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PURCHASE BY A COMPANY OF SHARES WHICH IT HAS ISSUED

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The Project Director for the Institute's Company Law Project is George C. Field, and the project is being carried on for the Institute by Mr. Field and a Company Law Committee consisting of J.J. Saucier, Q.C., G.H. Rose, Q.C., H.G. Field, Q.C., W. H. Hurlburt, Q.C., Professor Maurice Sychuk, Bernard J. Davies, John Klinck and W.R. Brown.

TABLE OF CONTENTS

PURCHASE BY A COMPANY OF SHARES WHICH IT HAS ISSUED

INTRODUCTION

We have undertaken a revision of the Alberta Companies Act and have done most of the work preliminary to consultation with the public and interested parties.

One important question in the revision is whether an Alberta company should have power to purchase shares which it has issued. By letter dated October 26, 1976, the Minister of Consumer and Corporate Affairs asked us to make a report and recommendations on that question in time for consideration by the legislature at its forthcoming 1977 spring session. We are therefore issuing this report in advance of our report on the revision generally.

The recommendation which we will make is that the Alberta Companies Act be amended to confer the power. However, we have concluded that in the context of the present Act we can recommend only a relatively restricted power; it is not practicable in the time at our disposal to carry out the intricate task of reconstructing the present Act so as to include the safeguards necessary for a more flexible power.

I. THE PRESENT LAW

(1) Historical Background in English Law

The problem to be solved has its origins in the prohibition against a company trafficking in its own shares which goes back to Trevor v. Whitworth (1887) 12 A.C. 409. In that case a shareholder claimed from the liquidator of a company the purchase price of shares in the company

which the shareholder had sold back to the company. The articles of association of the company provided for the purchase. The House of Lords, however, held that the company could not buy its own shares and that the shareholder could not recover the purchase price from the company. The court evolved the following rationale:

1. Trading in its own shares cannot be an object of a company. Therefore a provision in the memorandum of association which permits a company to purchase its own shares and thus effect a reduction of capital, is void.

2. Although the authority to purchase its own shares was contained in the articles of association, the company was caught on the horns of a dilemma. Firstly, if it was purchasing the shares with a view to reselling them, it would be trafficking in its own shares; and trafficking was ultra vires of the company because it was not and could not be one of the objects of the company. Secondly, if it was purchasing the shares in order to retain them there would be a reduction of capital which was not one of the reductions sanctioned or contemplated by the 1867 amendment to The English Companies Act.

The rule in Trevor v. Whitworth became an accepted part of the English law applicable to companies incorporated under The English Companies Acts.

(2) What a Company can do under the Present Act

(i) Acquisition and Cancellation of Shares

The Alberta Companies Act was taken from the English Companies Act of 1929, and the rule in Trevor v. Whitworth accordingly applies to companies incorporated

under it. There are, however, a number of ways in which a company can re-acquire or get rid of shares in its own capital stock, some of which involve a purchase of the shares. The things which it can do are as follows:

1. It can cancel authorized but unissued capital. That results in a reduction of authorized capital but not a reduction of paid-up capital.

2. It can cancel paid up shares surrendered to it by way of gift. The paid-up capital is reduced since the shares are no longer outstanding, and the paid-up capital account is customarily reduced by transferring the dollar value to a contributed surplus account. In Alberta it could probably be transferred directly to retained earnings because there is no prohibition in Alberta which prevents a company from paying a dividend out of its contributed surplus.

3. It can cancel paid up shares acquired in the distribution of the assets of another company under liquidation. The same comments apply as in No. 2.

4. It can reduce its capital in any way under the provisions of section 38(1)(b). For the purposes of the section "capital" means not only paid-up capital but also an amount remaining unpaid on a par value share issued as not fully paid up. Section 41 imposes a continuing liability on the shareholder for any amount received with respect to any creditor who is prejudiced.

5. The company may redeem redeemable shares under section 70 and it may do so under any one of three methods, two of which are contained in that section. Firstly, it may use as its source of funds the proceeds of a new issue created for that purpose. Secondly, it may use funds

otherwise available for distribution by way of dividend, providing it sets up a capital redemption reserve fund. This is a bookkeeping entry in which the total amount being used to redeem these shares is deducted from the retained earnings figure and set up in a capital redemption reserve fund which is not available to be distributed amongst the shareholders of the company by way of dividends. Thirdly, it may redeem the shares by a reduction of capital in which case it must comply with the provisions of sections 38 to 40.

6. If it is a mutual fund company it can accept surrenders of shares under section 71.

7. Fractional shares can probably be cancelled in case of an amalgamation under the very broad power granted to the court under section 156, or on a compromise and arrangement under the powers granted under section 155.

(ii) Corporate Distributions and Reductions in Capital

A purchase by a company of shares which it has issued involves a distribution of corporate funds to the shareholder whose shares are purchased. Under the Alberta Companies Act, a company can make the following corporate distributions:

1. Dividends. A company may pay a dividend if it is not insolvent, and providing the dividend does not render the company insolvent or impair the capital of the company. In Alberta contributed surplus does not form part of the capital of the company and therefore a dividend may be paid from contributed surplus.

2. As we have said at page 3 it may redeem redeemable shares under the provisions of section 70, without reducing capital.

3. As we have said at page 3 it may reduce its capital so long as it complies with the provisions of sections 38 to 40.

II. PROPOSALS

(1) Should a Company have power to purchase Shares Which it has Issued?

We will first state the argument in favour of conferring upon a company the power to purchase shares issued by it. A limited liability company is a vehicle for doing business. It would in many cases be able to do business more efficiently and effectively by purchasing shares issued by it, and it would in some cases be able to achieve objectives in that way which it could not achieve in any other way. We will go through a list of such cases commencing at page 9 of this report but we will here mention two important examples. One is the case in which the only practicable way for ownership of a company to be transferred from a founding group of shareholders to the next generation of owners is to allow the company's money to be used to buy out the founding shareholders through a re-purchase of the shares which they hold. The second is the case of a company which has surplus cash and would find it a good investment to buy its own shares; that case is particularly likely to occur if the price of the shares on the market is somewhat depressed below the true value of the company's property and undertaking.

We will now state the argument against conferring the power. The argument is that the power may be abused.

It may enable one shareholder or a group of shareholders to obtain an unfair advantage over another shareholder or group of shareholders. For example, a company controlled by one shareholder may purchase his shares at a price in excess of their value, thereby reducing the value of the shares of the remaining shareholders, or, having better information about the value of its shares than does a shareholder, it may buy the shareholder's shares at too low a price, thereby increasing the value of the shares of the remaining shareholders at the expense of the selling shareholder.

Our view is that it would be safe to grant a company the power to buy shares issued by it if the power can be exercised only in ways which will not favour one shareholder over another and which will not prejudice potential investors or creditors. We will now give a summary of the proposal which we think suitable for inclusion in the present Act, bearing in mind the deficiencies of that Act. We will then show the extent to which the proposal would permit a company to use the power to achieve its objectives.

(2) Summary of Proposals

Our recommendations are embodied in the draft amendments which are attached to this report as Appendix A, and the commentary accompanying the draft report gives detailed reasons for each amendment which is recommended. The effect of the recommended amendments is as follows:

1. That a company incorporated under the Alberta Companies Act be permitted to purchase shares which it has issued.

2. That the portion of the price representing the consideration received by the company for issuing the shares in the first place must be allocated to reducing paid-up capital.

3. That the remainder of the price may be deducted from any surplus account that the directors designate.

4. That the power may be exercised by a resolution of the directors rather than a special resolution of the shareholders.

5. That the repurchased shares be classed as authorized but unissued shares.

6. That the power cannot be exercised unless the company will still be solvent and able to meet its obligations as they become due.

7. That there be various disclosure requirements:

(a) For private companies a notification to the Registrar of Companies.

(b) For public companies the filing of insider reports.

8. That since the present Act does not contain an "oppression" section granting the shareholder easy access to the courts, the offer can only be made in one of two ways. One way is to make it in accordance with the unanimous agreement of all of the shareholders. The other way is to make it by an offering to all of the shareholders holding shares of the class being purchased, accompanied by an information circular under which the company must state the

number of shares it proposes to buy. If there is an over subscription, the company must buy pro rata from the offering shareholders.

9. That there be two exceptions to the requirements in the preceding recommendations:

(a) The purchase by a public company of not more than 1% of its issued shares per month.

(b) That a public company be entitled to apply to the Securities Commission for an exemption from the information circular requirements in any case where compliance with the requirements of other jurisdictions, such as Ontario, provides adequate protection. Because of the restrictive nature of the proposed amendments we think that there could also be other legitimate cases which should be exempted.

10. That the following additional safeguards and remedies be provided:

(a) That a company which purchases shares which it has issued by subject to the same liability as that which is now imposed on insiders who trade in a company's shares.

(b) That the directors of the company who authorize the purchase be liable in damages if the company purchases its shares in breach of the solvency and liquidity tests, with recourse over against the selling shareholder.

(c) That an interested person be entitled to apply to the court for a restraining order or an order rescinding the offer.

11. That the proposed legislation deal with the problem of the enforceability of a contract to purchase shares over a period of time.

12. That from the date that the amendments become law a subsidiary company shall be prohibited from acquiring shares of its parent except to a nominal extent, and should be prohibited from voting any shares which it does acquire.

(3) Effect of Proposals

The following are some examples of purposes for which a company may wish to buy shares which it has issued. We will in each case consider whether the purpose can be achieved under our proposals. If it can, we will discuss the extent to which our proposed safeguards will protect the classes of person who might be prejudiced by the purchase.

(i) Corporate Reorganization

Business reasons often exist for a change in the capital or organization of a company, for the acquisition of another company or amalgamation with it, or for a change in its classification from a private company to a public company or from a public company to a private company. The more freedom a company has to organize its affairs to suit the circumstances in which it finds itself, the more efficient it is as a business vehicle. Our proposals will go some way towards conferring these powers, but their effect will be limited by our recommendation that, in the

absence of unanimous agreement, the company must make its offer to the holders of all of the class of shares affected; the company will not be able to make an offer which is capable of being accepted only by one shareholder or a group of shareholders of the class. Our reason for not going further is that, at least until the position of the minority shareholder is strengthened, the possibilities of abuse would otherwise be too great to be accepted.

(ii) Control

The purchase of the shares and the resulting cancellation of their votes may be used to change the control of a company. For example, in a company the shares of which are owned by A (40%), B (30%), and C (30%), the purchase of C's shares by the company will give A majority control, and somewhat similar effects may be achieved in a large company. Our proposals will not necessarily prevent any change in control, but we think that our proposed requirements of full disclosure and pro rata purchases will give adequate protection to the shareholders.

The power may also be used to prevent a change in control. The group in control of a company may in some circumstances protect itself against the possibility of another group making a take-over bid or obtaining control by purchases on the market.

The requirements of disclosure and of a pro rata purchase which we have recommended will, we think, give adequate protection against the abuses which might occur if a company were to have an unrestricted power to buy from one shareholder or group of shareholders only.

It should be noted that our proposals will make it possible for a company, particularly in a case in which the market value of its shares is depressed below the breakup value of the company, to cause the company to offer to buy in shares at a higher price in order to inhibit an actual or potential take-over bid. In a particular case, the relative merits of the control group and of the possible challengers may make the prevention of a take-over bid either a good thing or a bad thing, but, as we have said, we think that our proposals will give each shareholder of the class an adequate opportunity to make an informed decision as to whether it is in his interest to retain his shares or to sell.

(iii) "Repatriation"

Representations have been made to the effect that a company should have the power to purchase shares which it has issued and which are held by foreign shareholders; the purpose would be to shift control to Canadian shareholders. An unrestricted power could of course be used to shift control from any group to any other group, though we do not know how likely it is that it would be used for the purpose we have mentioned. The power we have suggested is not likely to be useful in achieving "repatriation" in any but a few cases. The reason is that our recommendations will (in the absence of unanimous agreement which is not likely to be reached in any but a closely held company) require a pro rata purchase so that the foreign shareholders can be bought out only if the Canadian shareholders do not accept their parts of the offer. We think, however, that, in the context of the present Alberta Companies Act, the power to make an offer to a specific shareholder or group of shareholders is incompatible with the protection of the other shareholders of the class and we do not recommend it.

(iv) Price Stabilization, Advancement or Depression

A public company may enhance the market value of its shares by making an offer to purchase the shares at a high price. Here again, we think that the requirements of disclosure and of an offer to all holders of shares of the class will enable shareholders and potential investors to make informed decisions. It is, of course, true that we recommend that a company be able to buy up to 1% of its shares each month, but we do not think that that level of purchase will lead to abuse.

An unrestricted power would enable a public company to buy shares, hold them as an asset, and resell them. The company would then be able to advance the price at will by purchasing shares and depress it at will by putting a large block of repurchased shares on the market. The requirements that we have mentioned, together with the requirement that shares purchased by the company be treated as authorized but unissued, should provide sufficient safeguards against such abuses.

(v) Retirement of a Controlling Shareholder

It is often very difficult to manage the transfer of the shares of a closely-held company from a deceased shareholder or from a shareholder who wishes to retire from the company. It is often desirable that younger employees of a company buy out the shareholder, but often they could acquire sufficient capital only by receiving money as income from the company and exposing themselves to taxation which makes the cost of the purchase prohibitive. If the company itself could purchase the shares of the retiring or deceased shareholder, that would have the effect of permitting the

transfer of control and ownership, though the value of the company will have been reduced by the purchase. (There may of course be taxation problems in connection with the repurchase itself, but in a particular case these may be avoided, or they may be less). In some cases in which the shareholder has died the purchase might be funded by insurance taken out by the company on his life. It seems to us to be desirable that shareholders should be able to transfer control and ownership, and we think the requirement of unanimity, or alternatively of disclosure and an offer to all shareholders of the class, will give adequate protection to the other shareholders.

(vi) Compromise of a Shareholder's Indebtedness

Occasionally a shareholder who is indebted to a company gets into financial difficulties. It may be to the advantage of the company to be able to settle its claim by taking back the shares in satisfaction of a debt. That is a perfectly reasonable business proposition, but our proposals do not provide for it. The power to carry it through could be abused, and should be permitted, if at all, only in the context of a revised Act with additional safeguards.

(vii) Employee Share Ownership Plans

A more important business arrangement is a plan under which an employee of a company will be permitted to invest in shares of the company, and under which the shares will be repurchased from him when he leaves the company's employment. That is sometimes done at the present time under trust arrangements which involve the use of some company funds and which may therefore be open to question.

Any doubts could be cleared up, and in some cases cumbersome trusteeship arrangements could be made unnecessary, by conferring an unrestricted power upon a company to buy its own shares. Such arrangements are proper, but our proposals for amendments to the present Companies Act will not facilitate them unless there is unanimous agreement by the shareholders, which will not normally be obtainable except in the case of a closely-held company. We do not perceive sufficient urgency to justify emergency action which may prejudice shareholders, and we will leave employee share ownership plans to be dealt with in the revised Act.

(viii) Fractional Shares

Fractional shares in a company are sometimes created, and are sometimes a nuisance. It would be convenient if the company could simply purchase the fractional shares and cancel them, and in the usual case no one would be injured. It would, however, be possible to contrive the creation of fractional shares with a view to repurchasing them in a way which would prejudice other shareholders, and in view of that fact, and the further fact that the problem is not an urgent one, we think that solving it can be left to the revised Act.

(4) Tax Consequences of Proposals

It is not possible, even if it were desirable, to assure a company and its shareholders that a purchase of shares which the company has issued will not have adverse tax consequences. Our proposals are permissive only, and

those who choose to take part in a transaction which would be permitted by them if they are adopted will have to assure themselves by proper advice that they understand the tax consequences of what they do. If they proceed incautiously they may expose themselves to disastrous consequences against which the Companies Act will not protect them.

III. CONCLUSION

It is our belief that legislation embodying the proposals which we have made in this report and appendix would confer a useful and beneficial power upon companies incorporated under the Alberta Companies Act. We believe that in a modern revised Act providing new safeguards for shareholders a less limited power will be proper; our proposals are necessarily limited because we are recommending an important temporary change in the structure of an Act which has not advanced with the times and which requires the complete revision upon which we are engaged.

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BY: _____
CHAIRMAN

_____
DIRECTOR

January, 1977

APPENDIX A

THE COMPANIES ACT AMENDMENT ACT, 1977

1. The COMPANIES ACT IS HEREBY AMENDED.

2. The following new division is added after Division 1 of PART 4 to be entitled:

DIVISION (1.1) PURCHASE BY A COMPANY OF ITS OWN SHARES

COMMENT:

The subject should be dealt with in one division for convenience of reference. The proposed legislation provides that a purchase by a company of its own shares will constitute an alteration of issued capital. The logical place for the division, therefore, is immediately following the division which deals with other alterations and reductions of capital.

41.1 Notwithstanding the provisions of section 2(1)12, for the purposes of this division:

"court" means the Supreme Court of Alberta presided over by a judge of the Supreme Court designated by the Chief Justice of the Trial Division.

COMMENT:

The Ontario Business Corporations Act (OBCA) defines "court" as follows:

> "court" means the Supreme Court of Ontario presided over by one of those Judges of the High Court who are designated by the Chief Justice of the High Court for the purpose of hearing applications under this Act.

The concept of a designated judge is already used in Section 86(1) of our Companies Act and is appropriate for the purposes of Section 41.5 and 41.11.

41.2 (1) Subject to the provisions of this division, a company may purchase shares issued by it.

(2) Unless the articles otherwise provide the power conferred by this section may be exercised by resolution of the directors.

COMMENT:

Subsection (1) is the enabling section and generally follows the wording of Section 32 (1) of the Canada Business Corporations Act (CBCA). It uses the word "purchase" instead of the word "acquire" because, unlike the CBCA section, it is not used for redemption of preferred shares. Subsection (2) makes it clear that a company may authorize the purchase by a resolution of the directors.

41.3 (1) Where a company has purchased any share issued by it of a class with par value, the issued capital is decreased by an amount equal to the par value of the share.

(2) Where a company has purchased any share issued by it of a class without par value, the issued capital is decreased by an amount equal to the amount obtained by dividing

(a) the amount of the consideration received by the company from time to time for which the shares were issued less any

reduction of capital with respect to such shares effected by the company in accordance with the provisions of this Act, by

(b) the number of issued shares of that class.

(3) Shares which have been issued by a company and purchased by it shall be restored to the status of authorized but unissued shares.

COMMENT:

The section requires that a company reduce the dollar figure for its issued capital following a purchase of shares issued by it. If the shares purchased are par value shares, subsection (1) is self-explanatory. If the shares purchased are no par value shares, subsection (2) requires that the dollar figure for the issued capital be reduced by the average price received by the company for the shares. The excess amount over the prescribed figure is simply left to the discretion of the directors of the company, and it may be deducted from whatever surplus account the offering circular states will be used, or whatever fund or whatever surplus account the shareholders agree to in a unanimous agreement. Subsection (3) disposes of the problem of voting the shares, as authorized but unissued shares carry no vote. It also solves the problem of dividends as no dividend will be paid on such a share. This subsection is most important as it goes a long way towards preventing market manipulation by public companies. In order to resell the shares, a public company would have to make an offering subject to the prospectus provisions of the Securities Act.

41.4 (1) A company shall not make any payment to purchase any share issued by it if there are reeasonable grounds for believing that:

(a) The corporation is, or would after the payment be, unable to pay its liabilities as they become due; or,

(b) The realizable value of the company's assets would after the payment be less than the aggregate of its liabilities and the paid up capital of the remaining shares of every class or kind.

(2) The provisions of section 89(2) of this Act do not apply with respect to a purchase by a company of any share issued by it.

COMMENT:

Subsection (1) establishes the double-barrelled solvency test contained in Section 32(2) of the CBCA. That section, however, uses the word "stated capital". Our Act has no such definition and in fact uses the word "capital" to cover a variety of meanings. The phrase "paid up capital" as used in the present Act does not conflict with the definition of "paid up capital" as used in Section 89(1)(c) of the Income Tax Act, Canada; hence it was used.

Section 89(2) of the present Act provides that an appraisal surplus cannot be used to justify payment of a dividend for five (5) years after the reappraisal. We think that there is a possibility that a court would deem any amount over the amount attributed to the capital account under Section 41.4, to be a dividend and we think that the

possibility should be removed by making Section 89(2) inapplicable.

We think that no advertisement or notice to creditors should be required. That is a substantial departure from existing requirements for reduction of capital for which a court application is necessary and under which the court considers the position of creditors. These requirements, however, are based upon a concept of the sanctity of paid-in capital which we consider illusory and outmoded, and which do not appear in the CBCA. If the directors are prepared to authorize an unlawful purchase of shares, the consequences of which they will be personally liable for, we do not think that a requirement of notice to creditors will stop them; and there is no such requirement for the declaration of dividends which is the principal mechanism for corporate distributions. We believe further that requirements of notice and advertising would be unduly onerous, as transactions under the proposed power may be small or large, frequent or infrequent, and will usually be perfectly within the law.

41.5 (1) Directors of a company who, contrary to the provisions of Section 41.4, vote for or consent to a resolution authorizing the company to purchase any share issued by it, are jointly and severally liable to restore to the company any amount so paid and not otherwise recovered by the company.

(2) A director who has satisfied a judgment ordered under this section is entitled to contribution from the other directors who voted for or consented to the resolution.

(3) A director who is liable under subsection (1) is entitled to apply to the court by way of originating notice of motion for an order compelling a shareholder or former shareholder to pay to the company any money that was paid contrary to section 41.4.

(4) Where the purchase by the company of a share issued by it is in contravention of the provision of section 41.4, any creditor who was a creditor at the time of the purchase, or any shareholder, may apply to the court in the same manner, and the court may, if it is satisfied that it is equitable to do so,

(a) order a shareholder or former shareholder to pay to the company any money that was paid by the company to purchase the share;

(b) order the company to issue an equivalent number of shares to the shareholder or the former shareholder; and

(c) make such further order as it thinks fit.

(5) An action to enforce a liability imposed by this section may be commenced only within two (2) years after the date of completion of the purchase.

COMMENT:

This section imposes a liability on the directors who vote for the resolution. It follows generally the provisions of section 113 of the CBCA. The solvency test is designed to protect both creditors and shareholders.

41.6 A private company that purchases shares issued by it shall notify the Registrar within thirty (30) days of the date of the purchase, of the date, the number, and the class or kind of shares that it has purchased.

COMMENT:

This section deals with the disclosure requirements for a private company and is self-explanatory. We have not designated any particular form, but we feel that the information should be available to anyone who attends at the Companies Branch and searches the company file. The provisions of section 53(1)(c) and (f) of the present Companies Act, dealing with the register of members, are adequate in their present form to compel the company to make the necessary alterations in its register of members. Since the register of members is open to inspection by a member of the public, there will be two places where the information is available.

41.7 (1) A public company which under this division purchases shares issued by it shall be deemed to be an insider for the purposes of Division (3) of PART 6 of this Act.

(2) A private company which under this division purchases shares issued by it and makes use of any specific confidential information for its own benefit or advantage which, if generally known, might reasonably be expected to affect materially the value of such shares, is liable to compensate any shareholder or former shareholder for any direct loss suffered by such person as a result of the purchase, unless such information was known or ought reasonably to have been known to the selling shareholder at the time of the purchase.

(3) An action to enforce any right created by subsection (2) may be commenced only within two (2) years after the date of the purchase that gave rise to the cause of action.

COMMENT:

This section will require a public company to comply with the reporting sections in the insider trading provisions, and will impose civil liability if the company uses confidential information to the detriment of the selling shareholder.

Subsection (2) imposes the same civil liability upon a private company. Subsection (3) provides the same limitation period presently contained in Section 85 of the Companies Act which is applicable to public companies under Subsection (1).

41.8 (1) Unless all of the shareholders at the date of the purchase have unanimously agreed in writing to the proposed purchase, a company that proposes to purchase shares issued by it shall:

(a) make its offer to purchase to every shareholder resident in Canada who holds shares of the class or kind to be purchased; and,

(b) deliver or mail a copy of the offering circular stating the number and the class or kind of its issued shares which the company proposes to purchase, in prescribed form, to each shareholder resident in Canada of record as at the date of the offer in such manner as may be provided in the articles of the company for the sending of any notice of a meeting of the shareholders; and,

(c) in the case of a private company, file a copy of the offering circular with the Registrar within fifteen (15) days of the date that it is delivered or mailed to the shareholders of the company; and,

(d) in the case of a public company, file a copy of the offering circular with the Commission within five (5) days of the date that it is delivered or mailed to the shareholders resident of Canada; and

(e) for the purposes of this section, a shareholder is deemed to be a resident of Canada if his latest address shown on the register of members of the company is an address within Canada.

(2) Where in response to the offer contained in the offering circular, the shareholders agree

to sell a greater number of shares than the company offered to buy, the company shall purchase from all of the shareholders who offered to sell, pro rata as nearly as possible disregarding fractions.

(3) Notwithstanding subsection 1(a) a company may make its offer to purchase shares issued by it to every shareholder who holds shares of the class or kind to be purchased, wheresoever resident.

COMMENT:

"Commission" is defined in Section 2(1)7 of the present Act and means the Securities Commission. The provision that the offering circular need only be mailed to shareholders resident in Canada is a technique borrowed from the CBCA which avoids the necessity of obtaining clearance from the American Securities and Exchange Commission. The company must state in its offering the number of shares it proposes to buy. Since the offer is sent to all shareholders of the class being purchased, each will have an opportunity to sell. Other shareholders will receive notice and have their remedy under Section 41.11. Subsection (2) is designed to cover a situation where the company receives offers to sell in excess of the number of shares it offers to buy. Subsection (3) makes clear that a public company whose shares are widely held outside Canada may address its offer to all of its shareholders if it wishes to do so. It will of course have to comply with the requirements of the American Securities and Exchange Commission with respect to any shareholders who are residents of the United States.

41.9 A public company whose shares are listed on a Canadian stock exchange, or traded in the over-the-counter market in Canada, need not comply with the provisions of Section 41.8 if:

(1) The shares it proposes to purchase are bought through the facilities of a stock exchange or in the over-the-counter market; and,

(2) There has been no solicitation of the shareholders by the company; and,

(3) In any one month it purchases not more than one (1%) percent of the kind or class of shares which were issued and outstanding on the first day of that month.

COMMENT:

This concept is taken from the CBCA and its regulations. It was felt that one (1%) percent of the issued shares per month could hardly be sufficient to substantially affect or manipulate the market price and that the requirements of stock exchanges and the Securities Commission will provide adequate disclosure.

41.10 A public company that has not obtained the unanimous agreement of all of its shareholders to the proposed purchase of any of its issued shares may apply to the Commission for an order declaring the proposed purchase to be exempt from the provisions of Section 41.8(1)(b) and 48(1)(d) and the Commission may deem the proposed offer to be exempt upon such terms or conditions as it may impose.

COMMENT:

It is our feeling that there should be some manner in which legitimate transactions under exceptional circumstances could be permitted, providing that the company obtains an order exempting it from complying with the offering circular provisions of Section 41.8, particularly in the case where an Alberta public company will have to comply with the requirements of another jurisdiction such as Ontario.

41.11 Where in connection with an offer by a company to purchase shares issued by it, the company, or its directors, do not comply with this Act or the regulations, any member of the Commission, or any interested person, may apply to the court by way of originating notice of motion, and upon such application the court may make an order:

(a) approving the contents of the offering circular with or without variation and requiring distribution of the corrected document to each shareholder entitled to receive it;

(b) restraining the distribution of the offering circular;

(c) requiring any person to comply with this Act or regulations;

(d) Rescinding the offer.

COMMENT:

This section is modelled in part on Section 198(3) of the CBCA. It provides a means of restraining or modifying the offer, and in extreme cases preventing the company from making an offer.

41.12 (1) A contract with a company providing for the purchase of shares issued by it is specifically enforceable against the company except to the extent that the company cannot perform the contract without being in breach of Section 41.4.

(2) In an action brought on a contract referred to in subsection (1), the company has the burden of proving that performance thereof is prevented by Section 41.4.

(3) Until the company has fully performed a contract referred to in subsection (1), the selling shareholder retains the status of a claimant entitled to be paid as soon as the corporation is lawfully able to do so or, in liquidation, to be ranked subordinate to the rights of creditors, and to the rights of any class of shareholders whose rights were in priority to the rights given to the class of shares which he sold to the company, but in priority to the rights of the other shareholders.

COMMENT:

This section follows Section 38 of the CBCA but differs in that it protects the rights of shareholders with rights

prior to those of the shares purchased.

41.13 (1) From and after the date upon which this division becomes law, a subsidiary company shall not acquire any shares of its holding or affiliated company in excess of one (1%) percent of the number of issued shares of the holding or affiliated company.

(2) A subsidiary company that acquires any shares of its holding or affiliated company, as permitted under this section, shall not be entitled to receive any notice of, or to vote at, any meeting of the shareholders of the holding or affiliated company with respect to such shares.

COMMENT:

Since the purchase by a subsidiary of the "parent's" shares is an indirect manner of a company buying its own shares, and since we have imposed restrictions and tried to give protections whenever a company does purchase its own shares, these restrictions and protections will be of no avail unless we provide a specific prohibition that a subsidiary or affiliated company cannot acquire shares in the parent.

The definitions used for "subsidiary", "holding" and "affiliated" companies are the definitions used in the present Companies Act in Section 2(2), (3) and (4) respectively.

The exception to this provision, that the subsidiary be permitted to acquire up to one (1%) percent of its holding or affiliated company's shares, is to enable a subsidiary company to take advantage of the rollover provisions of Section 85 of the Income Tax Act, Canada. Under Section 69 of the Income Tax Act, Canada, the general rule is that a non-arm's length transaction is deemed to be at market value. One exception to this rule is found in Section 85(1) of the Income Tax Act, Canada, under which an elective rollover is permitted, subject to the other provisions of that section, providing that the transferor receives some shares of the transferee as part of the consideration. It is a convenient method of implementing certain kinds of corporate reorganization without having to go through the more complex method of amalgamation. The proposed Section 41.13 therefore contains a permitted exception up to one (1%) percent. In a very special case, however, this might be enough to tip the balance of control if the subsidiary were permitted to vote the shares; therefore such shares as may be acquired under the exemption are not entitled to a vote while held by the subsidiary.

3. Section 288 is amended by adding the following subsection:

> *(c) Prescribing the form and content of the offering circular mentioned in section 41.8.*

COMMENT:

Section 288 does not contain the necessary power to make the regulations which will be necessary under Section 41.8.

4. *This Act comes into force on a date to be fixed by proclamation.*

COMMENT:

The amendments should not come into force until the regulations regarding the form and content of the offering circular required under Section 41.8 have been prepared. It will take time to prepare them.

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