attend a shareholder's meeting and cast the shareholder's vote on the shareholder's behalf, and that right is, if not a fundamental right, at least a very important one, whether the corporation is large or small, and whether or not it distributes securities to the public. That suggests that it should be considered as part of business corporation law; and the suggestion is strengthened by the further consideration that the law pertaining to proxies must deal in some way (though not necessarily uniformly) with all corporations, including those with the largest number of shareholders and those with the smallest, and including those Alberta business corporations which distribute shares to the public in Alberta, those which distribute shares to the public but not in Alberta, and those which do not distribute shares to the public at all. On the other hand, as we have noted, mandatory proxy solicitation and the "for or against" proxy are important protections to those who invest through the capital markets; that suggests that these mechanisms should be used as part of securities regulation. That suggestion is strengthened by the fact that corporations which distribute shares in Alberta are now required to comply with proxy regulation and will continue to do so under a new Securities Act even if they are not Alberta corporations. Another consideration is that a corporation should not be obliged to look at more than one legislative provision on the same subject and should certainly not be faced with two applicable legislative provisions which are different.

In the result, we think that the law relating to proxies should be considered both in the context of business corporation law and in the context of securities regulation. We propose to do the former (i.e., consider it in relation to business corporation law), while bearing in mind that securities regulation, as presently embodied in the Securities Act and as it may be expected to be embodied in a new Act based upon Bill 76 of 1978 is necessary. We will then deal with the question of any overlap between the proposed ABCA and securities legislation. (See p. 114 of this Report.)

(b) Proposed Provisions Relating to Proxies and Proxy Solicitation

(i) General

There is no doubt that the statutory authority for voting by proxy, which is contained in the CBCA (s. 142(1)) and which has been in the ACA since 1967 (s. 139(1)), should be carried forward into the proposed ABCA, and s. 142(1) of the draft Act would

carry it forward.

We now turn to the group of devices which have been associated with the use of the proxy for the protection of investors; mandatory solicitation for proxies for specific purposes; mandatory disclosure; the "for and against" proxy; and mandatory exercise of the vote in accordance with the proxy. These are collectively intended to facilitate informed voting by shareholders. We will discuss them firstly with relation to corporations which are not closely held.

(ii) Corporations which are not closely held

(A) Purpose of proposals

The management group of a large corporation customarily operate the proxy solicitation mechanism at the expense of the corporation and with all the advantages of incumbency; they are thus usually able to obtain substantial numbers of proxies in favour of their nominees and, because share holdings are often widely dispersed, they are able to use those proxies to retain control of the corporation. The management group may serve the corporation and its shareholders well, but they may also serve it badly; and it has been seen as inappropriate for the owners of the corporation to have little power to make decisions and little information upon which to make them. The group of devices we have mentioned are intended to increase that power and that ability, and we think that they should be included in the ABCA. They already exist in the CBCA and in the ACA, and their inclusion in the ABCA will not, we think, substantially change the existing law. We will now discuss them individually.

(B) Mandatory proxy solicitation

The requirement that corporations other than closely held corporations must solicit proxies does not of itself constitute an advantage to the shareholders. However, the requirement is the foundation upon which the system is built. The solicitation triggers management's obligation to provide the "for and against" proxy form and the proxy circular. It also triggers management's obligation to vote proxies from all shareholders who send them in, and not only the proxies received from those shareholders who are favourably disposed, or who do not express opposition, to management's proposals. We therefore recommend that proxy solicitation continue to be made mandatory for corporations which are not closely held, as it is by CBCA s. 143(1) and ACA s. 140 and 141; and s. 143(1) and 144(1) of the draft Act would do so.

(C) "For and against" proxy

We will now consider the requirement that anyone who solicits a proxy must provide the shareholder with a form of proxy which will allow the shareholder, if he wishes, to name a proxyholder of his own choice rather than those named in the proxy, and which will also allow him, if he wishes, to require his votes to be cast in accordance with his instructions on the matters of business referred to in the notice of the meeting. That requirement enhances the ability of the shareholder to have his wishes given their proper weight, and we recommend that the law continue to impose it. We think that the form should be prescribed by regulations, as CBCA s. 143(1) provides, and should not be prescribed in detail by statute, as ACA s. 142 provides.

S. 143 of the draft Act would give effect to these views, leaving the form of proxy to be prescribed by regulations which would be drafted when the decision has been made to enact a business corporations statute.

(D) Limitation to use at one meeting

The purpose of proxy circulars and "for and against" proxy forms is to provide shareholders with information upon which to make decisions, and to enable them to require that their votes be cast in accordance with their decisions. It follows from this that the proxy solicitation must relate to the business to come before a particular meeting, and that the proxy must be solicited for that meeting. CBCA s. 142(3) therefore says bluntly that the proxy is valid only for the meeting (including adjournment) for which it is given. Although the OBCA allows proxies to be valid for a year, we recommend adoption of the CBCA provision. As the drafters of the CBCA said (Proposals, p. 103):

> "If proxies could be used at subsequent meetings, perhaps to vote on entirely different matters, the whole purpose of the system would be lost."

S. 142(3) of the draft Act would therefore follow its CBCA counterpart.

(E) Proxy circular

Both the CBCA (s. 144(1)) and the ACA (s. 141) require that a shareholder whose proxy is solicited be sent a circular containing information; and regulations under both Acts prescribe a great amount of information to be given pursuant to those requirements. Under the CBCA, the circular is called a "proxy circular", two kinds of which are contemplated: if the solicitation is by management, a "management proxy circular" is to be sent, and in the case of a solicitation by anyone other than management, a "dissident's proxy circular" is to be sent.

The purpose of the requirement is to enable the shareholder, if he wishes to do so, to make an informed decision on the matters of business which are to be dealt with at the meeting for which the proxy is solicited. We recommend that this requirement be continued in the proposed ABCA, and that the regulations be along the general lines of those which have been promulgated under the CBCA. S. 144(1) of the draft Act would give effect to these views, though we have left the regulations to be drafted when the decision has been made to enact a business corporations statute.

(F) Exemptions

There are cases in which disclosure of some or all of the information required in a proxy circular would be harmful to the corporation or in which the business to be conducted is too trivial or the relevance of the information too slight to justify the trouble and cost involved in preparing and circulating the circular. Some provision should be made to relieve the corporation from the obligation in such cases, and it does not seem practicable to try to define by statute the precise circumstances in which that relief should be given.

The practicable alternatives appear to be exemption by a court (see ACA s. 138(2)) and exemption by the Director of the Securities Commission (see CBCA s. 145(1)); and we think that either would be suitable. However, a decision upon an application for exemption appears to us to be somewhat removed from an adjudication upon legal rights, the making of which is the peculiar function of the courts, and somewhat closer to an administrative action designed to facilitate the proper administration of corporations, the making of which is part of the peculiar function of the Securities Commission (though it should be noted that not all corporations covered by the proposal are within the general jurisdiction of the Securities Commission). Further, we do not think that formal proceedings are necessary to the proper consideration of applications for exemption. For these reasons we propose that the exempting power should be vested in the Director of the Securities Commission, subject to an appeal under s. 239(2) of the draft Act. S. 145 of the draft Act would give effect to that proposal.

(iii) Closely held corporations

(A) Mandatory solicitation of proxies

Much of what we have said about the use and solicitation of proxies relates only to cases in which there is a management or control group of shareholders on the one hand, and a large, unrelated and relatively uninformed group of shareholders on the other; the purpose of the system is to make members of the latter group better able to make informed decisions upon matters of business affecting the corporation and to have their decisions taken into account. We now turn to a consideration of the system in relation to a corporation with a small number of shareholders, in which the relationship among shareholders is likely to be closer.

We consider first the requirement of mandatory solicitation of proxies, with the accompanying obligations to send all shareholders a "for and against" proxy form and a proxy circular. Where all shareholders are directors or spouses of directors, it seems to us that such a requirement would be absurd. Where some shareholders are not involved in management, but the number of shareholders is small, some argument can be made for the requirement on the grounds that the law should protect those outside the management group; but we think that it is overborne by the countervailing arguments that the requirement would likely to ignored, and that its fulfilment would impose upon small corporations cost and trouble which are not justified by the likely benefit; in most closely held corporations the shareholders are likely to be sufficiently informed or to be able to stipulate for more information if they want to do so. While the choice of any number as the division between a "small" number of shareholders and one which is not "small" necessarily has some element of arbitrariness and will include some corporations in an inappropriate category, we think that the law must make such a choice, and the number chosen should be that which is the number chosen by the ACA (s. 138(1)), Bill 76 of 1978 (s. 83(2)(a)) and the CBCA (s. 143(2)). (We elect to include a corporation with exactly 15 shareholders among closely-held corporations in order to conform with Bill 76, rather to exclude them in order to conform with the CBCA and the ACA.) We are therefore of the opinion that the requirement of proxy solicitation should not apply to a corporation with 15 or fewer shareholders.

That proposal would apply the requirement of mandatory proxy solicitation to non-distributing corporations with 16 or more shareholders. We are somewhat concerned about recommending its application to any corporation which does not distribute its shares to the public. There is a divergence on this point between ACA s. 138(1) and CBCA s. 143(2): the ACA excepts all private companies and applies its numerical test only to public companies, while the CBCA applies only the numerical test. The argument for mandatory proxy solicitation is strongest in the case of a distributing corporation, as investors invest in the corporation on the strength of a scheme of statutory regulation, while those who invest in non-distributing corporations do not. With some division of opinion, however, we have decided to recommend following the CBCA: there are some large private companies in which the division between the control group and other shareholders is as sharp as it is in the case of distributing companies, and s. 145(1) of the draft Act would leave it open to those in which that is not the case to obtain exemption from the Director of the Securities Commission. Section 143(2) therefore follows its CBCA counterpart.

(B) Voluntary solicitation of proxies

We have recommended that the solicitation of proxies and related requirements not be mandatory if the corporation has 15 or fewer shareholders. The next question is whether the requirements relating to the provision of proxy circulars and "for and against" forms of proxies should apply if anyone voluntarily solicits proxies in connection with such corporations.

An argument can be made that anyone who makes use of the legal machinery of a corporation to obtain the vote of a shareholder should have to provide the information required for a proxy circular, and should provide a form which facilitates the carrying out of the shareholder's decision; even if Shareholder A solicits the proxy of Shareholder B to overbear Shareholder C in a three-shareholder corporation the obligation should be there. We have concluded again, however, that the cost and trouble to small corporations generally would be too great in relation to the expected benefits, and we think that, because of the closer relationship, the solicited shareholder will usually in such a case be able to demand any necessary information before giving a proxy. Even the right to apply for exemption would, we think, leave closely held corporations subject to an unduly onerous procedural requirement, and if the great bulk of them were to decide to conform to law by seeking exemption, the administrative burden upon the Director of the Securities Commission would also be unduly onerous unless his consideration of each case were merely pro forma and therefore of little value. Accordingly, we recommend that the requirements of the proxy circular should not apply to corporations with 15 shareholders or fewer. Section 144(2) of the draft Act would give effect to this recommendation.

(C) Limitation to use of proxy at one meeting

CBCA s. 142(3), which limits the validity of a proxy to only one meeting, applies to all corporations, however few its shareholders. The arguments for such a provision are much weaker when it is not associated with a system of giving information to shareholders to make informed decisions upon specific matters; and there are likely to be cases in which a shareholder will want

to have his interests in a corporation looked after by a trusted man of business for an extended period of time. With some doubt, we are nevertheless inclined to follow the CBCA: proxies may continue to be used when the giving has been forgotten or the circumstances changed; and a shareholder who wants a representative for the long term would, under s. 142(2) of the draft Act, be able to appoint an attorney who could then issue proxies to himself for each meeting (though we realize that this would be an extra procedural step involving extra trouble, and sometimes expense). S. 142(3) of the draft Act would give effect to our views.

(iv) Relationship between Securities Act and Proposed ABCA

It is now time to make a recommendation about the relationship between the proposed ABCA and the Securities Act in the field of proxies and proxy solicitations.

For reasons which we have given (ante, p. 109) we think that the law relating to proxies is an integral part of the law of business corporations. Further, we think that non-distributing Alberta corporations must be, and Alberta corporations which distribute shares to the public other than in Alberta should be, dealt with in some Alberta legislation; and they are not dealt with by the Securities Act. For these reasons we think that the ABCA should deal with the law of proxies in relation to all corporations, whether they are distributing corporations or non-distributing corporations. However, we think that the law relating to proxies is also an integral part of securities regulation.

How then should the overlap between the two Acts be dealt with? Its effect is already mitigated by s. 103 of the Securities Act under which the Securities Commission may exempt a company from the proxy solicitation provisions of that Act if the law of the corporation's own jurisdiction contains substantially similar requirements (and the ACA does contain substantially similar requirements). The proposed Securities Act, Bill 76 of 1976, would go farther; s. 85(1) would make the proxy and proxy solicitation provisions of the bill inapplicable if the requirements of the laws of the incorporating jurisdiction are substantially similar to those provisions. If the bill is enacted all Alberta corporations will be governed in this respect by the business corporations statute (the ACA or the proposed ABCA) so long as the latter is "substantially similar" to the Securities Act. So long as care is taken to see that the two statutes do not thereafter diverge in this area, Alberta corporations will have to look to the business corporations statute and to it alone. That is as it should be: the Legislature should not lay down two different laws for the same corporation to follow. If for any reason Bill 76 is not proceeded with, we think that s. 103 of the Securities Act should nevertheless be replaced by s. 85(1) of Bill 76. The overlap would then be done away with: the ABCA would prevail. However, the Securities Act would remain and would come into force if the ABCA requirements should diverge.

5. Qualification of Prospectuses

ACA s. 95 requires that any form of application or subscription issued for shares or debentures offered to the

public must be accompanied by a prospectus which complies with the Securities Act and is filed with the Registrar of Companies under ACA s. 93. Other provisions relating to prospectuses appear in ACA s. 94 and 96, and ACA s. 176 requires extra-provincial companies other than Dominion companies to file with the Registrar prospectuses inviting subscriptions in the province for shares and debentures.

We think that the regulation of prospectuses, their issue, use and contents, is better left to the Securities Act, and that there is no function to be performed by overlapping provisions in business corporation law. The regulation should apply only to issues of securities offered to the public in Alberta, which is the subject matter of the Securities Act, and supervision by the Securities Commission is fundamental to it. We see little advantage in requiring the filing of prospectuses with the Registrar of Corporations when they are filed with the Securities Commission, and we do not think that corporations and the Registrar should have the burdens of filing and caring for unnecessary documents. We therefore recommend that the proposed ABCA not regulate prospectuses and not require the filing of prospectuses; and the draft Act does not contain any provisions which would do so. We have omitted CBCA s. 186 which does require filing; the considerations affecting a jurisdiction, such as Alberta, which regulates security trading under other legisislation, are different from the considerations affecting a jurisdiction, such as Canada, which does not.

6. Take-over Bids

CBCA s. 187 to s. 198 establish rules of conduct for the making of "take-over bids", a term which is defined in CBCA s. 187 to include offers, other than exempt offers, to purchase shares which would give the offeror more than 10% of a corporation's issued shares, and all offers, except exempt offers, by a corporation to purchase its own shares. The exemptions include offers to buy shares of a corporation with fewer than 15 shareholders and offers to fewer than 15 shareholders by way of separate agreements, and they also include purchases in the market which fall within CBCA Reg. s. 58. CBCA s. 197(1) authorizes the court to exempt an offer if no unfair prejudice to shareholders will result.

In Alberta, the Securities Act regulates take-over bids and the ACA does not. The situation in the province is therefore different from that in which the CBCA was enacted, there being no general federal securities regulation.

The primary purpose of the legislation governing take-over bids is to protect offeree shareholders. It requires substantial disclosure of information; it requires that offeree shareholders be given time to accept and to withdraw their acceptance; it precludes the offeror from paying one offeree more than another; and, if the bid is for less than all of the shares of a class, it provides that the purchase is to be made pro rata from those shareholders who deposit shares pursuant to the bid. It seems to us to be clear that legislation governing take-over bids is really securities legislation, and we think that it should be left to the Securities Act. The draft Act therefore does not include any provisons for the regulation of take-over bids.

CBCA Part XVI. which includes s. 187 to 198, also includes s. 199 which provides for the compulsory acquisition by the offeree of the shares of a small dissenting minority of the offeree shareholders after a successful take-over bid. We will discuss that subject later in this Report (see XII.5 Compulsory Acquisition After Take-over Bids).

7. Insider Trading

(a) Scope of subject

Alberta legislation deals with two subjects under the heading "insider trading". One is "insider reporting"; the other is the imposition of civil liability upon an "insider" of a company who uses confidential information for his own benefit in buying or selling securities of the company. Part X. of the CBCA deals with these two subjects, and also prohibits insiders from selling short and buying or selling calls or puts. We will deal with these three subjects separately.

(b) Insider reporting

ACA Part 6 Division 3 requires one who becomes an insider of an Alberta public company having 15 or more shareholders to file with the Securities Commission a report showing his ownership and control of shares and debt obligations of the company, and thereafter to file reports showing changes in his ownership and control. The Alberta Securities Act, Part 11, imposes similar requirements upon "insiders" of extra-provincial companies whose shares are distributed after October 1st, 1967, in the course of a distribution to the public, concerning which a prospectus has been filed with the Securities Commission. The CBCA applies similar requirements to "distributing corporations."

The requirement of "insider reporting" is intended to expose to public view the trading of shares; improprieties in the use of inside information are less likely to occur if it is known that the transactions will be made public, and improprieties which do occur are more likely to come to light. The insider reports also help others to decide when to go into or out of the market. These functions relate to the regulation of trading in securities and to the protection of investors.

The CBCA, as we have said, contains provisions regulating "insider reporting." There is, of course, no existing federal securities legislation, and there is therefore no other federal statute covering the field. The province does have securities legislation, however, and we therefore recommend that the proposed ABCA follow the examples of the Manitoba CA and the Saskatchewan BCA and omit any regulation of "insider reporting. The draft Act therefore would not cover "insider reporting".

If that recommendation is accepted, "insider reporting" should be dealt with by the Securities Act. As we have said, the Securities Act does not at the moment cover Alberta companies. If the proposed ABCA comes into force before the proposed new Securities Act, the existing Securities Act should therefore be amended to cover Alberta corporations as well as extra-provincial corporations. However, the insider trading provisions in Part 15 of the proposed new Securities Act, Bill 78 of 1976, would cover insiders of "reporting issuers" other than mutual funds, and that term would cover Alberta business corporations as well as

extra-provincial corporations; so that if Bill 78 is enacted before the proposed ABCA is enacted, no further action would be needed. That statement may require some slight qualification, as there may be some few companies whose shares are traded somewhere that have not issued voting securities on or after October 1st, 1967 in respect of which a prospectus was filed, and whose shares are not listed and posted for trading on any stock exchange in Alberta so as to bring it within s. 1(1)(t)(iii) of the Bill 76 of 1978, and which do not fall within any of the other categories in that definition. If such companies exist, we think that they should be covered by a definition in the proposed new Securities Act rather than by having elaborate provisions in the proposed ABCA.

(c) Short sales, puts and calls

CBCA s. 124 prohibits insiders from selling shares which they do not own or for which they have not fully paid, and it prohibits them from buying or selling calls or puts. We have not formed any opinion as to whether or not such provisions are necessary or desirable. We think that these subjects, like "insider reporting," are matters for regulation of trading in securities and not matters of basic business corporation law. We have therefore omitted from the draft Act any counterpart of CBCA s. 124.

(d) Civil liability for use of insider information

CBCA s. 125 imposes two kinds of civil liability upon an insider who, in buying or selling a security of the corporation, uses for his own benefit specific confidential information which, if generally known, might reasonably be expected to have a material effect on the value of the security. The first is liability to compensate a person who suffers a direct loss as a result of the transaction. This liability is likely to be in favour of a seller from whom the insider has bought shares at an undervalue or a buyer to whom he has sold shares at an overvalue. It does not attach if the injured party knew or should have known the information. The second is liability to account to the corporation for any profit which the insider has made as a result of the transaction. In theory it appears possible that the corporation might recover a profit and that the other party might afterwards recover compensation for the loss, so that the insider would be subject to double liability for the same money, but it does not seem likely that double liability will occur in practice.

We think that, subject to limitations which we will propose below, Alberta law should impose civil liability upon insiders along the lines of CBCA s. 125 and of the ACA and the Securities Act. We think that the considerations in favour of such an imposition are particularly strong in the case of distributing corporations. Insiders of large corporations necessarily have a great deal of confidential information, and much of that information is not available to other shareholders, and, indeed, in the interests of everyone cannot be made available to the other shareholders. In such a case it is clearly an abuse of a confidential position for an insider to use for his own benefit information entrusted to him for the benefit of all; and he should not be able to keep the fruits of a wrongful act.

The shareholders of a closly held corporation are more likely to be well informed about its affairs, but we think that if they are not they should be protected against the misuse of confidential information by insiders. Further, there are now large private companies under the ACA, and there will be large non-distributing corporations under the ABCA, in which there are sharp divisions between control groups and the great bodies of shareholders. We therefore think that the civil liability should be imposed upon the insiders of non-distributing corporations in favour of shareholders of those corporations.

Should the civil liability also be imposed upon insiders of non-distributing corporations in favour of outsiders who buy shares in the corporation? The answer we gave in our Draft Report was yes, but we have had second thoughts. The insiders of a non-distributing corporation do not invite the public to trade in the securities of the corporation under the disclosure rules of Securities Commissions and stock exchanges. Then, a sale of shares in a non-distributing corporation is an individual transaction which is more likely to be well considered and investigated by the buyer of the securities. Finally, and most important, the sale of the shares of a closely held corporation is frequently tantamount to a sale of the underlying assets; in a sale of assets by the corporation there would not be any such liability, and we do not think that the duties and liabilities of essentially similar transactions should depend upon the form which the particular transaction takes. We accordingly propose that the civil liability to be imposed upon the insiders of a non-distributing corporation be a liability in favour of shareholders of the corporation only. We think that the considerations which we have mentioned justify a departure from uniformity with the CBCA and the provincial Acts based upon it.

We now turn to the question: should the liability be imposed upon insiders by the Securities Act, or should it be imposed by the proposed ABCA? We think that, because of the substantial element of investor protection which is involved, the Securities Act should deal with the civil liability of the insiders of distributing corporations. We think, however, that the proposed ABCA should deal with the civil liability of the insiders of non-distributing corporations; in that context, the liability is part of the legal relationship between the shareholders of the corporation on the one hand, and the directors and other insiders on the other. S. 125 of the draft Act would give effect to the views which we have expressed.

We do not think it appropriate here to go into the detailed definition of "insider," which appears in s. 121 of the draft Act. Insiders would include the corporation and its affiliates; directors and officers of the corporation, and shareholders controlling more than 10% of the voting shares; persons employed by the corporation or retained by it on a professinal or consulting basis; and anyone who receives information from any of these in the knowledge that the person giving it is an insider. In addition, if one corporation becomes an insider of another or acquires its property or amalgamates with it, directors of the first would be deemed to have been insiders of the second for the previous six months. These definitions are quite broad, but it should be noted that s. 125 would not impose any liability unless a member of the class uses specific confidential information for his own benefit or advantage in a transaction involving a security of a corporation of which he is an insider or a deemed

insider.

XII.

RELATIONSHIP OF MAJORITY AND MINORITY

1. Proposed Remedies: General Discussion

Our proposals are intended to enable business to be done easily and efficiently, and they therefore do not include restrictive and cumbersome (and, we think ineffective) safeguards such as the doctrine of limited corporate powers, the doctrine of constructive notice, and the requirement of court approval for important changes in capitalization. We think that the draft Act would confer great advantages in those cases in which business is carried on honestly for the common benefit of the shareholders, that is to say, in the vast majority of cases. We think that it must be recognized, however, that there will be some cases in which those who control a corporation will act in a way which is unfair to those who do not control it, whether by seeking a discriminatory advantage for themselves at the expense of the minority or by changing the ground rules governing the conduct of the corporation's business; and we therefore think that the proposed ABCA must include measures designed to prevent and to correct the abuse of the power of control.

We are, then, considering at this point two interests of shareholders. One is that their corporation's business be conducted efficiently. The second is that their corporation's business be conducted fairly and honestly in their collective interest. Measures intended solely to promote one interest are likely to derogate from the promotion of the other, and the striking of the proper balance is not easy.

Our proposals follow the CBCA in general, and we can adopt what the drafters of the CBCA had to say about the striking of the balance between efficiency and fairness (Proposals, p. 158):

> 474. Although many of the substantive provisions of the Draft Act are complemented by specific remedies to enforce compliance with discrete rules, we think that for two reasons these specific remedies must be buttressed by other remedies having much wider application. First, the Draft Act is extraordinarily permissive, for it omits altogether the traditional--and we think largely formalistic --safeguards such as minimum capital contributions, limited and clearly specified objects, statutory restrictions on conditions attached to shares and so on, allowing considerable scope for misconduct, and therefore requiring fast effective remedies to prevent abuse of the rights of persons having an interest in a business corporation. Second, given the protean quality of the business corporation as a legal institution and the seemingly inexhaustible ingenuity of the unscrupulous to exploit this quality to further their own ends, it is impossible for the draftsman to anticipate all the possibilities of misuse.

That is not to say, however, that the general remedies set out in Part 19.00 have been tacked on as an afterthought. Impliedly, at least, the proposed remedies reflect three fundamental policies.

475. First, the structuring of a business corporation as an ideal "democratic" polity, while desirable, is not at all a complete answer to the problem of satisfactorily resolving corporate disputes. Throughout the Draft Act structuring techniques such as pre-emptive rights and cumulative voting are not only legitimated but positively encouraged. Nevertheless they are deliberately not made mandatory, a policy which would, in our opinion, over-emphasize their most useful function--i.e., as close corporation planning tools--and thus distract attention from the real problem of providing effective remedies to prevent or at least to furnish compensation for demonstrable wrongs.

476. Second, we think that the best means of enforcing a corporation law is to confer reasonable power upon the allegedly aggrieved party to initiate legal action to resolve his problem, making the Draft Act largely self-enforcing, obviating the need for sweeping administrative discretion and harsh penal sanctions, and, at the same time, forcing resolution of the issues before the courts, which have the procedures, the machinery and the experience that enable them better than any other institution to deal with such problems. Included within this concept, of course, is the "appraisal" right conferred upon each shareholder by s. 14.17, which entitles a shareholder to withdraw his investment at an objectively appraised price in the event of a fundamental change in the business or affairs of the corporation.

477. Third, the remedies provided in the Draft Act recognize that corporation law--and particularly the duties of officers, directors and dominating shareholders of corporations--is in a very fluid state, reflecting the uncertain role or identity of the business corporation in contemporary society. For this reason we have frequently established only very broad quality standards of conduct (e.g., s. 9.19 referring to duties of directors and officers and s. 19.04 relating to "oppressive or unfairly prejudicial" conduct of management or dominant shareholders), permitting the courts to determine whether there has been failure to comply with those standards, that is, to continue to develop the common law of responsibility of corporate management unhampered by the legal fetters created at a

time when courts were preoccupied with enforcing "democratic" structures--particulary voting power--as the one real object of the law. Investigation by a government agency is also provided for, but it is essentially a residual remedy, available to resolve problems that cannot be adequately dealt with by ordinary litigation.

478. The remedial techniques employed in the Draft Act fall, analytically, into six categories that can be best explained by concrete illustrations.

(1) Disclosure: access to corporate records and lists of shareholders under s. 4.03, publication of insider reports under s. 10.03, and disclosure of financial statements under s. 13.01, 13.03, 13.05 and 13.06.

(2) Structural techniques: pre-emptive rights referred to in s. 5.05, cumulative voting referred to in s. 9.06, and shareholder proposals under s. 11.05.

(3) Civil action: improper insider trading under s. 10.04, court review of an election of directors under s. 11.13, and a restraining order in respect of an untrue statement made in the course of a proxy solicitation under s. 12.08.

(4) Administrative proceedings: revocation of corporate name under s. 2.08, cancellation of certificate of incorporation under s. 17.03, or investigation under Part 18.00.

(5) Director's personal liability: improper purchase or redemption of a corporation's shares, improper payment of a commission in respect of the sale of shares, improper payment of a dividend, or making an improper loan or guarantee, etc., all of which are referred to in s. 9.16.

(6) Penalties: failure to maintain records under s. 4.02, refusal to permit access to corporate records under s. 4.03, failure to file an insider report under s. 10.02, or failure to distribute financial statements under s. 13.06.

The foregoing examples are of course not complete. They have been selected only for illustrative purposes.

479. The major premise of this Part is that a corporations Act should be largely self-enforcing by civil action initiated by the aggrieved party, not by severe penal sanctions or sweeping investigatory powers.

> If this policy is not adopted, it is our opinion, given the state of the common law, that we must continue to rely on ever broader powers of investigation as a means to remedy corporate ills, which become increasingly complex as businesses become more and more sophisticated.

We turn now to a consideration of the principal remedies which our proposals would give to shareholders.

2. Investigations

(a) Purposes of Investigations

The drafters of the CBCA had this to say about the purposes of the system of investigation (Proposals, p. 154):

> 464. The system of inspection is designed to serve two purposes. First, it is a valuable weapon in the armoury available to shareholders as a protection against mismanagement. Although Part 19.00 of the Draft Act [CBCA Part XIX] greatly extends and improves the means of redress open to individual shareholders in the courts, it will almost certainly be true in many cases that even the most sophisticated litigative weapons will be valueless for lack of information as to the details of suspected mismanagement. That information is, by its very nature, likely to be known by the suspected wrongdoers and unlikely to be known or voluntarily disclosed to those seeking to complain of the suspected wrongdoing. Accordingly, we have provided in s. 18.01(2) that if an applicant can satisfy the court that there are circumstances suggesting wrongdoing, an investigation order may be made in aid of litigation.
>
> 465. Moreover, there is a public interest in the proper conduct of corporate affairs, and while the protection of the public interest may be a by-product of the protection of shareholder interests, we are not persuaded that it is a necessary by-product. Accordingly, s. 18.01(1) provides for an application by the Registrar.

Professor LCB Gower says in his draft Ghana Code, at page 62, referring to the powers of investigation in the latest English Act:

> They have proved one of the most effective safeguards against abuse; the possibility of an investigation is in itself an inducement to behave with propriety, the threat of an investigation may cause impropriety to be ended voluntarily, and an actual investigation may bring to light for the first time facts which will enable legal

proceedings (civil or criminal) to be taken.

We think that these considerations indeed require that the law provide the machinery for an outside investigation of a corporation's affairs in a proper case. The CBCA provides that machinery and we agree with it.

(b) Control of the system of Investigations

In England, the Companies Act of 1948 placed in the hands of the Board of Trade the responsibility for deciding upon and conducting an investigation, and one alternative which we must consider is whether the proposed ABCA should give that responsibility to a government agency such as the Securities Commission. However, while investigations should be investigations and not adjudications, they are part of a process which may well affect the civil and criminal rights and liabilities of individuals; and it seems to us that, although the court is not an appropriate body to decide to carry out an investigation, it is the appropriate body to decide when an investigation is justified, who should carry it out, what powers are needed, and what ground rules should be laid down for it. ACA s. 160 provides for the appointment of inspectors by the court, and CBCA s. 223(1) provides for both appointment and supervision by the court. S. 222(1) and (2) of the draft Act would accordingly provide for an application to, and an order by, the court, for an investigation of a corporation's affairs, and s. 223 would provide for the appointment and supervision of the inspector by the court.

That is not to suggest that the Securities Commission should not have a part in the system; indeed, we think that, through its Director, who would have a number of functions under Part 18 of the proposed Act, it should have an important part, though not one that it would play very frequently. In the case of corporations which distribute securities to the public, investigations are closely related to the protection of the investing public (which is the primary function of the Commission), and in other cases, the Commission is the body with the greatest expertise and staff. It is the body to which aggrieved persons have turned in the past and are likely to turn in the future. We therefore think that the Director of the Securities Commission should be able to apply to the court for an order for investigation; he would then in a proper case be able to assume the burden of carrying the proceedings on behalf of aggrieved shareholders or in the public interest. We think that for the same reasons the court should be able to appoint him to conduct investigations; and we think that for his assistance in protecting the investing public the Director should receive information about applications for investigations and copies of the reports of investigators. S. 222(1) of the draft Act would therefore include the Director among those who may apply for an investigation, and s. 223(1) would allow the court to appoint him as the inspector.

We should perhaps mention that for a long time the power to order an investigation was given to the Lieutenant Governor in Council by the ACA, and indeed, ACA s. 161 still contains language referring to that power. However, ACA s. 160 was amended in 1970 to give the power to the courts. It almost goes without saying that it is not appropriate that the Lieutenant Governor in Council should have the function of supervising a

system of investigation of particular corporations, and the draft Act would not give it to him.

ACA s. 160 allows a company itself to appoint inspectors to conduct an investigation. The CBCA does not, and we do not think that the proposed ABCA should do so. Those who have the power to procure a resolution for an investigation could use that power to appoint directors who will investigate, and if the directors need the extraordinary powers available under the Act, they would be able to apply for a court-appointed inspector. We understand that the company's power under the ACA is rarely used; a long service official of the Companies Branch informs us that he can only remember one such appointment in recent years.

(c) Right to apply

The principal purpose of a system of investigations is to afford shareholders protection against mis-management of corporations. A shareholder therefore should have the right to apply for an order for an investigation.

A variety of requirements have been imposed upon the applicants by different statutes, e.g., that they hold a tenth or a fifth or a fourth of the issued shares, or that they include a certain number of shareholders or a percentage of shares or both. Presumably such requirements reflect an opinion that a procedure so upsetting and potentially damaging as an investigation should only be instituted for persons with a legitimate and substantial interest in the corporation. The OBCA, the CBCA, the Man CA, and the SBCA have, however, abolished any numeric requirement, and we recommend that the proposed ABCA follow them in so doing. There is no evidence that the opening of the floodgates by the abolition of a numerical qualification would bring about a spate of investigations; the potential responsibility for costs itself is sobering. And the floodgates would remain under the control of the courts, who have traditionally been careful to avoid undue interference in the affairs of corporations. A numerical qualification is an unduly inhibiting obstacle in the way of a shareholder who wants an investigation, and, since the order is discretionary, the courts will take into account the legitimacy or otherwise of his reasons for seeking the investigation.

CBCA s. 222(1) goes farther. It permits a "security holder" to apply, and that term includes the holders of a bond, debenture, note or other indebtedness or guarantee of a corporation. We do not think that as a general rule a creditor should be able to apply for an investigation; however, the holder of a bond or debenture which can be converted into shares has a legitimate interest in the management of a corporation, and we can see also a case in which there is grounds for suspicion that a corporation (though still solvent so that it cannot be put into bankruptcy) has been set up as part of a scheme to defraud investors. Again, we think that the good sense of the court, and the judicial exercise of its discretion to grant or refuse an order for an investigation, will be sufficient protection against the granting of unwarranted orders for investigation at the instance of the holders of debt obligations. We accordingly recommend that a "security holder" be entitled to apply for an order for an investigation.

We have already mentioned the function of the Director of the Securities Commission. We think that he should be able to

apply for an order for investigation, so that he could in a proper case remove the burden of the proceedings from a complaining shareholder, or so that he could, upon occasion, launch an application where there is a wider public interest to be served. S. 222(1) of the draft Act would give effect to these views.

(d) Scope of investigation

CBCA s. 222(1) allows a security holder to apply for an investigation not only of the corporation which issues the security but also of its affiliated corporations, i.e., its parent, its subsidiaries, and other CBCA corporations controlled by the same person or corporation. That is an extension of the system of investigation, and it may be thought that the security holder's rights should extend only to the corporation the securities of which he holds. There are arguments in favour of the extended provision, however. It is, we think, clear that the power to investigate a subsidiary is desirable, because mismanagement of the subsidiary affects the parent. But, more than that, it is possible to divide among several corporations what is in substance one commercial venture, and to have the several corporations buying, selling and furnishing services among themselves; in such a case, to allow only one corporation to be investigated would be to make it difficult or impossible to unravel the whole scheme. We accordingly recommend that the power to investigate extend to affiliated ABCA corporations, and s. 222(1) of the draft Act is drafted accordingly. Indeed, we think that it should be extended somewhat further than the CBCA extends it; s. 222(1) of the draft Act would extend it to include affiliates which are still under the ACA. The power, however, appears to us to be an integral part of the basic law of business corporations and we do not think that the proposed ABCA should try to apply it to extra-provincial corporations.

(e) Grounds for application

CBCA s. 222(2) sets out the grounds for an application for an investigation order. They come down to two: suspected fraud, whether as a scheme or in fact; and alleged oppression of security holders. We think that these are proper grounds, and s. 222(2) of the draft Act reflects that view. We have however, changed the wording from that of CBCA s. 222(2) to ensure that the court will not construe it as requiring that the facts be proven before the order for investigation to ascertain the facts can be granted.

(f) Conduct of the investigation

Under the CBCA it is for the court in each case to decide who is to conduct the investigation (i.e., who the inspector is to be) and what powers he is to have, and to give directions for the conduct of the investigation; the CBCA itself does not say who the inspector is to be and does not confer powers upon him. It is, of course, not to be expected that a judge will sit down and devise a plan; what is to be expected is that in the first instance the applicant will have to satisfy the judge that the order should be made and that the applicant's plan is appropriate, and that thereafter any interested party will have the right to ask the judge to change the rules in whatever way is appropriate. We agree with this approach and s. 222 and 223 of the draft Act adopt it.

The powers which the court can give the inspector under CBCA s. 223(1) are extensive. It can authorize him to enter premises and to examine documents and records; it can order the production of documents and records to him; and it can authorize him to conduct a hearing, administer oaths and examine witnesses under oath. In connection with the latter powers it can prescribe rules for the conduct of the hearing and require witnesses to attend and give evidence under oath. We think that these powers are appropriate and adequate, and s. 223(1) of the draft Act follows the CBCA.

We envisage that the inspector would conduct an initial examination of documents and records. We would also expect him to ask officers and employees of the corporation for such information and clarification as his progressing examination suggests. Then he may think it proper to take evidence under oath on important matters or from witnesses whose roles are important, who may attend voluntarily or be compelled to do so by court order. Finally, he will prepare a report which will be made to the court, with a copy to the Director of the Securities Commission, and, unless the court otherwise orders, with a copy to the corporation's auditor as well.

The inspector should act throughout as an investigator and in an investigative capacity. His report would make statements of fact and opinion; it would have important practical effects; and s. 230 of the draft Act would make it admissible as evidence of the facts stated in it. It will not, however, adjudicate upon rights, nor will it establish facts and opinions for legal purposes. Care should therefore be taken to see that his proceedings are not treated as adjudicative and as requiring the formal trappings of adversarial procedure. We think that the references in CBCA s. 223(1)(f) and s. (g) (which we have followed) to a "hearing," and some ambiguity in CBCA s. 225(2) dealing with the right to counsel, tend to obscure the investigative nature of the proceedings; while we have carried forward the references to "hearings" we have clarified s. 225(2) so that it would give the right to counsel only to a witness who is being examined.

The draft Act would make provision for the degree of confidentiality to be attached to various stages of the proceedings. The subject is dealt with in the comments on those sections in s. 222 to 224 of the draft Act, and will not be discussed here.

(g) Costs

A major barrier in the way of a shareholder who wants an investigation is the common legislative provision that he may be compelled to put up security for costs, of which ACA s. 160(3) is typical. We agree withthe policy of the CBCA s. 222(4), which provides that an applicant is not required to give security costs and, s. 222(4) of the draft Act follows it.

The costs of any application to the court is within the court's discretion. The costs of the investigation itself, however, which are likely to be substantial, should be dealt with by the statute. CBCA s. 223(1)(l) allows the court to require the corporation to pay the costs but does not go further. We think that the system of investigations is in the interests of corporations, and s. 223(3) of the draft Act would go somewhat

further than does the CBCA by imposing liability for the costs upon the corporation in the absence of a court order. S. 223(1)(K) of the draft Act would also go further than the CBCA by empowering the court to impose liability for costs upon "any person", a term which might include the applicant or the wrongdoers; we think that the court should be able to make whatever order is appropriate in the circumstances of the particular case.

3. Appraisal Right

(a) General discussion

We now turn to one of the most important innovations which should be considered for the proposed ABCA. It is the "appraisal right", which has already been referred to in our discussion of changes in the constitution of corporation at p. 48 of this Report, i.e., the right of a minority shareholder to require the corporation, if it changes certain fundamental ground rules governing the corporation or its business, to buy him out at a price representing the fair value of his shares. It is now time to examine that right, its nature, its establishment, and its enforcement.

One of the basic propositions of our business corporation law is that the majority must have its way. A shareholder presumably becomes a shareholder in the knowledge that this is so. He has made his bed and must lie in it whether it proves to be a bed of down or a bed of nails, and even, in some cases, if the actions of the majority have transformed it from a bed of down to a bed of nails. A share is property and the majority are entitled to use their property as they see fit. There is a contractual aspect to the relationship among shareholders, and that relationship allows the majority to rule and even to change the ground rules. There are of course limits to these propositions, but the lot of the minority shareholder may be an unhappy one indeed.

The law which we have described has been perceived as being unduly harsh upon the minority shareholder. One reaction has been to make it easier for him to obtain relief against oppression. Another, which has been adopted by most of the American states, by British Columbia, Ontario, the CBCA, the Man CA and the SBCA, and which is under discussion here, has been to give the minority shareholder a "right to dissent" or an "appraisal right".

The jurisdictions which have adopted the appraisal right recognize the right of the majority to have their way. Indeed, within the broad ground rules which apply to the company they give the minority no recourse in the absence of outright fraud, oppression or discriminatory treatment. However, if the majority want to change the broad ground rules, the minority, though unable to prevent the change, are entitled in those jurisdictions to demand that the company buy them out at fair value; the majority can do what it wants but it cannot hold the minority captive in an undertaking fundamentally different from that which everyone originally contemplated, or in a position within the company fundamentally different from that which the minority purchased.

The existence of the appraisal right gives rise to many difficulties. It is intended to give a bona fide minority a weapon against an unfair or unprincipled majority, but it may instead give an unfair or unprincipled minority an opportunity to extort benefits from the majority. An unquantified potential liability to buy out minority shareholders may inhibit bona fide corporate action. Buying out the minority may bleed the company of cash needed for its ordinary affairs or for the carrying out of the proposal which triggers the appraisal right. The proceedings to enforce the appraisal right are likely to be complex, long-drawn out and expensive. Nevertheless, we think that fairness to the minority requires that the appraisal right be instituted, and we recommend accordingly. There should be some limit beyond which majorities cannot carry minorities, and the mere existence of the appraisal right should usually cause the majority and the minority to reach a settlement.

The argument for the appraisal right is weaker if the company's shares are traded: the minority shareholder is then able to sell his shares and get out. Some American states have accordingly conferred the appraisal right only if there is no market. There are, however, difficulties. The market may be too thin to absorb the shares or to reflect their true value, and markets tend to be thinner in Canada than the United States. The market may, and often does, fluctuate so rapidly that it cannot be said at any given moment to reflect a true value which should be forced upon a dissenter; the laws of supply and demand may produce inappropriate results at a given time. Sometimes the proposed structural change with which the minority are dissatisfied may depress the market below the true value of the shares. We think that the proposed ABCA should confer an appraisal right even if there is a market, and s. 184(3) would do so.

(b) When the appraisal right arises

Not all "fundamental changes" trigger the appraisal right under CBCA s. 184. The following do (s. 184(1) & (2)):

(1) a change in restrictions or constraints on the shareholder's shares,
(2) a change in restrictions on the business which the corporation may carry on,
(3) amalgamation,
(4) the transfer of the corporation's registration to another jurisdiction ("continuance"),
(5) the sale, lease or exchange of all or substantially all of the corporation's property,
(6) a change in the rights of the shareholder's shares or an increase in the rights of shares of other classes which are or will become equal or superior.

We agree that these are the changes which are likely to make the corporation or its business something outside the original contemplation of the shareholders and which should give the minority the right to bail out. S. 184(1) and (2) of the draft Act would so provide.

(c) Determination of value

Under CBCA s. 184(3) the shareholder is entitled to the "fair value" of his shares, determined as of the close of business on the day before the resolution was adopted. If Re Manitoba Securities Commission and Versatile Cornat Corporation (1979) 97 DLR (3d) 45 (Man. Q.B.) is right, it is only a registered shareholder who may apply, and he will lose his appraisal right if he ceases to be registered.

S. 184 of the draft Act would merely prescribe the standard of compensation as "the fair value" of the dissenting shareholders' shares. We think it clear that "market value" would not be an appropriate standard for shares which have no market or which, because of restrictions on transfer, can legally be sold only to other shareholders who will not buy or who will not pay an appropriate price for them. We think also that, for reasons given earlier in this Report, even where there is a market it is not appropriate to take the market value at the time as establishing the legal value for the purpose of the appraisal right, though usually the market value will be right or will give the parties and the court some indication of what is right. For want of a better standard, we think that "fair value" should be accepted. The court would then have to decide in each case what the "fair value" is and what to consider in arriving at it. S. 184 would obviously leave a broad area of judicial discretion, and would therefore create uncertainty, but a legislative attempt to achieve certainty in the multitude of cases in which the appraisal right might arise would, we think, cause unfairness without substantially reducing uncertainty. S. 184(3) of the draft Act would give effect to our views.

(d) Procedure

(i) CBCA procedure

The procedure for asserting a minority shareholder's appraisal right should be designed with a number of (often conflicting) considerations in mind. These are:

1. Expedition.
2. Cheapness.
3. Simplicity.
4. Fairness to both sides.
5. Inducements to settle.
6. The corporation's need to know what financial problem it faces before it becomes irrevocably committed to the proposed action.

We will now set out the CBCA procedure and the periods of time involved, making no allowance for the time documents are in the mail, and assuming that each step is taken on the last possible day

The procedure is as follows:

	LATEST DATE (Date of shareholders' meeting resolution is "M")
1. Corporation gives notice of resolution; which should advise the shareholders of their appraisal right.	M - 21

2.	Shareholder must object to the resolution in writing at or before the meeting.	Date of meeting: M
3.	Corporation must send notice of adoption of resolution to each shareholder who objected.	M 10
4.	Dissenting shareholder must send the corporation particulars of and a demand for payment for his shares.	M 30
5.	Dissenting shareholder must send the corporation his share certificate.	M 60
6.	Corporation must endorse the share certificate with a notice that the holder is a dissenting shareholder and return it forthwith.	
7.	Corporation must make an offer to each dissenting shareholder.	M 37 (or date on which resolution is effective (E), whichever is later).
8.	Offer lapses if not accepted.	M 67, or E 30
9.	Corporation must pay if offer accepted.	within 10 days after acceptance
10.	If corporation fails to make an offer, or if the shareholder fails to accept, the corporation may apply to the court to fix a fair value.	E 50
11.	If corporation fails to apply, shareholder may do so.	E plus 70
12.	Court determines fair value of shares and makes an order against the corporation for that amount.	No time limit

It should be noted that the corporation cannot pay the dissenting shareholder if the corporation is or would then be unable to pay its liabilities as they become due or if the realizable value of the company's assets would be less than the aggregate of its liabilities (CBCA s. 184(26)). The corporation must notify the shareholder of such circumstances at the time it would otherwise be required to make an offer under CBCA 184(12) or within 10 days after the court has fixed the fair value of the shares. If it does so, the shareholder has a choice. He may withdraw his dissent, or he may choose to become a creditor subordinated to other creditors in a liquidation but preferred to

the shareholders.

It appears to us that the effect of the CBCA provisions is that the corporation becomes irrevocably committed to the appraisal procedure when the resolution which triggers it becomes effective; see CBCA s. 184(3). The CBCA allows the shareholders to authorize the directors to terminate the action provided for in the resolution, and CBCA s. 184(11) as amended by S.C. 1978 c. 9 s. 60(3) provides that when they do so, the dissenting shareholder is reinstated as of the date he originally sent his notice demanding payment for his shares, from which it might appear that, come what may, the corporation can resile at any time before the triggering action is carried out. However, it is arguable that an offer under CBCA 184(12) and an acceptance provided for in CBCA s. 184(14) must constitute a contract, so that when the corporation sends out its offer, it puts into the dissenting shareholders' hands the means to bind the appraisal right. While, in the absence of an accepted offer, the corporation must decide whether to proceed without knowing the amount at which the court will fix the amount to be paid, the CBCA procedure does seem to give the corporation as good a chance to assess its position before final commitment as the nature of things permits (though in many cases it will doubtless be under practical compulsion to carry out its proposal immediately).

The dissenting shareholder ceases to have any rights as shareholder, except his appraisal right, once he gives his notice demanding payment (CBCA s. 184(7)). S. 184(11) allows him to withdraw that notice before the corporation makes its offer under CBCA s. 184(12), but the two subsections are open to the construction that, by sending the notice, he puts it in the power of the corporation to make an offer and thus bind him to sell. If the dissenting shareholder withdraws his notice in time, or if the triggering action is terminated, he is reinstated, which seems appropriate. In the latter case, CBCA s. 184(11) provides that he is "reinstated as of the date he sent the notice referred to in subsection (7)"; while this clearly establishes his right to intervening financial benefits, we do not think that it would be construed as requiring his vote on any intervening resolutions to be counted retroactively, or as invalidating intervening meetings for failure to send him notice.

(ii) Comments on CBCA procedures

The CBCA procedure appears to be designed to give the corporation the greatest practicable opportunity to sort out the dissenting shareholders who are serious from those who are not; to give the dissenting shareholders a chance to consider an offer for their shares without being subjected to the costs of litigation and the need to hire a lawyer; and to provide the greatest possible chance for settlement. Although it may be temerarious on our part to question a procedure by the CBCA out of the New York Business Corporation Law designed to achieve such objectives, we have some misgivings based on the complexity and rigidity of the procedure and the time involved in it.

We will set out our concerns (not in any order of magnitude):

1. It is not clear to us what will happen if the corporation fails to notify the shareholder of the purpose of the meeting (though that might invalidate the resolution) or of

his right to dissent, and if the shareholder therefore does not file a written objection. (See CBCA s. 184(5)). Under C8CA s. 184(7) the dissenting shareholder who does not receive proper notice may file his objection within 20 days after he learns that the resolution has been adopted, but the corporation must send its notice within 10 days after the adoption and there is no provision for extension (though a court might of course imply one).

2. It is not clear to us what happens if the corporation does not give the notice under C8CA s. 184(6) that the resolution has been adopted.

3. From the corporation's point of view, the precision of the time periods may be illusory, as CBCA s. 184(7) allows the dissenting shareholder 20 days from receipt of the notice of adoption of the resolution or from learning of the adoption of the resolution. A corporation which wishes to be sure would have to effect personal service of the notice.

4. On the other hand, the dissenting shareholder probably loses his right absolutely unless he sends his notice demanding payment and giving other particulars within the stated time (CBCA s. 184(7)). On the literal wording of the section, he certainly loses it if he does not send in his share certificate (CBCA s. 184(8) and (9)). It is not clear to us why CBCA s. 184(9) should be so clear about the effect of failure to send in the certificate (which seems to us rather unimportant) while the section is not clear about the effect of failure to send in the notice containing the demand for payment (which seems to us fundamental).

5. We do not see why, if the share certificate is sent in at all, it should be returned to the dissenting shareholder pending completion or abandonment of the procedure. It also appears that, having sent the notice under CBCA s. 184(7) the dissenting shareholder has lost his rights as shareholder, and that by failing to send in the certificate he may also lose his right to compensation. Mr. Justice Laycraft in Jepson v. The Canadian Salt Company Limited [1979] 4 WWR 35 (Alta. S.C.), characterized this proposition at p. 43 as "arguable", and, in another case there might not be a waiver of the requirement such as the one which enabled Mr. Justice Laycraft to refrain from deciding whether the affirmative argument will prevail.

6. It is not clear to us what happens if, in the absence of an offer and acceptance, the corporation does not apply to the court under C8CA s. 184(15) within 50 days of the triggering action becoming effective and if the dissenting shareholder does not apply within the next 20 days under C8CA s. 184(16). While the court would probably find a way to give the shareholder some relief, it is arguable that after giving the notice under s. 184(7) he has only the statutory right to compensation, and that that right is exhausted when he does not apply (Mr. Justice Laycraft in the Jepson case (supra) held that the 20 days does not start until the

dissenting shareholder becomes aware that the corporation has not applied, but the implication in the judgment is that the shareholder might have lost all his rights if he did not apply in time). Some of the sting of this comment is removed by the court's power under s. 184(16) to extend the time, but until the kinds of acceptable grounds are established by decisions, it would be unsafe to rely upon that power. CBCA s. 184(16) also leaves open the vexed question whether the application is made when a document commencing proceedings is filed, or whether it is not made until it comes before the court.

The misgivings which we had formed about the procedure set out in CBCA s. 184 received support from the judgment of Mr. Justice Laycraft in Jepson v. Canadian Salt Co. Ltd., (supra) which we have already mentioned. He found in CBCA s. 184 a "procedural morass" which is likely to engulf a dissenting shareholder who is not extraordinarily alert, and his decision that the shareholders in that case had not been engulfed by it was based on the two holdings we have mentioned. One was that the corporation could waive, and had waived, the turning in of the share certificates. The second was that the 20 days within which the shareholders must launch their application to the court in order to preserve their rights started when they learned that the corporation had not made its application during the 50 days after the certificate of amalgamation had given effect to the amalgamation, and not when the 50 days actually expired; he could quite easily have come to the opposite conclusion on the wording of CBCA s. 186(16). He did not have to consider the grounds upon which a court could extend the time for a dissenting shareholder's application under s. 184(16).

Obviously, the inclusion of the s. 184 procedure in the CBCA requires serious consideration of that procedure for the proposed ABCA. However, we think that uniformity in the procedure for giving effect to the appraisal right, unlike uniformity in the principle of the appraisal right, is not a pressing concern; anyone who is involved for a corporation or for a dissenting shareholder will have to read the governing provisions carefully in any event, and because of our misgivings, we propose that a different procedure be adopted.

(iii) Alternative procedure

As we have said, CBCA s. 184 makes elaborate provision for notices, counter-notices, offers, acceptances, applications, and so on. Our proposal is to dispense with as much of this machinery as is not clearly needed, and to substitute a court application as the procedural framework within which the parties must operate. Our proposal is based upon the assumptions that the appraisal right will generally be exercised only where there is a substantial and serious issue between the majority and that minority; that flexibility and early access to the courts, coupled with some inducement to settle, are in the interests of the parties; and that a party should not lose his rights because he fails to follow the procedure correctly.

We have accordingly included in s. 184 of the draft Act a procedure which may be summarized as follows:

1. In addition to giving the usual notice of a meeting at which the resolution effecting the fundamental change is adopted,

the corporation, in order to put the shareholders in a position in which they must disclose their dissents, would have to notify the shareholders of their right to dissent and be bought out; otherwise a shareholder need not act until he learns both that the resolution was adopted and that he has the right to dissent (s. 184(5)).

2. The dissenting shareholder would then be required to file a written notice of objection at or before the adoption of the resolution. We think that this is the one procedural requirement which must be an absolute condition of the exercise of the appraisal right: the corporation cannot be put into the position of adopting and acting upon the resolution in ignorance of the fact that the dissenting shareholder is asserting his right. The only exception would be the case in which the corporation itself is at fault in not giving the dissenting shareholder proper notice. (It will be noted that s. 184(5) would not require any particular form of notice of objection, and we think that any writing that conveys the fact of objection will do; again, we find support in the judgment of Mr. Justice Laycraft in Jepson v. Canadian Salt Co. Ltd., (supra).

3. If the corporation then adopts the resolution, either the corporation or the dissenting shareholder would have the right to apply to the court by originating notice for a determination of the fair value of the shares.

4. The corporation would be obliged to make an offer based upon fair value, and to explain how the "fair value" was determined. Once the application is before the court, the court would control it, and would proceed to dispose of it by giving judgment against the corporation and in favour of the dissenting shareholder.

Under this procedure, either the corporation or the dissenting shareholder would be entitled to resile until the action proposed by resolution becomes effective (e.g., until the certificate of amalgamation or the certificate of amendment of the articles is issued or until the business is sold), or until there is an accepted offer or a court determination (whichever first occurs). S. 184(5) to (16) of the draft Act set out the procedure in detail.

4. Remedies for wrongs committed against the corporation, its shareholders, and others

(a) Shareholders' rights of action under existing Alberta law[4]

We now turn to the discussion of another of the most important innovations which should be considered for the proposed ABCA, the proposed reorganization and extension of the remedies of minority shareholders for abuse of power by those who control the corporation.

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[4] This statement leans heavily upon the discussion in Gower, Principles of Modern Company Law (3rd. ed.), chapters 24 and 25, and, because that statement is available, is much compressed.

The power to control a company's actions is divided between the directors and the shareholders, and is therefore vested in those who hold the majority of votes in the two organs. Control by the majority is necessary for business efficiency and is therefore salutary; but the majority can abuse its power and in such a case the minority must have protection.

In Foss v. Harbottle (1843) 2 Hare 461, it was held that only the company itself could sue its directors for a breach of their duty to it. The rule in that case leaves the decision to sue in the hands of those who control the company and thus gives effect to the principle of majority rule. It also gives effect to the concept of the company as a legal person separate from its shareholders and with its own rights and obligations. Later cases extended the rule to cases of internal irregularities in the operation of the company, including even the refusal to call for a poll at a meeting. The extension gives further effect to the principle of majority rule, as it leaves such irregularities to be dealt with by the majority of the shareholders or by those whom they elect; but it does so by treating them as wrongs done to the company things which appear to us to be better characterized as wrongs done to its shareholders.

It is apparent that the rule in Foss v. Harbottle, if applied without exception, would allow any majority to perpetrate any violation of the rights of any company or of any minority, and the courts have therefore created exceptions to it. A shareholder may sue where a company acts or proposes to act beyond its powers or in a way which requires the as yet unobtained authority of more than a simple majority vote; these exceptions are fairly straightforward. The shareholder may also sue where there has been a "fraud on the minority," or where his "personal rights" have been infringed. Professor Gower (Gower, p. 585) also points out that certain judicial dicta suggest that an exception will also be made in any other case in which the interests of justice require it, though he obviously considers the existence of that exception to be doubtful.

There are problems of concept and of terminology. Some courts have said that the majority shareholders must exercise their powers "bona fide for the benefit of the company as a whole"; others have said that the majority shareholders must not discriminate so as to give themselves an adantage of which they deprive the minority; still others have said that the majority must not commit a fraud on the minority or must not oppress them; and some, mostly in the United States, have said that the majority shareholders have a fiduciary duty to the minority. Unfortunately, these rules have not been consistently agreed upon or applied and it is difficult to say more about them than that they appear to give more protection to the minority than in fact they do give. The need for rationalization of the law seems to us to be obvious.

The result of the problems we have mentioned is that the limits of the "fraud on the minority" exception are unclear. Professor Gower (Gower, p. 579) sets out the following conclusions:

> 1. Members or debentureholders voting at company or class meetings are not bound to disregard their own selfish interests, but are generally entitled to vote or refrain

from voting in whatever way they think best for themselves.

2. But a resolution will be avoided and the company restrained from acting upon it if it attempts--

(a) to expropriate the company's property; or

(b) to waive prospectively or restrospectively, the directors' duties to act bona fide in what they believe to be for the best interests of the company as a whole; or

(c) to enable some members or debentureholders to acquire compulsorily the shares or debentures of others. unless the power of acquisition is exercisable only in circumstances which are, prima facie, beneficial to the company or class as a whole.

3. Further, any resolution will be set aside and the company restrained from acting upon it, if it can be shown that the predominant motive of those voting for it in the form in which it was presented was to benefit interests other than those of the members of the company or class qua members of the company or class or to injure the minority or to dominate for the sake of domination.

4. There is as yet no sign of a general extension of these quasi-fiduciary rules to actions by the members or debentureholders other than voting at meetings.

There are many ways in which a majority, particularly one which can pass a special resolution, can abuse a minority without falling afoul of the "fraud on the minority" exception however it is phrased; an example is the well-known English case, or rather, series of seven cases discussed in Gower, p. 571-3, in which a shareholder's position in a company was reduced from ownership of a substantial fraction of the shares with a contractual right to acquire enough more to give him a majority, to a position in which he could not even resist a special resolution which allowed the majority to approve a share transfer which ignored his pre-emptive right to buy the shares being transferred.

As interpreted in recent cases, a shareholder's right to sue for an infringement of his personal rights, in Professor Gower's view, avoids "the major absurdity of the Foss v. Harbottle rule--the preventing of a member from complaining of an impropriety merely because it would not have been improper if authorized by the general meeting, notwithstanding that the general meeting has not authorized it or had any opportunity of doing so"(Gower, p. 586); indeed Professor Gower thought that the

shareholder's right might be extended to cover every improper action by the directors. The right does not seem broad enough yet, however, nor is it clear how, if money or property is sought to be recovered for the company, the difficulties arising from the procedural requirements of the rule in Foss v. Harbottle are to be resolved.

It will be seen that there are two kinds of action. One is a "derivative" action, i.e., an action brought by a shareholder to enforce a right of a company, and the other is a "personal" action, i.e., an action brought by a shareholder to enforce a personal right of the shareholder against a company. In a derivative action, the shareholder must sue for himself and all other shareholders other than the wrongdoers, and he must join the company as a defendant. He is really a self-appointed representative of the company suing to enforce those rights which the company has, and doing so for the company's benefit. According to Professor Gower, (Gower, p. 588-89) a shareholder cannot bring a derivative action unless the wrong to the company also involves a fraud on the minority, and unless it is clear that the company itself will not sue the wrongdoers because it is controlled by them. In a personal action, the shareholder may sue for himself, though, if the right infringed is a right common to all shareholders, he may, if he wishes, sue in a representative capacity on behalf of all shareholders other than the wrongdoers. Unfortunately, there is great confusion between the derivative action and the personal action. The same acts or omissions may inflict a wrong upon both the company and the shareholder, e.g., an action which is ultra vires the company or the expropriation of company property by the directors; or there may be doubt as to which kind of wrong is involved. The confusion greatly adds to the difficulties of a minority shareholder who wishes to prevent or rectify the abuse of power by the majority.

(b) Shareholders' rights of action under the proposed ABCA

(i) General discussion

The reorganization and extension of the minority shareholder's remedies for abuse of power by those in control of a corporation are among the most important reforms which the ABCA makes. CBCA s. 232 allows a shareholder, with leave of the court, to bring or intervene in an action in order to enforce a corporation's rights, (a derivative action) and CBCA s. 234 allows a shareholder to apply for relief if anything "oppressive or unfairly prejudicial" is done by the corporation or the directors (a personal action). These provisions are intended to do away with the difficulties created by the rule in Foss v. Harbottle, and they much improve the position of the minority shareholder vis-a-vis the majority.

The drafters of the CBCA had this to say about their proposed secs. 19.02 and 19.04, the prototypes respectively of C8CA s. 232 and 234 (Proposals, p. 162):

> 484. Section 19.02 in broadly permissive terms--but always subject to court supervision-legitimates the shareholder's derivative action that is brought in the name of the corporation to enforce a right of the corporation, e.g., where the directors divert

to themselves the profits from a transaction that they had a duty to effect in the name and on behalf of the corporation. The object of s. 19.02 is to remedy a wrong done to the corporation, therefore it applies to all corporations irrespective of size or distribution of shares. Section 19.04, on the other hand, will be invoked most frequently--but not always--in respect of a corporation the shares of which are held by only a relatively small number of persons, a so-called "close corporation", since its usual object is to remedy any wrong done to minority shareholders. Examples of such cases are commonplace. The most frequent cases are mentioned in the Jenkins Report (para. 205): e.g., where dominant shareholders appoint themselves to paid offices of the corporation, absorbing any profits that might otherwise be available for dividends; the issue of shares to dominant shareholders on advantageous terms; or the repeated passing of dividends on shares held by a minority group. Generally, the purpose of these tactics is to squeeze out minority shareholders. Another illustration is the liquidation "freeze-out" that succeeded in Fallis and Deacon v. United Fuel Investments Ltd. [1963] SCR 397. Scrutiny of these examples shows that there is no clear dividing line between the cases. Diversion of corporate profits is clearly a wrong to a corporation that normally would be remedied by a derivative action under s. 19.02. A refusal to declare dividends in order to squeeze out minority shareholders would call for an application under s. 19.04. But the payment of excessive salaries to dominant shareholders who appoint themselves officers is a borderline case: it may constitute a wrong to the corporation and, at the same time, may have as its specific goal the squeezing out of minority shareholders (at a low price reflecting the small dividends paid)whose investment is no longer required. In such a case the aggrieved person may select the remedy that will best resolve his problem. And if neither of these remedies is adequate in the circumstances the aggrieved person may request the ultimate solution--liquidation and dissolution under s. 17.07. In sum, we think that the courts should have very broad discretion, applying general standards of fairness, to decide these cases on their merits.

485. Derived from s. 210 of the U.K Companies Act, 1948,s. 19.04 is drafted in language which aims at the same goal as the original model, but which has been modified in accordance with the recommendations of the Jenkins Report (para. 212) to strip away the

self-imposed judicial qualifications that have limited the application of s. 210 and that have therefore cast considerable doubt upon the effectiveness of the original provision. The conceptual differences between the original model (s. 210) and s. 19.04 of the Draft Act are subtle, but in general terms the changes are as follows:

(a) The standard based on just and equitable grounds to wind up the corporation has been deleted, abrogating the effect of those cases that interpreted s. 210 to mean that grounds to wind up the corporation must always be established.

(b) The section applies not just to a continuing course of oppressive conduct but also to isolated acts of any corporate body that is affiliated with the corporation or any of its affiliated corporations.

(c) To the basic criterion "oppressive" is added the phrase "unfairly prejudicial to or in disregard of the interests of", which makes abundantly clear that s. 19.04 applies where the impugned conduct is wrongful, even if it is not actually unlawful.

(d) The Jenkins Report also recommends that the right to invoke s. 19.04 be conferred upon legal representatives and that the court be empowered, in connection with a s. 19.04 application, to make a restraining order. The former has been effected by paragraph (b) of s. 19.01 which gives wide discretion to the court to determine who is a proper person to make an application under s. 19.04, the latter by subsection (3) of s. 19.04.

In addition s. 19.04 is made applicable to all cases of conduct that are "oppressive or unfairly prejudicial to or in disregard of the interests of" any security holder, creditor, director or officer and not just to the narrow case where a shareholder is oppressed in his capacity as a shareholder. See the discussion in Gower, Modern Company Law, 3rd. ed., pp. 598 to 604. Note, too, that s. 19.04 may be invoked in respect of an affiliate as well as the principal corporation. On summing up the standards set out in s. 19.04 it is difficult to improve on

> the frequently quoted interpretation of the meaning of s. 210 made by Lord Cooper in Elder v. Elder and Watson Ltd. [1952] S.C. 49 at p. 55: "... the essence of the matter seems to be that the conduct complained of should at the lowest involve a visible departure from the standards of fair dealing, and a violation of the conditions of fair play on which every shareholder who entrusts his money to a company is entitled to rely".

As we have said, the derivative action under CBCA s. 232 can be brought only with leave of the court, which must be satisfied under CBCA s. 232(2)(a) that the directors have been given an opportunity to bring the action, that the applicant is acting in good faith, and that the bringing of the action appears to be in the interests of the corporation. The shareholder can also apply, on similar conditions, to intervene in and prosecute or defend an existing action, and the section extends to actions brought or defended on behalf of a subsidiary as well as the corporation itself. Because the action is brought or maintained in the name of the corporation and on its behalf, the court will be able to give whatever relief the corporation is entitled to. Under CBCA s. 233 the court also has power to give directions about the conduct of the action, to direct that a defendant pay the amount of a judgment directly to present and former security holders, and to require the corporation to pay legal fees incurred by the complainant.

The commencement of an application under CBCA s. 234 is not dependent upon the exercise of discretion, but the court's power to grant relief is expressed in apparently discretionary terms, i.e., the section says that the court may grant relief. The grounds for the application are that something has been or is being done that is "oppressive or unfairly prejudicial" to the complainant, or that "unfairly disregards" his interests. The court's powers are very extensive; it can issue injunctions, change the corporation's constitution, override a unanimous shareholder agreement, replace the directors, require the corporation to buy back shares and debt securities, and put the corporation into investigation, receivership or liquidation. Even more, it can set aside a transaction or contract to which the corporation is a party, and provide for compensation to any party to the transaction or contract; and it has a general power to make "an order compensating an aggrieved person." The remedy is also available when the oppression takes place through the actions or affairs of "affiliates," i.e., parents, subsidiaries, and subsidiaries of the same parent or controlled by the same individual.

CBCA s. 235 makes provisions of great importance to the derivative action and also to the personal action. It abolishes the shareholders' ratification, actual or potential, as a defence to both, and reduces it to being evidence which the court may take into account. A proceeding cannot be settled, discontinued, or dismissed for want of prosection without the approval of the court. The shareholder cannot be required to give security for costs, and the corporation may be compelled to make accountable advances for interim costs.

CBCA s. 234 appears to set up three criteria, the satisfaction of any of which gives rise to a cause of action

under the section: is the conduct oppressive? Is the conduct unfairly prejudicial? Does the conduct unfairly disregard the interests of any security holder, creditor, director or officer? The three criteria probably, however, come down to one criterion which, so far as a shareholder is concerned is this: Is the conduct unfair to the shareholder? If it is, he should have a remedy. The section does not tell the courts much about what is "unfair," nor does it tell the courts how to choose between the various remedies which the section makes available; it leaves them free to apply broad equitable standards. There are obvious arguments against allowing broad discretions unaccompanied by well articulated rules for their exercise, but we think that the section embodies the best practical solution to the problems in this area. On the one hand, the present law is both uncertain and rigid, and we think that it does not allow the courts to do full justice. On the other, the circumstances in which companies and their shareholders find themselves are subject to almost infinite variation, and legislation which would try to provide for them all would necessarily be almost unbearably complex and would be unlikely to provide a net which would catch only the unscrupulous.

At this point, we will state our conclusions. We are satisfied that the present Alberta law relating to the abuse of the power of control of a company is unsatisfactory and that the CBCA has made great improvements by providing for the derivative action and the personal action. We therefore think that the CBCA provisions for the derivative and personal proceedings (CBCA s. 231 to 235 inclusive) should be accepted in principle, and they should be adopted by the proposed ABCA with some changes in detail; we discuss the particular provisions in the comments on s. 231 to 235 of the draft Act. We will now discuss a number of specific questions which are involved in the general conclusions which we have stated.

(ii) Getting rid of shareholders[5]

Firstly, we turn briefly to the devices which those who control companies have long used to rid themselves of minority shareholders. They may do so by using their control to make the minority's position unprofitable to them, e.g., by draining off profits in the form of salaries or otherwise and refusing dividends, or by diluting the minority's shareholdings, so that the minority will sell their shares or can be ignored (a "squeeze-out"), or they may do so by a technique which destroys the minority's shares or requires them to sell their shares to the company or to the majority (a "freeze-out"). The former is more common in closely held companies, the latter in companies whose shares are publicly traded.

There may be valid and legitimate reasons for getting rid of shareholders. In a closely held company, dissension may interfere with the profitable operation of the company, or a shareholder may not be carrying his weight. In a larger company, it may be desirable to "go private" for tax reasons or, again, to end dissension. On the other hand, the reasons may not be valid or legitimate. It may simply be that the majority want to obtain the whole benefit of the company's enterprise and to exclude the minority. There are questions as to what the law should do to

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[5] The discussion under this heading owes much to views expressed to us by John L. Howard. See note 1, supra p. 83.

regulate such activities, which are particular cases of the abuse of majority powers.

In a case in which the majority engages in a "squeeze-out" by making the minority's position unprofitable and one of impotence, the personal action under CBCA s. 234 is available, and the question is whether, in the court's view, the corporation's affairs are being carried on in a way which is unfair or oppressive as between majority and minority. If what is being done is a wrong to the corporation, the derivative action under s. 232 is also available. If it involves a "fundamental change" in the corporation's constitution, the minority will also have the appraisal right, i.e., the right to dissent and to be brought out at fair value under CBCA s. 184. These remedies appear to us to be sufficient. In Re Sabex Internationale Ltee. (1979) 6 BLR 65 (Que. S.C.) Gonthier J. allowed relief under s. 234 on the grounds that a proposed rights offering would dilute the interest of the original shareholders, even though the offering was made to all shareholders pro rata.

The question of the "freeze-out" is more difficult. The minority will have at least one or more of the three remedies described in the preceding paragraph, depending upon the way in which the "freeze-out" is carried out. The personal action under CBCA s. 234 will usually be one of the remedies, and in order to contrive a situation in which shares are cancelled or must be exchanged for money or other consideration it is likely that a "fundamental change" will have to be made in the corporation's constitution so that the appraisal right will arise.

It has been suggested that "going private" transactions, i.e., transactions under which shares in a distributing corporation are cancelled or are required to be exchanged for money or other securities, should have further restrictions imposed on them. These restrictions could take the form of a requirement that a valuation of the shares by an independent qualified valuer be communicated to the shareholders and that the transaction require the approval by ordinary resolution of the affected class if there is a cash offer at least equal to the valuation, or an approval by special resolution of the affected class if the offer is not for cash or is for a lesser amount. The proposed Ontario BCA would impose such restrictions.

The question is how far the legal regulation of business activity should go. It may seem unfair that the law should provide a mechanism by which some owners of an enterprise can oust others; this is particularly so in a case in which the control group has previously "gone public" and attracted the investors whom it is now in their interest to exclude. On the other hand, the business may operate more efficiently under the proposed arrangement, and, since investment in distributing corporations is made from commercial motives, it may be enough to establish machinery designed to ensure that the minority receive fair value for their shares. By way of rejoinder to the last statement it may then be said that there are cases in which investors have invested, have ridden out the bad times and should not be forced out of what has the prospect of being a profitable enterprise for what may well be imperfect compensation. Our conclusion, again, is that the CBCA provisions strike a reasonable balance among the conflicting interests of the control group and the interests of minority shareholders; that they should be adopted in principle; and s. 184, 232 and 234 of the

draft Act would do so.

It will be noted that CBCA s. 234 in particular leaves much scope for the development of the law by the courts for the protection of minorities. In Neonex International Ltd. v. Kolasa]1978[2 WWR 593 (BCSC), Bouck J. thought that the CBCA amalgamation procedure can be used by the majority to freeze out a minority; in that case the minority sought to enforce their appraisal right. However, in Alexander v. Westeel-Rosco Ltd. (1979) 22 OLR (2d) 211 (H.C.), an interim injunction was granted on the grounds hat a proposed freeze-out would be oppressive and unfairly prejudicial to the minority; and in Ruskin v. Canada All-News Radio Ltd. (1979) 7 BLR 142 (Ont. H.C.) (in which the grounds for holding the amalgamation oppressive do not appear from the report) not only was an injunction granted to stop a re-organization based upon an amalgamation but Eberle J. gave a direction that a certificate of amalgamation be cancelled and withdrew the direction only because undertakings adequate to protect the minority were given by the majority. These cases suggest that in proper circumstances the courts will not be reluctant to interpret their powers under CBCA s. 234 broadly.

(iii) Relationship between the derivative and personal actions

It seems to us that the essential point in proceedings under either CBCA s. 232 or 234 is that a person with an interest in a corporation is complaining about the abuse of power by someone who controls the machinery of the corporation. In legal form the wrongdoers in one case may be doing a wrong to the corporation; in another they may be causing the corporation to act in a way which is wrongful; and in a third they may be changing the corporation's constitution in a way which will give them an unfair advantage over the minority; but in substance they are wrongfully using the power of control. It may be that the remedy for a case in which directors who have done a wrong to the corporation and refuse to allow that corporation to sue them is to allow the complainant to bring an action against them in the corporation's name; that the remedy in another case may be an injunction to stop the company from acting in contravention of a restriction on the business which it is restricted from carrying on (probably supported by an injunction against the directors); and that the remedy in a third case may be an injunction to prevent shareholders from passing a resolution approving a sale of the corporation's property to themselves or an order deleting an amendment made by the shareholders to the articles of incorporation. In all those cases, however, the wrongdoers are doing something to the prejudice of the complainant's interest in the corporation, whether it prejudices his rights under the corporate constitution or affects the value of the corporation to which his rights apply. The crux of the matter is that the wrongdoers are abusing their power of control.

As we have said, we find some difficulty in the relationship between the derivative and personal actions in the CBCA: a given set of facts may appear to give rise to both or it may be doubtful which it gives rise to. The drafters of the CBCA (Proposals, p. 162) thought that in the area of overlap the aggrieved person would have an election, and it seems likely that they are right in that opinion, but a cautious lawyer is likely to feel impelled to bring two actions so as to be sure that he has brought the right one.

Three cases demonstrate the difficulty of characterization. The first is Farnham v. Fingold (1973) 33 DLR (3d) 156. In that case, the Ontario Court of Appeal held that under the OBCA counterpart of CBCA s. 232 (there being no OBCA counterpart of CBCA s. 234) all actions for which a shareholder may sue for on behalf of a corporation require leave, and it accordingly struck out a shareholder's class action on the grounds, among others, that the plaintiff claimed a declaration that the controlling shareholders held for the corporation and its shareholders any premium over market value realized by them on the sale of shares in the corporation. In Goldex Mines Ltd. v. Revill (1974) 38 DLR (3d) 513, an Ontario Divisional Court held that a claim for a declaration that directors' resolutions were void, a claim for a declaration that a proxy information circular and resulting proxies were void, and a claim for an injunction against the directors voting certain escrow shares, were all derivative claims, and set aside the writ. In an earlier case, Watt v. Commonwealth Petroleum Ltd. [1938] 4 DLR 701, the Alberta Appellate Division held that the usurpation of office by directors is an invasion of the rights of the company, not the shareholders, and dismissed a personal action brought by a shareholder to attack the election of directors.

The three cases may not be relevant to the interpretation of CBCA s. 231 to 235 because the OBCA under which the first two actions were brought has no counterpart of CBCA s. 234 providing for personal action, and there was no counterpart of either CBCA s. 232 or 234 in Alberta at the time of the Alberta case; we do not think that we should ignore the danger that a litigant proceeding under CBCA s. 234 will find himself out of court because he did not obtain leave and proceed under s. 232, because, as we have said, the substance of his complaint, whatever its form, is that those in control are abusing their power.

If we were starting with a clean slate, we think that we would recommend that the proposed ABCA set out one procedure to be followed whenever the claim is, in essence, that those in control of a company are abusing their power and treating the minority unfairly. That procedure would be commenced by a shareholder applying in his own right or as representative of a class, and would require that the corporation and the alleged wrongdoers be made parties so that all would be bound and relief could be given against each. Since the wrong, whether or not it is in form a wrong against the corporation, is really a wrong against the minority in the perpetration of which the corporation is merely the captive and the tool of those in control, the corporation itself would not be needed as a plaintiff but would be a party for notice, and so that all necessary relief could be given.

We are not, however, starting with a clean slate. We have before us the CBCA, which makes a valiant and probably successful attempt to balance the general interest in the business efficiency of corporations against the special interest of those who may be unfairly treated; and we think that this is a subject on which general uniformity between the CBCA and the proposed ABCA is specially important, both in fairness to those who must understand and live under both statutes, and so that the developing jurisprudence under one will be available for the interpretation of the other and may lead to the improvement of both if improvement proves desirable. Given the existence of

CBCA s. 232 and 234 or counterpart sections in the proposed ABCA, we think that competent counsel (and we are dealing with an area in which counsel will be involved and are likely to have a relatively high degree of sophistication) should be able to bring both kinds of proceeding where it is not clear which is appropriate; and we propose a helpful change in detail by allowing a claimant to ask for leave under s. 232 as part of the relief in a proceeding under s. 234.

We were invited by our lawyer consultants to go farther and to include in s. 234(3) of the draft Act a power to grant in a s. 234 application the relief to which the corporation would be entitled in the derivative action to be commenced by the complainant pursuant to the leave granted under s. 234(3)(q) of the draft Act. We found the suggestion attractive: such a power would ensure that the only result of a bitterly contested application under s. 234 would not be leave to bring a derivative action which would require the same parties to fight over the same ground. We regretfully formed the opinion, however, that there would be too great a danger that the result would be the giving of judgments on issues which have not been properly litigated and which have been clouded by confused procedures, and we therefore did not make the suggested change.

In general, s. 231 to 235 of the draft follow their CBCA counterparts, subject to the adoption in s. 231 of a definition of "action" which gives a broader scope to s. 232, and subject also to the inclusion of some additional powers for the court in s. 234(3).

(iv) Effect of proposals on the Rule in Foss v. Harbottle

There remains a question whether or not s. 232 and 234 of the draft Act would be exhaustive, i.e., whether or not they would do away with the derivative and personal actions developed by the courts. We expect that litigants will use the superior remedies under 234, so that the question will rarely, if ever, arise; it could, however, be of some importance if, for example, a litigant were to bring a derivative action under Foss v. Harbottle without obtaining leave. We do not recommend that the proposed Act formally abolish the rule; we think it best to leave it to litigants and to the courts to determine whether there is any residual place for the rule.

Both sections are permissive in form, i.e., in each case the complainant may apply for relief under the section. In terms, therefore, the sections do not do away with the right to bring an action under other authority, e.g., the rule in Foss v.Harbottle.

(c) Other complainants' rights of action

We have so far discussed the derivative and personal rights of shareholders under s. 232 and 234 of the CBCA and of the draft Act. There are other classes, however, who are "complainants" who may apply for leave to bring a derivative action under CBCA s. 232 and who may apply for personal relief under CBCA s. 234. The additional classes include former shareholders of the corporation and present and former shareholders of "affiliates"; present and former directors and officers of the corporation and its affiliates; past and present holders of debt obligations included in the term "security"; the Director appointed under

CBCA s. 253; and "any other person who, in the discretion of the court, is a proper person." We will now discuss the inclusion of these "complainants."(The definition also extends to the beneficial owners of shares, but we do not regard that extension as controversial, and we include beneficial owners in the term "shareholders.")

(i) Former shareholders

The definition of "complainant" in CBCA s. 231 includes former shareholders of a corporation. Accordingly, a former shareholder can apply for leave to bring a derivative action under CBCA s. 232, or can bring an application for personal relief under CBCA s. 234.

Much of the relief available in a personal action under CBCA 234, is not appropriate to a former shareholder; indeed, the only effective remedy which the court can give which appears likely to give him effective relief is "an order compensating an aggrieved person," and the court can give him that remedy only if CBCA s. 234(3)(1) is construed as conferring a new cause of acti We are inclined to accept what appears to us to be a significant new remedy; if the affairs of the corporation are carried on in a way which the court finds "oppressive" or "unfairly prejudicial," it seems reasonable enough that the court should have power to order the corporation or the wrongdoers to make good any financial loss which they have inflicted upon an individual while he was a shareholder.

At first blush it appears that a former shareholder cannot benefit from a derivative action (as distinguished from a personal action) to enforce a corporation's rights; on the face of it any benefit will accrue to the corporation in which he no longer has any interest. CBCA s. 233, however, gives the court power to direct that the amount of a judgment in a derivative action brought under s. 232 be paid directly to "former and present security holders," a term which includes former shareholders; and this provision, if construed literally, gives rise to interesting possibilities. In a case such as Regal (Hastings) Ltd. v. Gulliver, [1942] 1 All E.R. 378, or Abbey Glen Property Corporation v. Stumborg, [1978] 4 WWR 28, the court, instead of awarding a windfall profit to the new shareholders by giving judgment for the corporation for wrongs done before they bought their shares, could require payment to former shareholders who have suffered actual loss thrugh a depressed sale price for their shares. There are difficulties with this. Under traditional analysis, such a direction would be a direction to pay to A (the former shareholder) money which belongs to B (the corporation), and the courts may well be reluctant to make directions for which they do not perceive any jurisprudential foundation. Arising from the same analysis, there may be difficulties in the tax treatment of money received by A which belongs to B. Then, it may be that it is the initiative of the new shareholders which establishes the cause of action. We are inclined however, to accept the CBCA position, which appears to leave the courts with flexible powers which can be exercised according to the circumstances, and which would enable it in a proper case to avoid putting the fruits of the action into the corporation where they would be under the control of the wrongdoers who control it. S. 233 of the draft Act therefore follows CBCA s. 233.

(ii) Present and former shareholders of affiliates

The definition of "complainant" in CBCA s. 231 includes former and present shareholders of "affiliates," a term which, under CBCA s. 2(1) and 2(2) includes parents, subsidiaries, subsidiaries of the same parent, and corporations controlled by the same person. "Person" includes, among other things, a partnership or association. A shareholder of one corporation can accordingly apply to bring a derivative action under CBCA s. 232, or can bring an application for personal relief under CBCA s. 234 involving another corporation which is in any of these categories.

We think that a shareholder in a corporation can be oppressed by things done in its subsidiary, which can of course affect the value of his shares in the parent. What is done in the parent will not directly affect a subsidiary, but it may result in the affairs of the subsidiary being carried on improperly, and we do not think that a shareholder in the subsidiary should be stopped from getting full relief by the interposition of another legal personality. The relationship of a subsidiary to another subsidiary of the same parent or to another company controlled by the same person, is more remote, but we are inclined to accept the CBCA position. There may be an occasional case in which it is necessary for the court, in the interests of justice, to go into the whole of an inter-related business, and we expect that it will not do so unless there is a clear necessity. S. 231(b)(1) of the draft Act therefore follows CBCA s. 231(1) in that respect.

(iii) Present and former directors and officers

The definition of "complainant" in CBCA s. 231 includes "a director or an officer or a former director or officer of a corporation or any of its affiliates." A person in any of these categories can accordingly apply to bring a derivative action under CBCA s. 232, or can bring an application for personal relief under CBCA s. 234.

We can see that a director who is denied the rights of a director should have recourse under CBCA s. 232 and 234 in relation to his own corporation, and a director who has resigned may want to have the corporation required to remove him from its records. So far we have no difficulty with the CBCA position. We find it more difficult to conceive of proper cases for a director of one corporation, as a director, to obtain relief with regard to an affiliate, but we are inclined to go along with the CBCA here also. Again, there may be circumstances in which it is necessary to look into the whole of a business and not merely that part which is conducted by one corporate entity; and there is the further point that the protection of a complainant's position as director may be necessary in order to protect his position as shareholder.

The argument in favour of an officer having the right to apply for either kind of relief seems to us to be much more tenuous, as officers as such have no property rights and no right to take part in the management of the company except rights which the directors give to them. However, we think that if an officer applies, which is likely to be highly unusual unless he has another interest as well, the court will bear these facts in mind and grant relief only if it is necessary to do so in order to

protect the officer in another capacity or to protect the shareholders generally. We therefore accept the CBCA position here also. S. 231(b)(ii) of the draft Act follows CBCA 231(b) with regard to directors and officers for the sake of uniformity.

(iv) The Director

The question here is whether any public official should have power to apply for relief under s. 232 and 234 of the proposed Act. We think that the answer is yes, and that the official should be the Director of the Securities Commission. It seems to us almost beyond argument that abuses in corporations covered by the Securities Act should properly be within his purview, and there may be cases of more closely held corporations in which justice will be done only if an independent outsider will act. S. 231(b)(iii) therefore follows CBCA s. 231(c).

(v) Holders of Debt Obligations

The definition of "complainant" in CBCA s. 231 includes a present and former registered holder of a "security" of a company or its affiliates. The definition of "security" in CBCA s. 2 includes a "debt obligation of a corporation" and "a certificate evidencing such a ... debt obligation." The reference to the certificate in CBCA s. 2 and the reference to a registered holder in CBCA s. 231 probably restricts the definition of "complainant" to those creditors who are entitled to have certificates and who are to be entered in the securities register. Accordingly, those creditors, and not others, can apply for leave to bring a derivative action under CBCA s. 232 and can apply for personal relief under CBCA s. 234. The situation under CBCA s. 234, however, is somewhat confused by the fact that, though the relief must be sought by a "complainant" defined as set forth above, it may be sought on grounds that not only a "security holder" but also a "creditor" has been dealt with in an oppressive or unfairly prejudicial way.

We start by saying that we have no doubt that where the principal character of an individual is that of shareholder he should have recourse under s. 232 or 234 of the draft Act even if the actual oppression affects him in some other capacity; e.g., if two shareholders combine against the third and cause the corporation to pay off their shareholder's loans and not his, they should not be able to repel his claim for relief on the grounds that he is oppressed, if at all, as creditor and not as shareholder. We accordingly think that the proposed ABCA should allow a person in such a position to obtain relief. It appears from the explanatory comments made by the drafters of the CBCA that under s. 232 and s. 234 the problem which the inclusion of security holders as "complainants" was intended to solve was the courts had held that he could not.

A more difficult question is whether or not the proposed ABCA should extend the remedies to the holders of debt obligations who have no other relationship with the corporation. To start with, there is less evidence of an evil to be cured. Then, the derivative and personal remedies are designed to deal with the abuse of majority power, which is not necessarily the same thing as abuse of position under a loan contract; it is possible that inclusion of the holders of debt securities in CBCA s. 232 and s. 234 will be construed as effecting a radical change in the relationship between a corporation and one class of its

creditors.

There appear to us to be three arguments in support of conferring the remedies on the holders of debt securities. One is uniformity: in the absence of strong reason, it does not seem appropriate for a class of creditors to have a substantial right in connection with a federal corporation which they do not have in connection with a provincial corporation. The second is that the holders of debt securities are in much the same position as, and virtually indistinguishable from, the holders of non-voting preference shares, and should have similar treatment in the interests of fairness and of maintaining the attractiveness of debt securities as investments. The third is that it is likely that the courts will not make the remedies available to the holders of debt securities, as such, except in extreme cases in which those in control of a corporation have clearly abused them.

We are divided in our views. Some members of our Board think that conferring the remedy on the holders of debt securities will impose a new duty upon the persons in control of a corporation towards a class of persons outside the corporation; that it will give rise to an undesirable derogation from the principle of limited liability (since the court can order compensation under s. 234 of the draft Act) and that it will provide a way for the holders of debt securities to interfere with the management of the corporation. Others see the holders of debt securities as being investors just as much as are the shareholders, and see the availability of the remedy as a protection against unconscionable disregard of the interests of those investors and as a factor in making investment more attractive. Our majority recommendation however, is that the proposed ABCA follow the CBCA on the point, and s. 231(b)(i) of the draft Act does so.

(vi) Other proper persons

The final class included in the definition of "complainant" in CBCA s. 231 is "any other person who, in the discretion of a court, is a proper person to make application under this Part."

We have some reservations about legislation which confers broad statutory discretions without guidelines. Here, however, we think such a discretion appropriate. The specific listed classes appear to us to cover all cases in which the derivative and personal remedies should be available, but foresight is necessarily imperfect, and the general discretion would allow the courts to make up for the imperfections of foresight. We think also that the courts can be relied upon to allow only proper applications. S. 231(b)(iv) of the draft Act therefore follows CBCA s. 231(d).

(d) Compliance orders

CBCA s. 240 empowers the court to order the corporation, its directors and officers (and others) to comply with the Act, the regulations, and the corporation's constitutional documents. S. 240 of the draft Act follows it, but adds shareholders to the list of those who can be orde Although it will be useful in other areas as well, this power should be particularly useful to minority shareholders, and we accordingly mention it here.

5. Compulsory Acquisition After Take-over Bid

Under CBCA s. 199 (which was not included in the draft CBCA) one who under a take-over bid has acquired 90% of the shares of a class is entitled to acquire the remainder at the offered price or fair value. ACA s. 153 is to much the same effect, though it is patterned upon English legislation and lacks some important protections given by the CBCA, including the dissenting offeree's right to elect for fair value instead of the take-over bid price. Among the western provinces, British Columbia and Saskatchewan have such provisions. Manitoba does not. Ontario does not have such a provision, but we understand that consideration is being given to the adoption of one.

A provision which allows A to acquire compulsorily the property of B, absent any contract between them, is unusual; and it may be thought oppressive. Nevertheless, we think that it should be made. It has been part of our law for a long time, and the only serious criticism that appears to have arisen is from its abuse as a device by which a sufficiently large majority can get rid of a minority, an abuse which has been outlawed by CBCA s. 199. Considerations of uniformity with the CBCA suggest its continuance. It has useful commercial effects: the marketability and value of shares is improved by the availability of a means whereby, in cases in which the offeror will not accept less than all the shares, the wish of the great majority cannot be defeated by the intransigence of a few; and it promotes commercial efficiency in a situation in which the new owners of the great majority of the shares are unable to operate the corporation to the best advantage because of the need to recognize the interests of the remaining few of the old shareholders. These arguments are less strong in relation to an offer by a corporation to repurchase a class of its shares, but they do have some application, and we recommend that the proposed ABCA follow the CBCA, the SBCA and the proposed OBCA by including such an offer among those which can give rise to a power of compulsory acquisition. S. 187-199 of the draft Act would give effect to these views; it follows CBCA s. 199 in principle, though we have made some changes in drafting and in substance.

Under s. 187 to s. 199 of the draft Act, the minority shareholder would not have the right to refuse to transfer his shares. He would however have the right to elect between accepting the terms on which the transferor acquired the 90% or more of the shares, on the one hand, and demanding the fair value of the shares, on the other. In practice, a take-over bid which is accepted by the holders of 90% of the shares is likely to include a premium over market value which will bring the price up to or over fair value, and the minority shareholder who opts for the latter takes the risk that fair value will be found to be less than the take-over bid price. The likelihood that the price offered is fair is strengthened by the requirement that the offeror cannot include in the computation of the 90% any shares held by it, by an affiliate or by an associate. However, the protection given to the minority shareholder on price, both in practice and in principle, meets one of the serious objections to compulsory acquisition, and, we think, allows the arguments in favour of a provision for compulsory acquisition to prevail.

We have considered recommending that the court have a discretion to stop a compulsory acquisition. BCCA s. 279(3) gives the court a broad discretion to "order otherwise", i.e., to

order that offeror is not entitled and bound to acquire the shares. The British Columbia Court of Appeal in Gregory v. Canadian Allied Property Investments [1979] 3 WWR 609 held, or at least assumed, that the grounds upon which the court should order otherwise would be unfairness to the minority shareholder, and that the onus of showing unfairness (at least where the offeror did not refuse to disclose relevant information) is upon the minority shareholder. We are inclined to the view that the existence of a discretion to stop a compulsory acquisition would inject a degree of uncertainty which might well cause an offeror who wants all the shares to refuse to accept less than all the shares, to the detriment of the majority who want to sell; and that it is better that the law should confer an unqualified right of acquisition coupled with safeguards as to price.

XIII.

LIQUIDATION AND DISSOLUTION

1. Need for a scheme for liquidation and termination

Once a corporation ceases to have any business purpose its existence, and the obligations involved in its continued existence, are useless nuisances. The law must therefore provide a scheme for terminating the existence of business corporations. The scheme should provide for simple cases in which it is only the interests of the shareholders that are involved, and in which a very simple procedure is sufficient. It should also provide for more complex cases in which there are conflicting interests among the shareholders, or in which there are other interests involved such as those of creditors, and in which some more formal procedure for realizing the corporate assets and discharging the corporate liabilities is necessary. The scheme should also provide for dissolution as an ultimate sanction against a corporation's aggravated failure to comply with the provisions of the business corporations statute.

2. Liquidation and dissolution

(a) Schemes of the ACA, the Winding-up Act (Canada) and the CBCA

ACA ss. 192 to 277 make elaborate provision for liquidation and dissolution. The winding-up process may be carried on voluntarily. A voluntary winding up may be converted into a winding up under the supervision of the court. Alternatively the company may be wound up by the court for failure to file an annual report or hold an annual meeting, for failure to carry on business for a year, or because the number of members has fallen below the legal minimum. It may also be wound up by the court if the company has passed a special resolution calling for winding up by the court. Finally, and most important, the company may be wound up by the court "if the court is of the opinion that it is just and equitable that the company should be wound up." The ACA sections make elaborate provision for the determination of contributors, for the appointment of liquidators, for the powers of liquidators, for committees of inspection, for meetings of creditors and of the company, for preferential payments, for proofs of claims and for other related matters. The mass and complexity of the provisions makes for difficult reading, and the procedures which they lay down are also quite complex. Part I of the Winding-up Act (Canada) (which can be applied to provincial trading companies that are insolvent or in liquidation) provides a similarly complicated procedure under which the court winds up the company.

CBCA Part XVII enacts a scheme which we think is simpler and more efficient. In accordance with its general policy of allowing corporations to manage their own affairs, it allows the corporation, through its appropriate organs, to bring about its own dissolution and to bring about the liquidation of its own assets and the satisfaction of its own liabilities. Part XVII goes on to provide for two ways in which the liquidation may be brought under the control of the court: at the instance of the Director or any interested person, the court may under CBCA s. 204(8) order that an existing liquidation be continued under the supervision of the court, or, at the instance of a shareholder,

the court may itself order the liquidation and dissolution of the corporation under CBCA s. 207(1). The grounds for an order under s. 207(1) are, firstly, the same kind of oppressive and unfair conduct which would allow a shareholder to bring an application under CBCA s. 234; secondly, the occurrence of a specified event which entitles the shareholder to demand dissolution under a unanimous shareholder agreement; and thirdly, that it is just and equitable that the corporation should be liquidated and dissolved. The drafters of the CBCA (Proposals, p. 148) said that the closest model in Canada for the CBCA "is probably the dissolution provisions in provincial corporations Acts," though an example which they thought better, and one in which they found many useful ideas, was the New York Business Corporation Law.

It will be seen from the description which we have given that the scheme of the ACA and the scheme of the CBCA are not too different in fundamental outline. There are however important differences in procedure and in the ways in which the two statutes provide for the protection of the various interests involved. We will now give a general description of the CBCA procedures.

(b) Procedures for voluntary dissolution

The CBCA first provides three different procedures for dealing with very simple cases. These are as follows:

(1) If the corporation has not issued any shares, the directors may dissolve it at any time by resolution (CBCA s. 203(1)). The intention of the drafters of the CBCA (see s. 17.03(1) of the draft CBCA) was that this procedure would apply if the corporation has not commenced business and has not issued any shares, but the reference to the commencement of business does not appear in the CBCA as enacted. S. 203(1) of the draft Act follows the CBCA except that it applies only if the corporation, as well as not having issued any shares, has no liabilities and no property.

(2) If the corporation has no property and no liabilities it may be dissolved by special resolution (CBCA s. 203(2)). This provision is sensible and s. 203(2) of the draft Act follows the CBCA.

(3) If the corporation has property or liabilities, it may be dissolved by special resolution if the special resolution authorizes the directors to cause the corporation to distribute its property and discharge the liabilities and if the corporation has done so before it sends articles of dissolution to the Director (CBCA s. 203(2.1)). This is an additional simplified procedure which can be followed without going through elaborate steps. Again, it appears to be sensible and we have included its conterpart in the draft Act.

The CBCA then goes on to provide a more elaborate procedure of voluntary liquidation and dissolution, but one which is still comparatively simple in comparison with those provided by the ACA. CBCA s. 204 requires special resolutions of all classes of shareholders and it requires advertising for creditors, but it still allows the corporation itself to carry out its own liquidation and dissolution; this is in contrast to the voluntary

winding up provisions of the ACA, under which (ACA s. 240(1)(b)) the company must appoint a liquidator.

We think the CBCA pattern suitable. The notion of liquidation by the corporation itself, without the appointment of a liquidator, originally caused us some concern for creditors and minority shareholders; but upon reflection, we concluded that these interests are properly protected by the following CBCA devices:

(1) The Director or any interested person (which term would include a shareholder or creditor) may apply under CBCA s. 204(8) to have the liquidation continued under the supervision of the court. This provision would cover the case of the shareholder or creditor who reasonably suspects that the liquidation is not being conducted properly.

(2) Under CBCA s. 219(4), any person with a claim against the corporation (including the claim of a creditor, or the claim of a shareholder who has not received his proper share of a property) would be able to recover his claim from the shareholders to the extent of the amount received by the shareholders on distribution. It follows from this that the shareholders would not obtain any benefit from an improper distribution, as they could be called to account for anything which they receive.

(3) The directors would also be responsible for any improper distribution, since the actions of the corporation would be authorized by the directors. A person with a claim against the corporation which had been prejudiced by a voluntary liquidation and dissolution would be able to apply under CBCA s. 202 to have the corporation revived, and upon revival it would then be possible to have a liquidator appointed. It would be one of his duties to pursue any claim against the directors for breach of their obligations to the company.

For these reasons, the draft Act generally follows CBCA s. 203 and 204 in providing for voluntary dissolution, with or without liquidation.

(c) Procedures for liquidation supervised by the court

As we have said, CBCA s. 204(8) permits the Director or any interested person to apply to the court for an order that an existing liquidation be continued und and CBCA s. 207(1) authorizes a shareholder to apply to the court for an order for the liquidation and dissolution of the corporation or any of its affiliated corporations upon grounds of oppression, upon grounds that a unanimous shareholder agreement entitles him to demand dissolution after the occurrence of a specified event which has occurred, or upon grounds that it is just and equitable that the corporation should be liquidated and dissolved. The latter ground is the traditional one, and we do not think it necessary to describe it further here.

The procedure is quite simple in each case. S. 208(1) provides that an application to supervise a voluntary liquidation

and dissolution is to state the reasons why the court should supervise the liquidation, and these are to be verified by affidavit. CBCA s. 209 provides that an application to the court under s. 207(1) is to state the reasons why the corporation should be liquidated and dissolved, and these reasons are to be verified by affidavit. S. 209(2) goes on to say that the court, on an application under s. 207(1), may require the corporation or an interested person to show cause why the corporation should not be liquidated and dissolved, and the order is to be published in a newspaper at least once in each of the four weeks which are to go by before the show-cause hearing and are to be served upon the director and each person named in the order.

Under CBCA s. 210 the court has appropriate powers in a liquidation. There is provision in the section for the appointment of a liquidator, whereupon the corporation is to cease business except as needed for the liquidation and the powers of the directors and shareholders are vested in the liquidator. CBCA s. 214 imposes the usual kinds of duties upon the liquidator, including the duty to account, and s. 215 confers upon him usual kinds of powers. We think that these provisions deal adequately with the subject and the draft Act follows them with some minor variations which are described in the Comments.

(d) Relation between liquidation and the oppression remedy

One of the powers conferred by the court under CBCA s. 234(3) is the power to make "an order liquidating and dissolving the corporation," and CBCA s. 234(7) says that an applicant under the section may apply in the alternative for an order under s. 207. As we have pointed out, the grounds upon which a complainant may apply under CBCA s. 234 are included in the grounds on which a shareholder may apply for liquidation and dissolution under CBCA s. 207. These cross-references appear to flow from the intention of the drafters of the CBCA to avoid a legal situation in which the court would have only two choices, the first being to order liquidation and dissolution, and the second being to do nothing. While the drafting may have resulted in a certain amount of overkill, we think that the proposed ABCA should follow the CBCA for the sake of uniformity and to ensure that the tools in the hand of the court provide the necessary amount of flexibility.

(e) Dissolution as a sanction for non-conformance with statute

CBCA s. 205 empowers the Director to dissolve a corporation himself or to apply to a court for an order dissolving the corporation, if the corporation has not commenced business within three years of incorporation, if it has not carried on its business for three consecutive years, or if it has defaulted for a period of a year in sending to the Director any fee, notice or document required by the Act (the draft Act does not provide for dissolution for non-payment of a fee). These powers are somewhat similar to the powers given to the Registrar by ACA s. 188 to strike a company from the register if it is not carrying on business in the province or has not filed a return, notice or document for two consecutive years, a power which is the principal source of dissolutions of Alberta companies. The draft Act follows the CBCA with minor variations.

CBCA s. 206 goes on to empower the Director or any interested person to apply to a court for an order dissolving a corporation if the corporation has missed its annual shareholders meetings for two years or failed to comply with some of its obligations relating to financial disclosure, or if it is carrying on business contrary to a restriction contained in the articles of incorporation. On the other hand, ACA s. 187 allows the Registrar to certify to the Lieutenant Governor in Council that a company should be dissolved, and it then allows the Lieutenant Governor in Council to dissolve it (though, as we have said, the power has rarely, if ever, been used to dissolve a business corporation); there is no counterpart in the CBCA.

Dissolution, or the threat of dissolution, is among the most effective sanctions available to the Registrar, and we think that it should continue to be available in the proposed ABCA; it is somewhat draconian, but not as draconian as it sounds, in view of the provisions for revival and proper legal provisions for dealing with its property and its liabilities. The draft Act gives effect to this view.

(f) Insolvency

The drafters of the CBCA thought that "liquidation and dissolution provisions in a corporations Act should apply only when the corporation is solvent, and should yield to a comprehensive bankruptcy statute if the corporation is insolvent" (Proposals, p. 149). CBCA s. 201(1) accordingly provides that Part XVII does not apply to a corporation that is insolvent or bankrupt.

In the draft Act which was attached to our Draft Report we did not include a counterpart of CBCA s. 201(1). The Institute of Chartered Accountants of Alberta made the following comments upon our proposals:

"1. Section 201.(2) (being s. 200 of the present draft Act) of the proposed ABCA appears to enable the directors of a corporation, who should be fully aware of the fact if the corporation is insolvent and that the creditors will not be paid in full, to circumvent the provisions of the Bankruptcy Act which is designed to afford maximum protection to the public. The existing legislation in many provinces will not allow an insolvent corporation to wind up using this section of the act. In most cases, licensed trustees will not accept an assignment as liquidator if the corporation is insolvent. Since Part 17 of the proposed ABCA does not require any qualifications for a liquidator, the door is open for abuse. We acknowledge that there is a provision that anyone with the proper interest may take steps to put an insolvent company into bankruptcy; however, there is a real hesitation for unsecured creditors to do this due to the duplication of costs. This section of the proposed ABCA should only be used if all creditors are to be paid, and if that is the case, this section should so state. We recommend that the provisions of CBCA 201.(1) should be introduced into the proposed ABCA for the above reasons.

2. We question the provisions of section 204, which enables a corporation to handle its own liquidation. This procedure would be satisfactory in the case of a solvent company; however, this action would not be appropriate in the case of

> an insolvent corporation. The comments on this section point out that creditors would have certain rights against directors and/or shareholders; however, this section would open the door for abuse. As an example, if a company has been insolvent for a period of time, there is also a very real possibility that the shareholders may also be insolvent and any right of action against them for improprieties under this section would be to no avail."

This is a cogent statement and comes from a group whose views must be given weight upon such a subject. What should be done?

In response, we have made two changes in the draft Act. We will describe these now, and then discuss the effect of the draft Act with the two changes. The first change is in what is now s. 200 of the draft Act. In the previous draft Act the section provided that liquidation proceedings must be stayed if the corporation is found insolvent in a bankruptcy proceeding. In the present draft Act, we have removed the reference to a bankruptcy proceeding so that the mandatory stay would also apply if the corporation is found insolvent in a liquidation proceeding. The second change is in s. 203(1) of the draft Act, which, in the previous draft Act, would have allowed the directors to dissolve a corporation that has not issued any shares. S. 203(1) of the present draft Act would permit liquidation by the directors only if the corporation also has no property and no obligations.

Following the change in s. 203(1), the very informal procedures of s. 203 would apply only if there are no creditors, or all creditors are paid; s. 203 accordingly conforms, so far as it goes, to the views of the ICAA. The remaining voluntary liquidations are covered by s. 204 of the draft Act. S. 204(1) does not provide that a corporation must be solvent before a proposal for its voluntary liquidation can be made. However, under s. 204(7)(c) the corporation must discharge all its obligations before it can distribute its property among the shareholders under s. 204(7)(d). S. 204 therefore, although it is not in strict conformity with the views of the ICAA, would not authorize an insolvent corporation to distribute property in any way without the claims of creditors being satisfied.

We are not inclined to put as high an estimate as do the ICAA upon the likelihood that the omission of CBCA s. 201(1) would cause abuse of the liquidation procedure, nor are we inclined to put a very high estimate upon the effectiveness of CBCA s. 201(1) in preventing abuse. We will give our reasons.

Firstly, it does not seem to us that wrongdoers in control of a corporation would perceive or obtain much benefit from a liquidation proceedings under s. 204 or s. 207 of the draft Act. Wrongdoers who are willing to assume any resulting civil and criminal liability, can loot the corporation without putting it into liquidation. Secondly, putting the corportation into liquidation would not give them any civil or criminal protection, and would be of no value to them insofar as the basic legal situation is concerned. It might give them time to sell assets and make away with the proceeds under a spurious cloak of legality, but if that were their purpose, we think that they would be able to ignore the statement in CBCA s. 201(1) that Part XVII does not apply to insolvent corporations as easily as they

could ignore their civil liabilities as directors and shareholders and their criminal liablity as thieves. We therefore do not perceive the inclusion in draft Act of a counterpart of CBCA s. 201(1) as a substantial protection against wrongful acts and proceedings by those in control of insolvent corporations.

On the other hand, we do perceive CBCA s. 201(1) as a hindrance to some legitimate activities. In a particular case it may not be clear at the inception of proceedings whether or not a corporation is insolvent; and, while provincial legislation should not and could not impede a creditor who wants to put a corporation into bankruptcy, we think that it should not compel the corporation to attach to itself prematurely the label of bankrupt, which sometimes attracts consequences which are not in the interests of creditors or shareholders. We think that it is appropriate for the Legislature to address itself to a general scheme of liquidation and dissolution of corporations as part of a general scheme of corporation law. The corporation would be able to put itself into liquidation, or the court could make a liquidation order, without elaborate proceedings to determine whether or not the corporation's assets, the value of which may be in doubt and might be made even more doubtful by bankruptcy proceedings, will be sufficient to pay liabilities. If it should become clear that the corporation is insolvent, it would not be able to do more in the liquidation proceedings than get in its assets. If the corporation did not then make an assignment in bankruptcy, or if the creditors should at any time think that things are not being done properly, the creditors would have two alternatives. One would be to apply to have the liquidation supervised by the court; upon that application , if it should appear that the corporation is insolvent, the court would make a finding accordingly and proceedings would be stayed. The other alternative would be to petition the corporation into bankruptcy. If the draft Act were to contain a section similar to CBCA s. 201(1), and if the corporation were to honor it, the creditors would be in much the same position except that they would not have the alternative of applying to have a court supervised liquidation.

For all these reasons, we think that, in view of the changes that we have made in s. 200 and s. 203(1) of the draft Act, the draft Act is suitable without a counterpart of CBCA s. 201(1).

(g) Effect of dissolution and revival

(i) ACA provisions

Apart from ACA s. 187 (a discussion of which section we think unnecessary and irrelevant, particulary as we are advised that business corporations are rarely, if ever, dissolved under it) the ACA provides for two forms of dissolution and revival. Under ACA s. 188 and 189 ("technical dissolution") the Registrar strikes a company from the register because it has not complied with the Act or is not carrying on business, but the court may "order the company to be restored to the register," whereupon the company "shall be deemed ... to be still entitled to carry on business in the Province, as if it had not been struck off" and the court has incidental powers to restore the status quo ante dissolution, though subject to accrued rights. Under ACA s. 209 and 272 ("general dissolution"), the court, upon completion of a winding up, makes an order under s. 209 which has the effect of

dissolving the company, but within a year from the dissolution may declare "the dissolution to be void."

(ii) Effect of ACA on rights existing at time of dissolution

There is authority for the proposition that if a company ceases to exist, its property goes to the provincial Crown by escheat or as bona vacantia (see, e.g., Re Wells, Swinburne-Hanham v. Howard [1933] Ch. 29 (C.A.); Re Strathblaine Estates, Ltd. [1948] Ch. 228; Rex v. A.G.B.C. [1924] AC 213 (P.C., per Lord Sumner); Re Stowell-MacGregor Corporation and John MacGregor Corporation [1942] 4 DLR 120 (N.B.Ch.D). There is also authority for the proposition that its real property goes to the grantor by reverter (see, e.g., dictum, also by Lord Sumner, in Morris v. Harris [1927] AC 252, 258-9, and cases there referred to). There is even a decision of the Appellate Division to the effect that the property of a defunct company becomes bona vacantia only after the obligations of the company to creditors and shareholders are discharged, that is to say, never: the shareholders being "creditors" after payment of all other obligations (Embree v. Millar[1917] 1 WWR 1200). We see no need to canvass the learning on the subject or to express opinions on the present state of the law which applies when the corporation ceases to exist other than to say that the present law is not satisfactory.

There is also a question whether and when, upon dissolution under the ACA, the company ceases to exist for all purposes. In the case of a technical dissolution, the Supreme Court of Canada, under similar British Columbia legislation, has held that it does not (AGBC v.Royal Bank of Canada and Island Amusement Co. Ltd. [1937 SCR 459], and that the Crown could not claim the bank account of a dissolved company; the court paid great attention to the provision that upon restoration to the register the company is to be deemed to have continued in existence as if it had not been struck off. In the case of a general dissolution, ACA s. 272 does not have a similar provision. What it does have is a provision that, for a year, the court may declare the dissolution void; that provision appears sufficient either to reverse the consequences of dissolution or to say that those consequences never occurred, so that the company's property is either revested or taken never to have been divested. In In re C.W. Dixon, Ltd. [1947] 1 Ch. 251, Vaisey J. so held (though the effect of his decision may be weakened in Alberta because the Crown's right to bona vacantia in the case before him was statutory and subject to the revival provisions of the Companies Act 1929 (U.K.)). After the expiration of the year, there is no machinery in ACA s. 272 for revival of the company or for its restoration to the register and it may be that the Crown becomes entitled to its remaining property.

The rule stated by Blackstone was that "The debts of a corporation, either to it or from it, are totally extinguished by its dissolution," and older authorities appear to agree. Doubt has been cast on this view (see, e.g., Embree v. Millar [1917] 1 WWR 1200 (App. Div.); In re Wells, Swinburne-Hannam v. Howard [1933] Ch. 29, per Lawrence L.J. at p. 49 and following; though cf. Russian & English Bank v. Baring Bros. & Co. [1936] AC 405, per Lord Atkin at p. 427) and it seems to us that the ACA provisions discussed above would apply to preserve claims against a company struck from the register under ACA s. 188 and one the

dissolution of which is declared void under ACA s. 272.

(iii) Effect of ACA on rights arising after dissolution

Occasionally, the officials of a company may carry on business in ignorance of the fact that it has been dissolved and may thereby acquire rights and incur liabilities in its name. The decision of the House of Lords in Morris v. Harris [1927] AC 252 is authority for the proposition that where there has been a general dissolution under the English counterpart of ACA s. 209, a declaration under s. 272 would not validate things done in the meantime: the declaration puts the company in the position in which it was at dissolution, but does not give it retroactive power to do anything in the meantime. In the case of a technical dissolution under s. 188, it appears that such intervening acts are effective: Leask Cattle Company Limited v. Drabble [1923] 1 WWR 126 (Sask. C.A.); Tymans Ltd. v. Craven [1952] 1 All ER 613 (C.A.); Pocock Floors Ltd. v. Holmes Construction Ltd. [1971] 1 WWR 394 (Alta. D.C.). Occasionally also, a change in a dissolved company's rights and obligations might occur after dissolution without any action by the corporation. Will the law recognize such a change? The answer is not clear. Mr. Justice Ruttan in Montreal Trust Co. v. Boy Scouts of Canada (Edmonton Region) Foundation (1978-79) 3 E.T.R. 1, held that a company which was dissolved under s. 188 and restored under s. 189 took, to the exclusion of an alternative donee, a gift under the will of a testator who died while the company was not on the register. In B.C. Thoroughbred Ass'n v. Brighouse [1922] 3 WWR 665 (BCCA), McPhillips J.A. held that a company was restored to its rights as lessee under a lease which, in his view, was forfeited while the company was struck from the register, though the provision in ACA s. 189 protecting the rights of third parties made those rights subject to a short term lease granted by the landlord before revival. (The other members of the court did not deal with the point as they held that the lease was forfeited before the dissolution.) In an annotation to the Boy Scouts case, (1978-79) 3 ETR 2, D.P. Jones questions the validity of reasoning which allows an unregistered company to inherit and which overrides the rights of third parties such as the alternative donee. We are not aware of any authority on the effect of ACA s. 209 and 272 on this point.

(iv) Proposals relating to revival

(A) Scope of revival provisions

CBCA s. 202 provides for the revival of two classes of dissolved bodies corporate. One class is bodies corporate which are dissolved by CBCA s. 261 because they do not continue under the CBCA. The second class is corporations dissolved under CBCA Part XVII. The draft Act would make provision for the corresponding classes which would be dissolved under the proposed ABCA. We think, however, that the draft Act should also provide for the revival of a third class of dissolved bodies corporate, namely, companies dissolved under the ACA and its predecessors; we see no reason, on the one hand, to preclude their revival, nor, on the other, to keep the ACA revival provisions in force for their benefit. S. 201 of the draft Act, which follows CBCA s. 202, would deal with the revival of dissolved ABCA corporations, and s. 202, which has no CBCA counterpart, would deal with the other two classes.

(B) Procedure

CBCA s. 202 provides for application to the Director (our Registrar) for the revival of a body corporate by any interested person; and for the issue by the Director of a certificate of revival which, under CBCA s. 202(3), may impose conditions. The procedure, which requires only the filing of articles of revival, is expeditious and effective, and we do not in the case of a dissolved ABCA corporation see the need for a court order to protect anyone's interests. S. 202 of the draft Act therefore follows the CBCA insofar as dissolved ABCA corporations are concerned.

We do have difficulty with the CBCA procedure in the case of a body corporate which is dissolved by CBCA s. 261 because it fails to continue under the CBCA. CBCA s. 202 revives the body corporate as a CBCA corporation; presumably, since there is no provision for a new charter, it still has its old one, which does not conform to the CBCA. We think that some different procedure should be provided for such cases and also for the additional class of cases which we have added, i.e., companies dissolved under the ACA and its predecessors.

S. 202 of the draft Act would provide a procedure which we think appropriate for the revival under the proposed ABCA of companies which, at the time of dissolution, were not ABCA corporations. That procedure would require an application to the court, which could order the proceedings necessary to provide a corporate structure and constitution which complies with the proposed ABCA. The court would also provide for revival for a limited time or purpose. The procedure which would be provided for by s. 202 would be unlike the procedure for restoring a company to the register under ACA s. 189.

(C) Effect of Revival

As we have said, the draft Act would provide for a number of ways of dissolving a corporation. S. 201 would then provide one means whereby all dissolved ABCA corporations could be revived, and s. 202 would provide another means by which all dissolved ACA companies could be revived.

In each case, the corporation or company would be "revived," and, when revived it would, under s. 201(4) or s. 202(8), have "all the rights and privileges" and it would be "liable for the obligations" "that it would have had if it had not been dissolved." That proposition would be "subject to the rights acquired by any person after its dissolution." S. 221(1) of the draft Act would in the meantime vest any undisposed property in the Crown in right of the Province, and s. 221(2) would provide for the return to the corporation upon revival of any property then held by the Crown, or an amount equal to any money received by the Crown as such or as the proceeds of the disposition of other property, except for any amount by which those proceeds exceed the value of the property when it vested in the Crown. These proposals follow the CBCA.

We do not doubt the appropriateness of our proposals with regard to any property and rights held by the corporation at the time of its dissolution. The creditors and shareholders of a corporation are the persons who are and should be entitled to the benefit of its property and rights, and there is no reason why

the Crown or anyone else should acquire them beneficially merely because the corporation is dissolved. S. 202 would reinstate the corporation in beneficial entitlement, and s. 221 would preserve the legal title in the meantime and revest it in the corporation upon revival.

We also do not doubt the appropriateness of our proposals with regard to obligations of the corporation which exist at dissolution. Under s. 219 of the draft Act, actions and proceedings against the corporation on foot at the time of dissolution might be continued, and for two years new proceedings might be commenced, as if the corporation had not been dissolved; and thereafter (or, indeed, at any time) "any interested person," which term we think would include anyone with a claim against the corporation, might apply for a revival order which would have the effect of making the corporation liable for those obligations. While there may be some procedural difficulties in suing a dissolved corporation we think that these can be overcome.

We are more doubtful about rights and obligations which, if the corporation were not dissolved, would accrue either to a corporation or to others during the period after it is dissolved and before it is revived. The draft Act, like the CBCA, does not specifically deal with the intervening period. As we have already said, there is authority for the proposition that acts during the period of dissolution are not validated by a company's restoration to the register under ACA s. 189, and the words "dissolved" and "revived" appear to be stronger in favour of the proposition than the ACA words "struck from the register" upon which it is based, but a firm statement about their effect will have to await judicial interpretation. There is more doubt as to the law relating to things done by others which might be said to affect the company's rights and obligations and the rights of third parties which may arise during the interval. Our inclination, however, is to leave well enough alone, and we have done so by following the CBCA language.

XIV.

MANDATORY CONTINUANCE

1. Should continuance under the ABCA be mandatory?

Our basic premise is that the Companies Act is no longer a suitable instrument for the creation and regulation of business corporations. It follows from that premise that all business corporations incorporated subject to it should be brought under a new and suitable statute, namely, the proposed ABCA. While it would be possible to apply the proposed ABCA only to corporations incorporated after it comes into effect, that would leave all existing companies under an unsuitable law, and there would be for the indefinite future two systems of business corporation law affecting Alberta companies, with all of the extra costs and confusion resulting from that situation.

It must be recognized that any method of bringing existing companies under the proposed ABCA will itself involve costs and difficulties and, for a time, confusion. We are convinced, however, that advantages flowing from a new business corporation law will in the long run outweigh these disadvantages. We are however convinced, also, that the period of transition must be as short as is consistent with the giving to those affected an adequate time for adjustment to the new law.

2. How should mandatory continuance be brought about?

(a) Blanket application of Act versus filing new documents

It appears to us that there are two ways in which existing companies might be brought under the ABCA. One is simply to declare that the ABCA applies, and to make whatever consequential provisions appear necessary; this is what Manitoba has done under its counterpart of the CBCA. The other is to require each exising company to apply for "continuance" (i.e., re-registration) and to provide a new constitutional document ("articles of continuance") which will perform the same function as the articles of incorporation to be provided upon later applications for incorporation; this is what the CBCA itself has done, and what Saskatchewan has done under its counterpart of the CBCA.

The drafters of the CBCA (Proposals, p. 174) expressed the view that simply applying the CBCA to existing companies, though superficially attractive, would really be the most difficult method of all. They went on to say that many additional and complicated provisions would be required because the CBCA would apply to companies incorporated under the old letters patent regime as well as to companies incorporated under the simpler scheme of the CBCA, and that the introduction of additional complication would defeat one of the major objectives of the CBCA.

The Manitoba Companies Act of 1976 has managed to avoid much complication in the Act itself. S. 2(1) says that, with some exceptions which are not relevant here, the Act applies to every "corporation," which is defined so as to include existing Manitoba companies. S. 4(1) restricts an existing company to the businesses listed in the letters patent. S. 261(1) preserves for

two years the effect of the provisions in the existing constitution of the company which are inconsistent with the new Act. We are inclined to think, however, that the ABCA should not follow this model.

There is one material difference between the constitution of Alberta companies and that of Manitoba companies incorporated under earlier Manitoba legislation. That difference is the division of the constitutional provisions of existing Manitoba companies into letters patent and by-laws, and the division of the constitutional provisions of Alberta companies into the memorandum of association and articles of association. The division between the memorandum and articles of association does not (as does the division between letters patent and by-laws) correspond to the division between the new articles of incorporation and by-laws, and their whole content would have to be re-arranged between the articles of incorporation and by-laws, or new provision would have to be made for the whole of the company's constitution. This difference suggests that the approach of Saskatchewan, whose existing companies are also based on the memoramdum and articles of association, is preferable in Alberta. In addition, there are the problems which Manitoba presumably was willing to accept in order to avoid the trouble and cost of requiring each company to file new documents. We would not like, for example, to see existing objects clauses automatically brought forward as restrictions upon a company's business; and it seems to us Manitoba's s. 261(2) faces each company with two choices: one is to file new constitutional documents (which is what the CBCA procedure requires); the second is to accept for the indefinite future, after the first two years, the fact that its constitutional documents are likely to contain provisions which are contrary to the new Act and may well constitute traps for the unwary.

On the whole, we think that the bullet should be bitten, and that each company should be required to file a new constitutional document. We recognize that such a requirement will impose cost on each company and that it will impose upon each company the need to do additional paper work and go through additional procedures, none of which will appear relevant to the day to day functioning of companies which appear to be operating satisfactorily under the Companies Act. Our reasons for recommending such an imposition are, firstly, that the interest of the commercial community and of the public generally will be served by the introduction of the proposed ABCA, and, secondly, that the one-time cost of filing new documents is a lesser evil than the long-term costs of trying to live indefinitely with constitutional documents which do not fit in with the legislation. The cost of the proposed ABCA should, in our view, be recognized, accepted, and met.

To summarize our tentative views to this point, we think that each existing Alberta company should be required to file with the Registrar, within a reasonable prescribed time, "articles of continuance" of the company. Practicality will also suggest that upon continuance under the proposed ABCA each company adopt by-laws.

(b) Procedure

We recommend the following procedure:

1. That by special resolution the shareholders authorize the application for continuance and adopt articles of continuance.

2. That the company file the articles of continuance with the Registrar and that the Registrar issue a certificate of continuance.

In most cases, relations within an existing company will be harmonious and it will be possible to effect continuance under the proposed ABCA amicably and without hurting anyone. However, in a process which really involves the preparation of new constitutional documents it is possible, in the absence of safeguards, that exising constitutional protections for minority groups may disappear. For one example, the mere downgrading of a special resolution from one requiring a 3 to 1 majority (which is the Companies Act requirement) to one requiring a 2 to 1 majority (which is the proposed ABCA requirement) would eliminate the ability of the holder of 26% of the shares to prevent constitutional change; or, if the memorandum of association contains a requirement of an even greater majority for an amendment to the articles of association (see ACA s. 42(1)), that requirement might not be carried forward. For another example, the omission of a kind of business from the objects clause of an existing company may be designed to protect a minority against the company engaging in that business, and the protection would disappear when the company is brought under the ABCA, unless a restriction is specifically imposed in the articles of continuation. Examples could be multiplied.

In the CBCA as originally enacted, the only source of authority for the application for continuance was s. 261(1), which required a special resolution. 1978-79 S.C. c. 9 s. 84(1), however, added s. 261(1.3), under which the directors may apply for continuance "where the articles of continuance do not make any amendment to the charter of a body corporate [i.e., in the case of a company incorporated under Part I of the Canada Corporations Act, its letters patent] other than amendments required to conform to this Act." S. 261(1.3) may be useful in connection with the translation of a company having letters patent and by-laws into one having articles of incorporation and by-laws, as it may often be possible to translate the letters patent into the articles. The situation is, however, different in Alberta, because the division of constitutional provisions between the memorandum and articles of association is quite different from the division between letters patent and by-laws and because the whole of the contents of the articles is almost invariably protected against change by anything other than a special resolution; to preserve the existing "charter" of Alberta companies, it would be necessary to move into the articles of incorporation all of the articles of association except those overridden by the proposed ABCA; if the proposed ABCA were to protect only the contents of the memorandum of association and not the contents of articles of association it might leave a minority dangerously exposed. If that is so, and if it accordingly is accepted that the "charter" which is not to be amended would have to include both the memorandum and articles of association, a provision in the ABCA similar to CBCA s. 261(1.3) would require a long and careful consideration of a company's articles of association to decide which must be deleted and which carried into the articles of continuance (which seems to us impractical, unproductive and likely lead to error), and would

result in much material going into the articles of continuance which no one wants there (which would tend to give existing companies too many of the disadvantages of both the ACA and the ABCA systems, and too few of the advantages of either). In other words, we think that any suggestion in the ABCA that the contents of the memorandum and articles of association might be brought forward into the articles of continuance would lead to confusion and difficulty and would be of little practical value. We therefore do not think that a counterpart of CBCA s. 261(1.3) should be introduced into the ABCA.

Further, we think that the requirement that a special resolution authorize the application for continuance is a good one in that it will provide protection for those cases in which matters have been arranged so that a minority with more than 25% of the shares can prevent the taking of any action requiring a special resolution; we think that the "special resolution" which authorizes the continuance should not be the new ABCA special resolution which would require a 2 to one majority, but rather the kind of special resolution called for by ACA s. 2(1)32 which requires a 3 to one majority. S. 261(6) of the draft Act would so provide.

We think also that the special resolution should actually adopt the articles of continuance, and s. 261(4) of the draft Act would so provide. Such a requirement would impose some rigidity, but we would think that in a 3-year period it should be possible without difficulty to draft articles of continuance and have them approved by the Registrar and agreed to by the shareholders. The special resolution would be able to approve anything in the articles of continance which could have been done by special resolution by way of alteration in the memorandum or articles of association. The adoption of by-laws can be left to the company.

An additional safeguard for minorities appears in CBCA s. 261(1.2): the rights of a class of shares can be interfered with only if the class approves, subject to exceptions which normally apply under CBCA s. 170. There would be an awkwardness with a counterpart provision in the Alberta context. Under ACA s. 69, the rights of a class of shareholders can be changed by special resolution of the shareholders, but a special resolution of the class and a court order are required. The protection given by the ACA is broader in its requirement of a court order, but narrower in that it only relates to a specific interference with the rights of that class while CBCA s. 170 also applies to change in the rights of equal and superior classes. We do not see why it should be necessary in the process of continuance to make any change in the relative rights of classes of shareholders, and we do not think that such a change should be made in a process which has neither the safeguards provided in the ACA (the class special resolution and the court order) or the safeguard provided in the CBCA (the shareholder's right to dissent and be bought out at fair value). Accordingly, we think that no such change should be allowed to be made as part of the continuance proceedings unless there is unanimous agreement. If changes are necessary they could be made under the Companies Act before continuance or under the proposed ABCA after continuance.

CBCA s. 261(2) provides that a shareholder does not have the right to dissent under s. 184 in respect of an amendment under s. 261(1.1), i.e., the shareholder has no right to insist upon being bought out. We have included a counterpart provision in the

draft Act; the law should not require the company to do something which will result in putting it under an obligation to buy out shareholders. The continuance process, however, could be abused, and we think that there should be a safeguard. That safeguard would be that if the change is oppressive or unfairly prejudicial the minority would have a special right to apply for an injunction against it, and the court would have power to change the proposed articles of continuance so that they would not prejudice the minority. S. 261(9) of the draft Act would provide that safeguard.

Our proposals would require that the application for continuance be authorized by special resolution as defined in the ACA and would therefore allow a minority holding more than 25% of the votes to block the application. A minority might abuse that position by obstructing the continuance; they might be prepared, or even anxious, to suffer dissolution of the company, which is the sanction under the CBCA and which we will propose as the sanction under the proposed ABCA. We think that it would be useful to give the court, where agreement cannot be secured, power to settle the contents of the articles of continuance; and s. 261(10) of the draft Act would do so. We would not expect that the court would have to use its power frequently, if at all; apart from other circumstances making such applications unlikely, the existence of the power would be the best guarantee that it would not be needed. Such a provision would add some complexity to the proposed ABCA, but only for the transitional period.

(c) Dissolution as the sanction for non-continuance

CBCA s. 261(8) provides that an existing company which does not apply for a certificate of continuance within 5 years after the Act comes into force is dissolved. This is draconian. We think that it is also necessary, and we would even shorten the time to 3 years, subject to a power in the court to extend it for a year in cases of hardship: see s. 261(12) to (15) of the draft Act. The transitional period of confusion and duplication of business corporation law systems should be made as short as is consistent with giving companies sufficient time to comply. It seems to us that 3 years is a sufficient time, and that a longer term would merely encourage procrastination.

(d) Revival

Dissolution, it should be noted, is not the end of the matter. Even if a company does not apply for continuance within the prescribed time it would be able to get onto the register again under s. 201 of the draft Act, though the consequences of even a temporary dissolution are awkward enough to give companies an incentive to apply in time for continuance under the new Act.

XV.

EXTRA-PROVINCIAL CORPORATIONS

1. Purpose of registration

Many extra-provincial corporations carry on business in Alberta. The ACA, like other provincial business corporations Acts, requires them to register with the Registrar of Companies. Registration accomplishes two things: firstly, it provides for residents of the province basic information about extra-provincial corporations; and, secondly, it provides for residents of Alberta a place, or rather a person who has an address, for service of legal process and other documents. The proposed Act would continue the requirement of registration for the two purposes.

2. Proposed changes

As ACA Part 8, which deals with the registration of extra-provincial companies is drafted in somewhat outdated language, we have redrafted it, and we refer the reader to Part 21 of the draft Act. There are however some changes of substance to which we will draw attention here.

(a) Scope of registration requirement

Sec. 264 of the draft Act provides a detailed list of circumstances which, in addition to the usual meaning of the words, would constitute "carrying on business" and which would require an extra-provincial corporation to register in Alberta. Some of these (e.g., listing in a telephone directory) do not necessarily involve the presence of the corporation in the province, but we think that they do indicate an intention of doing business with its residents and that it is appropriate to require registration of an extra-provincial corporation which evinces that intention. The soliciting of business in Alberta, we think, is also sufficient grounds for requiring registration in Alberta, and it is therefore included in the definition of carrying on business in Alberta. We think that it is within the constitutional power of the Legislature to impose the requirement of registration in Alberta; in expressing this opinion we find some comfort in the majority opinion in the Supreme Court of Canada in R. v. Thomas Equipment Ltd. (1979) 15 A.R. 413, though the case is not directly on point.

(b) Name of extra-provincial corporation

Insofar as corporate names are concerned, s. 269 of the draft Act would treat extra-provincial corporations much the same as Alberta corporations. In our Draft Report we referred to the special problems which that section might create for extra-provincial corporations which have carried on business under a name for many years only to find that the name is unacceptable in Alberta: the corporation would not be able to register in Alberta without changing its name, and it might be legally unable to make a change under its own corporate law, or it might have to give up substantial goodwill and incur substantial cost to do so. We went on to say that we would consider a practicable plan for allowing an extra-provincial corporation to use a special name for Alberta if its use could be made consistent with the information-imparting function of the

registration of extra-provincial corporations.

Our lawyer consultants thought that the draft Act should provide relief for extra-provincial corporations and referred to Article 2106 of the California Corporate Code which provides such relief and appears to be workable. We have accordingly included in the draft Act as s. 270 a provision which would allow an extra-provincial corporation, the name of which would offend s. 269, to register under that name but to carry on business in Alberta under an assumed name approved by the Registrar. The corporation would acquire property and rights in its assumed name, and could sue or be sued in either its original or its assumed name. Except for the right to use an assumed name, the scheme of s. 270 is not that of the California article, but we think that it would be workable and would provide the needed relief without infringing upon the interests of others.

(c) Capacity and powers of an extra-provincial corporation

The effect of ACA s. 179 is that an extra-provincial corporation (other than a Dominion company, which are excepted for constitutional reasons) cannot, while unregistered, sue on a contract made in the course of a business which requires the corporation to be registered; the contract is not made illegal, however, and the corporation can at any time cure the situation by registering. It appears to us, on the one hand, that it is appropriate to require the corporation to comply with Alberta law before suing. It appears to us, on the other, that to make the contract illegal would be to go too far, the objectives of the registration requirement not being important enough to justify such a draconian penalty upon the extra-provincial corporation; further, the consequences of illegality may well be adverse to the other parties to the contract who are quite innocent. S. 281 of the draft Act would therefore carry forward the existing law on the point.

ACA s. 180(2) makes an unregistered extra-provincial company incapable of holding lands in the province. Again, we think that the objectives to be gained are not important enough to justify the possible adverse consequences of such a provision, and the draft Act does not contain a similar provision; the provisions of the Land Titles Act will preclude the registration of an interest in land in the name of an unregistered corporation, and that appears to us to be sufficient. The draft Act does contain a provision which would empower registered extra-provincial corporations to hold land.

The draft Act would abolish for Alberta corporations the rule of English and Alberta business corporation law that a company can only exercise the powers necessary to carry out its objects; s. 15 would put them substantially in the same legal position as natural persons and s. 16(3) would validate even acts in the course of a business which a corporation's articles of incorporation restrict the corporation from carrying on. For similar reasons, we do not think that an extra-provincial corporation carrying on business in Alberta should be able to shelter behind the rule of limited corporate powers. In view of s. 15 and s. 17 of the draft Act, it might be enough to say (as ACA s. 181 now does, but in the context of an Act which recognizes the rule) that a registered extra-provincial corporation "may exercise all the rights and powers and privileges granted to and conferred upon" corporations, but we

think that such a provision might be taken as an attempt to confer upon an extra-provincial corporation legal capacity which its own basic corporation law denies to it. We propose instead that the draft Act provide that no act of an extra-provincial corporation is invalid because the act is contrary to, or not authorized by, the corporation's basic law and charter and s. 281 would so provide.

(d) Service of documents on an extra-provincial corporation

ACA s. 174 requires an extra-provincial corporation to have an attorney resident in the province authorized to accept service of powers and to receive notices for it. We think that it should not be necessary to serve an individual, but rather that the person serving should be able to deliver documents at, or send documents by registered mail to, an office. S. 275 of the draft Act, as well as providing for personal service upon an extra-provincial corporation's attorney or alternative attorney, would accordingly, for the purposes of service, make his office the counterpart of an Alberta corporation's registered office.

XVI.

ADMINISTRATION

1. Administrative officials

(a) The Registrar

The draft Act contemplates that the Registrar of Corporations would be the custodian of records relating to corporations and would issue the certificates required by the Act, including certificates of incorporation. His functions would be substantially as the functions of the Registrar of Companies under the ACA and, indeed, he would be the same official with a slight change of nomenclature to conform to the usage of the draft Act. Under the CBCA, those functions would be performed by the Director appointed under CBCA s. 253, but the CBCA Director would also perform the functions which the draft Act would confer upon the Director of the Securities Commission, which we will discuss below.

In general, the draft Act would not confer discretionary powers upon the Registrar of Corporations; his usual function would be to ascertain that the requirements of the proposed ABCA have been carried out, and then to file the document in question and issue such certificate or other document as the draft Act would require him to do; his duties, while important and demanding, would in general be ministerial and administrative in nature.

There are, however, some discretionary powers which should be given to the Registrar. The most important of those powers have to do with names of corporations and extra-provincial corporations. Here, the Registrar would have a discretion under s. 12(2) of the draft Act to disapprove a name or proposed name if, in his opinion, it is objectionable, likely to mislead or to confuse, or similar to the name of any body corporate, association, partnership or firm known to the Registrar. He would also have a discretion under s. 12(4) of the draft Act to require a corporation to change a name of which he dispproves, and would himself have power under s. 12(6) to change it to a designated number if the corporation does not make the change itself. He would have similar, though not identical, powers under s. 269 and 270 with regard to the names of extra-provincial corporation. There would be other discretions with regard to names as well, and some unrelated ones, e.g., a discretion to dissolve a corporation under s. 205 of the draft Act; a discretion to attach conditions to its revival under s. 201(4); a discretion under s. 181(11) to allow a corporation to refer to pre-existing shares as having a nominal or par value; and a discretion under s. 182(1) to approve the continuance of an ABCA corporation under the laws of another jurisdiction if certain conditions are met.

(b) The Director

Generally speaking, the function of the Securities Commission is to protect investors in the capital markets. On the face of it, there would seem to be no reason to involve the Commission in the administration of a business corporations statute. However, there are a number of functions which we think should be performed under the proposed Act and which we think

would be most appropriately performed by public officials who are accustomed to looking into the affairs of companies and to taking steps to protect investors. The Securities Commission is such a body. It has staff and other resources for that purpose. The draft Act would accordingly confer these functions upon the Director of the Commission. Our discussion with the Securities Commission have not given us any reason to think that, given proper support, the Commission could not discharge them.

In some cases, the functions which we propose would relate to distributing corporations only, but there are a few in which it seems to us appropriate to have a public official available even with respect to corporations which do not distribute securities. Conferring functions of that kind upon the Registrar would require him to acquire staff to carry them out, and to direct his attention to functions which are quite different from those which are fundamental to his office. We therefore recommend that, where these functions should be performed with regard to non-distributing corporations, the Director of the Securities Commission should perform them.

It is characteristic of functions which the draft Act would impose upon the Director that they involve discretions: it would be for the Director to decide whether he would intervene in a given case, and what form his intervention would take. It seems to us that he is an appropriate official to exercise such discretions as he does so every day under the Securities Act.

Examples of the functions which would be performed by the Director under the draft Act are as follows: to determine that a security was or was not part of a distribution to the public (s. 3(3)); to apply to the court for an order that a meeting of shareholders be held (s. 138(1)); to exempt a corporation from mandatory solicitation of proxies or proxy circular requirements (s. 145); to apply for relief against misleading proxy circulars or to appear on such applications brought by others (s. 148); to authorize omissions from financial statements (s. 150); to apply for the appointment of an auditor (s. 161(1)); to dispense with an audit committee (s. 165(3)); to apply for liquidation and dissolution of a corporation for various failures to comply with the proposed ABCA (s. 206(1)); to apply for investigations and act as inspector (Part 18); and to apply for relief under s. 232, 234 and 240. In support of these functions, and also in support of the Commission's functions under the Securities Act, the draft Act provides for the filing of various notices and statements with the Director.

2. The courts

(a) Civil proceedings

The general scheme of the CBCA, which is followed by the draft Act, is to allow a corporation the greatest practicable amount of power to run its own affairs without intervention by administrative officials or by the courts. Upon occasion however that power will be abused. The policy of the CBCA and that of the draft Act is to give to those who are abused the protection of the courts, the court of civil jurisdiction under the Act being the Court of Queen's Bench. The appraisal right under s. 184 of the draft Act is one protection; the right to apply for leave to bring a derivative action under s. 232 is another; the right to apply to obtain relief for oppressive or unfair conduct

under s. 234 is a third; and the right to apply for a compliance order under s. 240 is a fourth. The day-to-day function of the court in the administration of the proposed ABCA would be substantially reduced from its function under the ACA by the deletion of the requirement of a court order in many cases such as reductions of capital and changes in the rights of classes of shares; but the intervention of the court on behalf of those who do not control corporations would be facilitated by the new remedies. The court, then, would be less of a regulator than it is under the ACA, but more of an adjudicator of disputes.

There would still, however, be some things that could be done under the proposed ABCA only by order of the court. The principal example is the carrying out of a reorganization or arrangement under s. 185 and 186 of the draft Act. Another is changing or formulation of articles of continuance if there is disagreement between the majority and minority about the constitution of a company when it continues under the proposed ABCA: see s. 261 of the draft Act. A third is investigations (though that has some aspects of a civil remedy in the event of a dispute) and liquidations. A fourth is revival of a dissolved Alberta company other than an ABCA corporation.

Finally, the court would have power to give directions to the Director and Registrar under s. 237, to receivers under s. 95, and in various other cases.

(b) Quasi-criminal proceedings

S. 244 of the draft Act would make every contravention of the Act an offence punishable on summary conviction, unless there is reasonable cause. There are other sections in the draft Act which would impose more substantial sanctions for contraventions which are of special importance. Under s. 245, the court before which the matter comes, in addition to powers usual in summary conviction matters, would have powerto order the offender to comply with the provisions of the Act. The Provincial Court would therefore have the power to make a compliance order once the accused has been convicted of an offence.

3. Appeals

(a) From the Director and the Registrar

S.239 of the draft Act would provide a right of appeal to the Court of Queen's Bench from certain decisions of the Registrar and the Director. In the case of the Registrar, these decisions include refusal to file articles or another document, decisions with respect to names, refusal under s. 181(11) to permit a continued reference to shares having a nominal or par value; refusal to issue a certificate of discontinuance under s. 182; refusal to revive a corporation under s. 201; a decision to dissolve a corporation under s. 205; or a decision not to exempt an extra-provincial not-for-profit corporation from payment of fees under s. 264(2). In the case of the Director, the appeal would be from various discretionary decisions. The appeal would be in the form of an application to the Court of Queen's Bench to require the Registrar or the Director to change his decision.

(b) From the courts

Under s. 242(1) of the draft Act, an appeal would lie to the Court of Appeal from any order made by the Court of Queen's Bench under the Act. That would include an order made upon an appeal from the Registrar or Director. At that point the question of a further appeal from the Court of Appeal to the Supreme Court of Canada would depend upon the usual rules relating to such appeals. S. 242(2) would provide an appeal to the Court of Queen's Bench in the one case in which the draft Act would confer jurisdiction upon the Provincial Court for which an appeal is not provided by the Summary Convictions Act, i.e., jurisdiction to make a compliance order under s. 245(1).

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