Report No. 36

PROPOSALS FOR A NEW ALBERTA BUSINESS CORPORATIONS ACT

VOLUME 2

DRAFT ACT AND COMMENTARY

INSTITUTE OF LAW RESEARCH AND REFORM

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I.

INTRODUCTION

1. Purpose of Report and of Draft Act and Commentary

We undertook to put forward proposals for the reform of the law of Alberta relating to business corporations. We have accordingly prepared proposals for a new Alberta Business Corporations Act in two volumes. In the first volume, which we have entitled "Report", we 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 general discussion in the Report.

In the course of our Company Law Project we published 16 Preliminary Discussion Papers. We also published our Draft Report No. 2, Proposals for a New Business Corporations Law for Alberta, and a companion volume containing a proposed Alberta Business Corporations Act and commentary. We issued these documents 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. Organization of draft Act

The draft Act consists of 22 Parts and each Part consists of two or more sections. We have appended to each section a Note giving its source. Where appropriate, we have appended to each section one or more of the explanatory Comments referred to above; except in the cases of s. 1 and s. 44(2) (where they

follow individual definitions), each Comment appears at the end of the section to which it refers.

For reasons which appear, e.g. at page 5 and 6 of our Report, we have in the absence of strong reason to the contrary, followed the form and content of the CBCA. The first twenty Parts of the draft Act, except for Part 15, bear the same names and numbers as the corresponding Parts of the CBCA, and, with few exceptions, the sections contained in these twenty Parts bear the same numbers as the corresponding sections of the CBCA. Parts 21 (Extra-Provincial Corporations) and 22 (Consequential and Commencement) of the draft Act cover subject-matter which is not included in the CBCA.

We have omitted any counterpart of CBCA Part XV because it deals with the qualification of prospectuses, a subject which, for reasons given at page 113 of our Report, we think should be left to The Securities Act; in order to retain the CBCA numbering system and because it otherwise seems appropriate we have created a new Part 15, Corporate Re-organizations and Arrangements, which includes the counterparts of CBCA ss. 185 and 185.1. We have omitted counterparts of a number of CBCA sections; and in order to maintain the same numbering system, we have divided existing sections in such a way as to maintain continuity, as have the Manitoba CA and Saskatchewan BCA. We have also for the same purposes occasionally inserted sections with decimal numbers, e.g., s. 180.1. We regard the maintenance of uniform numbering of Parts and sections (but not subsections) as a matter of great practical convenience for users of the provincial and federal statutes, and we recommend that both authorities take the steps necessary to preserve it.

II.

ABBREVIATIONS USED IN COMMENTS

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, L.C.B. Gower, 3rd ed., 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	A 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.

III.

DRAFT ACT

PART 1

INTERPRETATION

Application

1. In this Act,

(a) "affairs" means the relationships among a corporation, its affiliates and the shareholders, directors and officers of those bodies corporate but does not include the business carried on by those bodies corporate;

Comment

"Affairs" is used throughout the draft Act to describe the internal affairs of the corporation as distinguished from the outside business carried on by the corporation.

(a.1) "affiliate" means an affiliated body corporate within the meaning of subsection (2);

(b) "Alberta company" means a body corporate incorporated under or continued into Alberta and registered under The Companies Act but does not include an extra-provincial corporation;

Comment

The definition of "Alberta company" is added as a convenient way of referring in the draft Act to companies under the ACA and its predecessors.

(b.1) "articles" means the original or restated articles of incorporation, articles of amendment, articles of amalgamation, articles of continuance, articles of reorganization, articles of arrangement, articles of dissolution and articles of revival and includes an amendment to any of them;

(c) "associate", when used to indicate a relationship with any person, means

(i) a body corporate of which that person beneficially owns or controls, directly or indirectly, shares or securities currently convertible into shares carrying more than 10% of the voting rights under all circumstances or under any circumstances that have occurred and are continuing, or a currently exercisable option or right to purchase those shares or those convertible securities,

(ii) a partner of that person acting on behalf of the partnership of which they are partners,

(iii) a trust or estate in which that person has a substantial interest or in respect of which he serves as a trustee or in a similar capacity,

(iv) a spouse of that person, or

(v) a relative of that person or of his spouse if that relative has the same residence as that person;

(c.1) "auditor" includes a partnership of auditors;

(d) "beneficial interest" means an interest arising out of the beneficial ownership of securities;

Comment

The term "beneficial interest" is used only in section 31 of the draft Act, which seems perfectly clear without the definition. We have, however, included the definition in the interest of uniformity with the CBCA.

(d.1) "beneficial ownership" includes ownership through a trustee, legal representative, agent or other intermediary;

(e) "body corporate" includes a company or other body corporate wherever or

however incorporated;

Comment

"Body corporate" is used throughout the draft Act to include all corporate bodies, wherever incorporated. It is to be distinguished from "corporation" which is used to denote bodies corporate incorporated or continued under the draft Act.

(e.1) "Canada corporation" means a body corporate incorporated by or under an Act of the Parliament of Canada;

Comment

"Canada corporation" is not defined in the CBCA. It is useful in Part 21 of the draft Act, which provides for the registration of extra-provincial corporations.

(f) "Commission" means the Alberta Securities Commission;

Comment

The term "Commission" is not defined in the CBCA, but references to it are made in the draft Act.

(f.1) "corporation" means a body corporate incorporated or continued under this Act and not discontinued under this Act;

Comment

The definition of "corporation" is restrictive. It excludes bodies corporate incorporated under the laws of other jurisdictions or under other laws of Alberta unless they "continue" under s. 181 or s. 261 of the draft Act.

(g) "Court" means the Court of Queen's Bench of Alberta;

(g.1) "debt obligation" means a bond, debenture, note or other evidence of indebtedness or guarantee of a corporation, whether secured or unsecured;

Comment

It will be noted that "debt obligation" includes a guarantee.

(h) "Director" means the Director or any Deputy Director of the Commission;

Comment

The draft Act would give the Director a number of powers and responsibilities. See p. 167 of our Report.

(h.1) "director" means a person occupying the position of director by whatever name called and "directors" and "board of directors" includes a single director;

Comment

The definition of "director" is the same as that in the CBCA. It is also the definition in the ACA, except that the CBCA provides that a single director may exercise the powers of the board of directors.

(i) "distributing corporation" means a corporation

(i) any of whose issued shares, or securities which may or might be exchanged for or converted into shares, were part of a distribution to the public, and

(ii) which has not more than 15 shareholders;

Comment

1. The CBCA does not define "distributing corporation", except for the purposes of Part 10, Insider Trading. It refers in several places, however, 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". We have included a general definition because we think that it will be useful.

2. The CBCA refers to "securities" which are or were part of a distribution to the public. It appears to us, however, that the special provisions of the CBCA and of the draft Act applicable to "distributing corporations" are for the benefit of shareholders and not for the benefit of the holders of debt securities. S. 2(1)(i)(i) would therefore define "distributing corporation" in terms only of the holders of shares and of securities which are or may become convertible into shares.

3. S. 2(1)(i)(ii) would exclude from the definition of "distributing corporation" all corporations with 15 shareholders or less. The CBCA excludes only corporations with one shareholder, and the exclusion which we proposed in our Draft Report, though somewhat broader than the CBCA exclusion, was still quite restrictive. The argument for the more restrictive approach is that once an investor has bought shares as part of a public offering, the control group should not be able to change the ground rules by buying out all but 15 of the shareholders. Representations were, however, made to us that when the number of shareholders is 15 or less the special provisions (e.g. the number of directors and the requirement of an audit committee) become, on balance, undesirable, and we have concluded that those representations are right.

(i.1) "extra-provincial corporation" means a body corporate

(i) incorporated otherwise than by or under an Act of the Legislature or an Ordinance of the Northwest Territories, or

(ii) incorporated by or under an Ordinance of the Northwest Territories and not subject to the legislative authority of the Province by section 16 of The Alberta Act;

Comment

The CBCA does not contain a definition similar to that of "extra-provincial corporation", as it makes no provision for registration (as differentiated from "continuance") of bodies corporate incorporated under the laws of other jurisdictions.

(j) "incorporator" means a person who signs articles of incorporation;

(j.1) "individual" means a natural person;

(k) "liability" includes a debt of a corporation arising under sections 38, 184(19) or 234(3)(g) or (h);

Comment

1. The liability under s. 38 is the liability of a corporation to pay for shares in itself which it has purchased from a former shareholder. S. 38 sets out the status of that debt in the event of a winding up.

2. S. 184(19) sets out a similar priority to s. 38(3) in the

event of a dissenting shareholder exercising his appraisal rights, and the corporation being compelled to buy those shares from the dissenting shareholder.

3. Sections 234(3)(g) and (h) refer to the liability of a corporation under an order of the court following an oppression action by a shareholder, which order directs the corporation to purchase the securities held by the oppressed shareholder, and sets out a similar priority.

(l) "Minister" means the Minister of Consumer and Corporate Affairs;

(m) "ordinary resolution" means a resolution

(i) passed by a majority of the votes cast by the shareholders who voted in respect of that resolution, or

(ii) signed by all the shareholders entitled to vote on that resolution;

Comment

S. 1(m)(i) is the commonly understood definition of "ordinary resolution" and comes from CBCA s. 2(1). S. 1(m)(ii) is a convenient extension of the definition; s. 36(1) (which follows its CBCA counterpart) would validate unanimous signed resolutions, but we think it desirable to include a reference to them in the definition.

(n) "person" includes an individual, partnership, association, body corporate, trustee, executor, administrator or legal representative;

(o) "prescribed" means prescribed by the regulations;

(p) "professional corporation" means a corporation that has the words "Professional Corporation" as the last words of its name;

(q) "redeemable share" means a share issued by a corporation that the corporation, by its articles

(i) is required to purchase or redeem at specified time or upon the happening of a certain event, or

(ii) is required to purchase or

redeem upon the demand of a shareholder, or

(iii) may purchase or redeem upon demand of the corporation,

and includes a share issued by a corporation that may be purchased or redeemed by a combination of any of the methods referred to in subclauses (i) to (iii);

Comment

S. 1(q) varies somewhat from the definition of "redeemable share" in CBCA s. 2(1) with a view to ensuring flexibility.

(r) "Registrar" means the Registrar of Corporations or a Deputy Registrar of Corporations;

Comment

The draft Act would divide the functions of the "Director" and the "Registrar". See our Report, pp. 172-173.

(s) "Registrar's periodical" means the periodical referred to in section 253.1;

Comment

See our comment after s. 253.1.

(t) "resident Canadian" means an individual who is

(a) a Canadian citizen ordinarily resident in Canada,

(b) a Canadian citizen not ordinarily resident in Canada who is a member of a prescribed class of persons, or

(c) a permanent resident within the meaning of the Immigration Act, 1976 and ordinarily resident in Canada, except a permanent resident who has been ordinarily resident in Canada for more than one year after the time at which he first became eligible to apply for Canadian citizenship;

Comment

The definition of "resident Canadian" is required for the purposes of the rule requiring a majority of the directors of a corporation to be resident Canadians (s. 100(3)) and the rule that the directors shall not transact business at a meeting unless a majority of the directors present are resident Canadians (s. 109(3)). If any class of non-resident citizens is to be included in the definition, regulations will be required.

(u) "security," except in Part 6, means a share of any class or series of shares or a debt obligation of a corporation and includes a certificate evidencing such a share or debt obligation;

Comment

This is a general conceptual definition. There is a further definition for Part 6, "Security Certificates, Registers and Transfers", which by and large will deal with securities traded on a public market. We have added the words "except in Part 6" to make it clear that the definition in s. 1(u) does not apply to that Part.

(v) "security interest" means an interest in or charge on property of a corporation to secure payment of a debt or performance of any other obligation of the corporation;

(w) "send" includes deliver;

(x) "series" in relation to shares means a division of a class of shares;

(y) "special resolution" means a resolution passed by a majority of not less than two-thirds of the votes cast by the shareholders who voted in respect of that resolution or signed by all the shareholders entitled to vote on that resolution;

Comment

The definition of "special resolution" differs from the definition in ACA s. 2(1)32 which requires three-quarters vote of those attending the meeting (rather than a two-thirds vote) or a resolution signed by all of the shareholders. There is nothing prohibiting a corporation from entrenching a larger majority such as a three-quarter

majority in its articles of continuance or its articles of incorporation (see s. 6(3)).

(z) "unanimous shareholder agreement" means

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

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

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

NOTE: Definition and Interpretation. CBCA s. 2 with minor variations and additional definitions.

2.(1) For the purposes of this Act,

(a) one body corporate is affiliated with another body corporate if one of them is the subsidiary of the other or both are subsidiaries of the same body corporate or each of them is controlled by the same person, and

(b) if 2 bodies corporate are affiliated with the same body corporate at the same time, they are deemed to be affiliated with each other.

(2) For the purposes of this Act, a body corporate is controlled by a person if

(a) securities of the body corporate to which are attached more than 50% of the votes that may be cast to elect directors of the body corporate are held, other than by way of security only, by or for the benefit of that person, and

(b) the votes attached to those securities are sufficient, if exercised, to elect a majority of the directors of the body corporate.

(3) A body corporate is the holding body corporate of another if that other body corporate is its subsidiary.

(4) A body corporate is a subsidiary of another body corporate if

(a) it is controlled by

(i) that other,

(ii) that other and one or more bodies corporate, each of which is controlled by that other, or

(iii) 2 or more bodies corporate, each of which is controlled by that other,

or

(b) it is a subsidiary of a body corporate that is that other's subsidiary.

NOTE: Relationship of corporations. CBCA s. 2. See Ontario BCA as to (4).

3.(1) For the purposes of this Act, securities of a corporation

(a) issued upon a conversion of other securities, or

(b) issued in exchange for other securities

are deemed to be securities that are part of a distribution to the public if those other securities were part of a distribution to the public.

(2) Subject to subsection (3), for the purposes of this Act, a security of a body corporate

(a) is part of a distribution to the public if, in respect of the security, there has been a filing of a prospectus, statement of material facts, registration statement, securities exchange take-over bid circular or similar document under the laws of Canada, a territory of Canada, a province or a jurisdiction outside Canada, or

(b) is deemed to be part of a distribution to the public if the security has been issued and a filing referred to in clause (a) would be required if the security were being issued currently.

(3) Upon the application of a corporation, the Director may determine that a security of the corporation is not or was not part of a distribution to the public if he is satisfied that his determination would not prejudice any security holder of the corporation.

NOTE: Distribution to the Public. CBCA s. 2.

4. A document or writing required or permitted by this Act may be signed or executed in separate counterparts and the signing or execution of a counterpart shall have the same effect as the signing or execution of the original.

NOTE: Execution in Counterpart. New.

PART 2

INCORPORATION

5. One or more persons may incorporate a corporation by signing articles of incorporation and complying with section 7.

NOTE: Incorporation. CBCA s. 5 varied.

Comment

1. S. 5 would permit a one-shareholder corporation whether the one shareholder be an individual or another body corporate, and would entitle the incorporators to incorporate by following the statutory procedure. See the discussion at p. 10-14 of our Report.

2. For reasons which appear at p. 10 of our Report we have deleted the CBCA disqualification of minors, mental incompetents and bankrupts. Our reasons generally for following the ACA rather than the CBCA are that the disqualifications appear unenforceable, at least without an undue amount of policing by the Registrar, and that the consequences of holding that an apparently incorporated body does not exist are likely to be worse than the consequences of holding that it does exist and that some or all of its shareholders lack full legal capacity.

6.(1) Articles of incorporation shall follow the prescribed form and shall set out, in respect of the proposed corporation,

(a) the name of the corporation,

(b) the classes and any maximum number of shares that the corporation is authorized to issue, and

(i) if there are 2 or more classes of shares, the special rights, privileges, restrictions and conditions attaching to each class of shares, and

(ii) if a class of shares may be issued in series, the authority given to the directors to fix the number of shares in, and to determine the designation of, and the rights, privileges, restrictions and conditions attaching to the shares of, each series,

(c) if the right to transfer shares of the corporation is to be restricted, a statement that the right to transfer shares is restricted and the nature of the restrictions,

(d) the number of directors or, subject to section 102(a), the minimum and maximum number of directors of the corporation, and

(e) any restrictions on the businesses that the corporation may carry on.

(2) The articles may set out any provision permitted by this Act or by law to be set out in the by-laws of the corporation.

(3) Subject to subsection (4), if the articles or a unanimous shareholder agreement require a greater number of votes of directors or shareholders than that required by the Act to effect any action, the provisions of the articles or of the unanimous shareholder agreement prevail.

(4) The articles may not require a greater number of votes of shareholders to remove a director than the number required by section 104.

NOTE: Articles of incorporation. CBCA s. 6 varied.

Comment

1. The articles of incorporation would be the basic constitutional document of the corporation.

2. CBCA 6(1)(b) has been omitted. It requires the articles to show the place in Canada at which the registered office is to be located. We have recommended somewhat different treatment - see s. 19 of the draft Act.

3. Under s. 6(1)(b) no maximum number of authorized shares need be stated in the articles and an unlimited number may therefore be authorized. We suggested otherwise in the draft Act circulated for comment but were persuaded that there is no advantage to be gained from a mandatory restriction.

4. S. 6(2) would allow provisions normally in the by-laws to be protected against change (except by special resolution) by inclusion in the articles.

5. S. 6(3) and 6(4) would allow any provisions (except the provision for removal of directors) to be protected even further, i.e., by requiring an even larger majority.

7.(1) An incorporator shall send to the Registrar

(a) articles of incorporation, and

(b) the documents required by sections 19 and 101.

(2) If the name of the corporation set out in the articles of incorporation contains the words "Professional Corporation", the incorporator shall also send to the Registrar evidence satisfactory to him of the approval of the articles by or on behalf of

(a) the Institute of Chartered Accountants of Alberta,

(b) the Alberta Dental Association,

(c) the College of Physicians and Surgeons of the Province of Alberta, or

(d) the Law Society of Alberta,

as the case may be.

NOTE: Delivery of articles of incorporation. CBCA s. 7. As to subsection (2), see ACA s. 15(3.1).

8. Upon receipt of the documents and evidence required under section 7 and the prescribed fees, the Registrar shall issue a certificate of incorporation in accordance with section 255.

NOTE: Certificate of incorporation. CBCA s. 8 varied.

Comment

1. CBCA s. 8 does not include any provision regarding fees. S. 253.2 of the draft Act permits the Registrar to operate charge accounts.

2. S. 8 embodies the principle that incorporators, upon complying with specific statutory requirements have a right to incorporate: the Registrar would not have a residual discretion to refuse incorporation.

3. See the Comment on s. 253.1 with regard to the publication of notices of incorporations.

9.(1) A corporation comes into existence on the date shown in the

certificate of incorporation.

(2) A certificate of incorporation is conclusive proof for the purposes of this Act and for all other purposes

(a) that the provisions of this Act in respect of incorporation and all requirements precedent and incidental to incorporation have been complied with, and

(b) that the corporation has been incorporated under this Act as of the date shown in the certificate of incorporation.

NOTE: Effect of certificate of incorporation. CBCA s. 9; ACA s. 27.

Comment

1. S. 9 is intended to make the certificate of incorporation conclusive for all purposes of the civil law, and to change the law disclosed by the recent decision of the Appellate Division in C.P.W. Valve & Instrument Ltd. v. Scott, Vanderheyden & Fluid-Poise Instrument Company, [1978], 5 Alta.L.R. (2d) 271 (App.Div.), which casts doubt upon the effectiveness of a certificate of incorporation under the ACA.

2. Under s. 255(3), a certificate of any nature may be dated as of the day the Registrar receives the documents, or as of a later date specified by the Court or by a person submitting the documents.

10.(1) The word "Limited", "Limitee", "Incorporated", "Incorporee" or "Corporation" or the abbreviation "Ltd.", "Ltee", "Inc." or "Corp." shall be the last word of the name of every corporation but a corporation may use and may be legally designated by either the full or the abbreviated form.

(2) Notwithstanding subsection (1), the words "Professional Corporation" shall be the last words of the name of every corporation whose incorporation is approved in accordance with section 7(2).

(3) No person other than a body corporate shall carry on business within Alberta under any name or title that contains the word "Limited", "Limitee", "Incorporated", "Incorporee" or "Corporation" or the abbreviation "Ltd.", "Ltee", "Inc." or "Corp." or the words "Professional

Corporation".

(4) A person carrying on business in contravention of subsection (3) is guilty of an offence and liable upon summary conviction to a fine of not more than $5000.

(5) A corporation may file a notice in prescribed form with the Registrar designating an additional form or forms of its name in accordance with subsection (6).

(6) Subject to section 12(1), the name of the corporation or an additional form of its name in a notice filed under subsection (5) may be in an English form or a French form or in a combined English and French form and the corporation may use and may be legally designated by any of those forms.

(7) Subject to section 12(1), a corporation may, outside Canada, use and may be legally designated by a name in any language form.

(8) A corporation shall set out its name in legible characters in or on all contracts, invoices, negotiable instruments, and orders for goods or services, issued or made by or on behalf of the corporation.

(9) Subject to subsection (8) and section 12(1) and section 85 of The Partnership Act, a corporation may carry on business under or identify itself by a name other than its corporate name.

NOTE: Corporate name. CBCA s. 10; ACA ss. 10, 11 and 16(2).

Comment

1. S. 10 generally follows CBCA s. 10. See Report p. 30-32.

2. The 1978 amendments to the CBCA permitted the word "Limited", "Incorporated", etc. to appear in the middle of the name of the corporation, e.g. "Radio Corporation of America". We think, however, that the fact of limited liability should be drawn to the attention of the public in a more obvious manner and have so provided in s. 10(1) of the draft Act.

3. CBCA s. 10(2) gives the Director a discretion to exempt from s. 10(1) a corporation continuing under the CBCA. It is our view that s. 10(1) of the draft Act would not be onerous and that an Alberta corporation should comply with it. We have therefore not carried forward CBCA s. 10(2).

4. S. 10(2) of the draft Act would carry forward the existing policy of the ACA.

5. The sanction in s. 10(4) of the draft Act is the same as the sanction contained in ACA s. 10 with the exception that the penalty has been changed from $25.00 per day to one sum of $5,000.00 which is easier to enforce and follows the general amounts of penalties under the draft Act.

6. S. 10(6) varies from CBCA s. 10(3) which provides that a corporation may set out its name in its articles in both an English and a French form. The subsection had to be altered in the draft Act because the computer program in place at the Alberta Companies Branch cannot handle two alternate names upon an application for incorporation. Once the corporation is incorporated, the computer can handle a cross-reference. S. 10(6) would permit the corporation to use either an English or a French name following its incorporation.

7. S. 10(7) differs slightly from CBCA s. 10(4) which requires a proposed use of the name in another language in another country to be set out in the articles. This seems to us to be a mechanical requirement which need not be put into the articles of incorporation.

8. A corporation would be allowed to carry on business under a trade name subject to the conditions imposed by s. 10(8) above, and in section 12(1). If it does carry on business under a trade name, and if it falls within s. 85 of The Partnership Act, it would have to register the trade name.

> 11.(1) The Registrar may, upon request, reserve for 90 days a name for
>
> (a) an intended corporation,
>
> (b) a corporation about to change its name, or
>
> (c) an extra-provincial corporation about to continue as a corporation pursuant to section 181.
>
> (2) If requested to do so by the incorporators, a corporation, or an extra-provincial corporation referred to in section 11(1)(c), the Registrar shall assign to the corporation as its name a designated number determined by him.

NOTE: Reservation of name. CBCA s. 11 varied.

Comment

1. The original reservation under s. 11 would be discretionary. An extension of time would also be discretionary. The reservation would not give the incorporators absolute assurance that the Registrar will accept the name; apart from the slip provision in s. 12(4), s. 12(1)(b) would prevent the incorporation if, between the date of the reservation and the submission of the incorporating documents a corporation is incorporated elsewhere in Canada with a conflicting name.

2. The use of a number as a corporate name is useful, particularly in obtaining incorporation without the delay involved in approval of a verbal name. We see no disadvantage in allowing it. We therefore recommend that the practice be sanctioned by statute.

3. CBCA s. 12(4) allows the Director to require a corporation to change its name from a number to a verbal name. We think that such a power is unnecessary; and that the change from a number to a verbal name should be left up to the corporation itself. CBCA s. 12(4) has therefore not been carried forward into the draft Act.

> 12.(1) A corporation shall not be incorporated with, or have, or carry on business under, or identify itself by, or change its name to a name that is
>
> (a) prohibited by the regulations,
>
> (b) identical to the name of a body corporate incorporated under the laws of Alberta,
>
> (c) reserved for an intended corporation or a corporation under section 11(1), or
>
> (d) disapproved by the Registrar pursuant to subsection (2).
>
> (2) The Registrar may disapprove the name or the proposed name of a corporation if, in his opinion, the name
>
> (a) is objectionable,
>
> (b) is likely to mislead or confuse, or
>
> (c) is similar to the name of any other body corporate or to the name of any association, partnership or firm known to the Registrar, if the use of that name would be likely to confuse or mislead, unless the body corporate, association, partnership or firm consents in writing to the

use of that name in whole or in part, and, if required by the Registrar, undertakes to dissolve or change its name to a dissimilar name within 6 months after the filing of articles by which the corporation's name was acquired.

(3) Notwithstanding anything contained in this section, a corporation may be incorporated with a name similar to that of a corporation or an Alberta company which has been struck from the register if

(a) the corporation or Alberta company was struck from the register more than 3 years before such incorporation and has not since been restored to the register,

(b) the Registrar approves the use of the name, and

(c) the name of the new corporation includes the year in which it is incorporated.

(4) If, through inadvertence or otherwise,

(a) a corporation comes into existence with or acquires a name that contravenes subsection (1), or

(b) the Registrar disapproves a corporation's name after it is acquired by the corporation,

the Registrar may, by notice in writing, giving his reasons, direct the corporation to change its name to one that he approves within 60 days of the date of the notice.

(5) The Registrar may give a notice under subsection (4) on his own initiative or at the request of a person who feels aggrieved by the name that contravenes subsection (1).

(6) If a corporation

(a) has been directed to change its name under subsection (4), and

(b) has not appealed the request of the Registrar within 60 days of the date of the notice,

the Registrar may revoke the name of the corporation and assign to it a designated

number, and until changed in accordance with section 167 the name of the corporation is the designated number so assigned.

(7) If 2 or more corporations amalgamate, the amalgamated corporation may have the name of one of the amalgamating corporations, or, with the prior approval in writing of the Registrar,

(a) a distinctive combination, that is not confusing, of the names of the amalgamating corporations, or

(b) a distinctive new name that complies with subsection (1).

(8) The amalgamating corporations shall be deemed to be bodies corporate for the purposes of this section.

(9) If an application is made to revive a corporation under this Act, and between the date of dissolution of the corporation and the date of its revival, another corporation has come into existence with or has acquired a name that is likely to be confused with the name of the corporation to be revived, the Registrar may require, as a condition of the revival, that the revived corporation does not carry on business or, if it seeks to carry on business, that it change its name to a designated number immediately after it is revived.

(10) If the Registrar is satisfied that a professional corporation has ceased to be the holder of a subsisting permit as a professional corporation issued under The Chartered Accountants Act, The Dental Association Act, The Legal Profession Act or The Medical Profession Act, 1975, he may, upon giving notice to the professional corporation of his intention to do so, change the name of the corporation to exclude the words "Professional Corporation" and replace them with the word "Limited" or the abbreviation "Ltd.".

NOTE: Prohibited names. CBCA s. 12 with variations; ACA ss. 12(1) and 16(3); Saskatchewan BCA ss. 295, 296; subsections (3) and (8) are new.

Comment

1. We have discussed the subject of names in our Report at p. 30-32. It is sufficient to say here that, while forceful arguments can be made for leaving incorporators to take

responsibility for corporate names, we think that the Registrar should, in Alberta at this time, continue to regulate the choice of names.

2. The Registrar of Companies suggested that the names of dissolved corporations should, after a reasonable time, become available for new corporations. We agree; such a provision would do something to alleviate the problem of finding new corporate names, and a corporation which has been dissolved for some time cannot be heard to complain about the use of its name. We think however that a precaution should be taken to avoid confusion in the mind of the public, and also to avoid confusion if it should appear that land is registered in the name of the dissolved company, or if some other formal record exists which would give the dissolved company continuing rights. The additional precaution would be to add to the new corporation's name the year of its corporation, e.g., X Co. (1980) Ltd. Section 12(3) would give effect to these views.

3. Section 12(8) is intended to prevent a new corporation from being incorporated under the name of a corporation that was previously amalgamated with another corporation under another name.

> 13.(1) When a corporation has had its name revoked and a name assigned to it under section 12(6), the Registrar shall issue a certificate of amendment showing the new name of the corporation.
>
> (2) The articles of the corporation are amended accordingly on the date shown in the certificate of amendment.

NOTE: Certificate of amendment. CBCA s. 13.

Comment

See the comment on s. 253.1 with regard to the publication of notice.

> 14.(1) This section applies unless the person referred to in subsection (2) and all parties to the contract referred to in that subsection
>
> (a) believe that the body corporate exists and is incorporated under, or
>
> (b) intend that it shall be incorporated under
>
> the laws of a jurisdiction other than Alberta.

(2) Except as provided in this section, if a person enters into a written contract in the name of or on behalf of a body corporate before it comes into existence,

(a) that person is deemed to warrant to the other party to the contract

(i) that the body corporate will come into existence within a reasonable time, and

(ii) that the contract will be adopted within a reasonable time after the body corporate comes into existence,

(b) that person is liable to the other party to the contract for damages for a breach of that warranty, and

(c) the measure of damages for that breach of warranty shall be the same as if the body corporate existed when the contract was made, the person who made the contract on behalf of the body corporate had no authority to do so and the body corporate refused to ratify the contract.

(3) A corporation may, within a reasonable time after it comes into existence, by any act or conduct signifying its intention to be bound thereby, adopt a written contract made before it came into existence in its name or on its behalf, and upon the adoption

(a) the corporation is bound by the contract and is entitled to the benefits of the contract as if the corporation had been in existence at the date of the contract and had been a party to it, and

(b) a person who purported to act in the name of or on behalf of the corporation ceases, except as provided in subsection (5), to be liable under subsection (2) in respect of the contract.

(4) If a person enters into a contract in the name of or on behalf of a corporation before it comes into existence and the contract is not adopted by the corporation within a reasonable time after it comes into existence, that person or the other party to the contract may apply to the Court for an

order directing the corporation to restore to the applicant, in specie or otherwise, any benefit received by the corporation under the contract.

(5) Except as provided in subsection (6), whether or not a written contract made before the coming into existence of a corporation is adopted by the corporation, a party to the contract may apply to the Court for an order

(a) fixing obligations under the contract as joint or joint and several, or

(b) apportioning liability between or among the corporation and a person who purported to act in the name of or on behalf of the corporation,

and upon the application the Court may make any order it thinks fit.

(6) A person who enters into a written contract in the name of or on behalf of a body corporate before it comes into existence is not in any event liable for damages under subsection (2) if the contract expressly provides that he is not to be so liable.

NOTE: Pre-incorporation contracts. CBCA s. 14 substantially varied.

Comment

1. See the discussion at page 39-45 of our Report of the subject of contracts entered into on behalf of corporations not yet in existence.

2. S. 14(2) would, in effect, impose on a person entering into a written contract on behalf of a non-existent body corporate the liability of a purported agent for breach of warranty of authority, though the warranty would relate to the future and not the time of the contract. S. 14(6) would allow him to contract out of the liability. If the body corporate comes into existence and adopts the contract he would be exonerated from liability, except for the power of the court under s. 14(5) to fix liability under the contract or to apportion it.

3. S. 14(2)(c) would leave the damages to be determined on the same principles as damages for breach of warranty of authority.

4. S. 14(3) would change the common law rule which prohibits a corporation from adopting a contract made on its behalf before it came into existence.

5. Section 14(1) would make section 14 applicable unless the person who enters into the written contract in the name of or on behalf of the non-existent corporation, and all parties to the contract, believed that the body corporate was, or intended that it would be incorporated under the laws of Canada or another jurisdiction.

PART 3

CAPACITY AND POWERS

15.(1) A corporation has the capacity and, subject to this Act, the rights, powers and privileges of a natural person.

(2) A corporation has the capacity to carry on its business, conduct its affairs and exercise its powers in any jurisdiction outside Alberta to the extent that the laws of that jurisdiction permit.

NOTE: Capacity of a corporation. CBCA s. 15. "Alberta" has been subsituted for "Canada" in s. 15(2).

Comments

1. S. 15(1) would abolish the present rule that a corporation cannot enter into a contract except for an object authorized by its memorandum. See Report p. 36-38.

2. S. 15(2) would give the corporation extra-provincial capacity to the extent that provincial legislation can do so, and would allow it to receive powers from other jurisdictions in which it may wish to carry on business. It is somewhat similar to ACA s. 8(2).

16.(1) It is not necessary for a by-law to be passed in order to confer any particular power on the corporation or its directors.

(2) A corporation shall not carry on any business or exercise any power that it is restricted by its articles from carrying on or exercising, nor shall the corporation exercise any of its powers in a manner contrary to its articles.

(3) No act of a corporation, including any transfer of property to or by a corporation, is invalid by reason only that the act or transfer is contrary to its articles or this Act.

NOTE: Restriction on powers. CBCA s. 16.

Comments

1. S. 16(1) is probably unnecessary but it is included for

uniformity and for greater certainty.

2. The articles of incorporation, with the support of section 16(2), or another Act, might prohibit a corporation from carrying on a particular business. If the corporation acted in a manner contrary to a restriction contained in its articles of incorporation it could neither claim nor raise the defence of ultra vires against outsiders. If, however, the act of the corporation would be illegal if it were done by a natural person, the proposed Act would not prevent a corporation any more than a natural person from raising the illegality of the act as a defence to an action.

17. No person is affected by or is deemed to have notice or knowledge of the contents of a document concerning a corporation by reason only that the document has been filed by the Registrar or is available for inspection at an office of the corporation.

NOTE: No constructive notice. CBCA s. 17.

Comment

Under the present law relating to Alberta companies, a person dealing with the company is deemed to have notice of what appears in the memorandum and articles of association, so that if the company acts beyond its powers, or if those acting on behalf of the company act in contravention of the articles, the person will find that he cannot enforce his contract against the company. S. 17 is intended to change that rule, in conjunction with the other sections in this Part.

18. A corporation, a guarantor of an obligation of the corporation, or a person claiming through the corporation, may not assert against a person dealing with the corporation or dealing with any person who has acquired rights from the corporation that

(a) the articles, by-laws or any unanimous shareholder agreement have not been complied with,

(b) the persons named in the most recent notice filed by the Registrar under section 101 or 108 are not the directors of the corporation,

(c) the place named as the registered office in the most recent notice filed by the Registrar under section 19 is not the registered office of the corporation,

(c.1) the post office box designated as the address for service by mail in the most recent notice filed by the Registrar under section 19 is not the address for service by mail of the corporation,

(d) a person held out by the corporation as a director, an officer or an agent of the corporation

(i) has not been duly appointed, or

(ii) has no authority to exercise a power or perform a duty which the director, officer or agent might reasonably be expected to exercise or perform,

(e) a document issued by any director, officer or agent of the corporation with actual or usual authority to issue the document is not valid or not genuine, or

(f) financial assistance referred to in section 42 or a sale, lease or exchange of property referred to in section 183 was not authorized,

except where the person has, or by virtue of his position with or relationship to the corporation ought to have, knowledge to the contrary.

NOTE: Authority of directors, officers and agents. CBCA s. 18, with variation in (d).

Comments

1. CBCA s. 18 enacts the internal management rule and is in general acceptable.

2. CBCA s. 18 precludes a corporation and its guarantor from setting up the irregularities and lack of authority set out in it. At the suggestion of our lawyer consultants, the draft Act extends that statutory estoppel to "a person claiming through the corporation" so that, for example, a second mortgagee could not set up against the first mortgagee an irregularity which the corporation itself could not set up.

3. We think that a person searching at the Registrar's office should be entitled to rely on what he finds, and we have therefore changed s. 18(b) so that it would be a notice of directors "filed" by the Registrar that the corporation

could not contest, and not one which has been "sent" to the Registrar but which may not yet have reached him.

4. CBCA s. 18(d) would preclude a corporation from asserting that a director, officer or agent "has no authority to exercise the powers and perform the duties that are customary in the business of the corporation or usual for such director, officer or agent". This appears to set up two tests, firstly, whether or not the act is customary for that particular corporation, and, secondly, whether or not the act is "usual", and to bind the corporation if either test is satisfied. We are particularly concerned with the word "usual". It refers to "such director, officer or agent" and therefore grammatically refers to the particular individual whose authority is in question. If that is what is meant, the second test appears to be included in the first. The alternative would be that what is meant is "usual" for directors, officers or agents generally or for corporations of the kind involved or in the industry involved, but generalization is difficult, if not impossible, in view of the great diversity of corporations. We think that it would be better to substitute the single test of reasonable expectation. We think that that test would allow the courts to consider all the circumstances, and, indeed, that it is probably the test which they would apply anyway. We think that it would also provide a sufficient foundation for customary reliance on apparent authority.

5. S. 18(d) would not protect a party who relies on a forged signature. S. 18(e), however, would give some protection to a party who accepts a forged or unauthorized document. It would do so only if the document is "issued", a word which implies some degree of apparent regularity in the process, and if the functionary who issues it has actual authority, or would usually have authority, to do so. We do not see any better way to grapple with a problem which may arise under very diverse circumstances.

6. The concluding words of CBCA s. 18 could be construed to mean that a person with knowledge of the true facts would be deprived of the protection of the section only if his knowledge is acquired by virtue of his relationship to the company. While we think this to be the less likely interpretation we have re-arranged the wording so that it is clearly only the imputation of knowledge which would depend upon the relationship: if the person dealing with the company knows the true facts, the source of his knowledge would be immaterial.

PART 4

REGISTERED OFFICE, RECORDS AND SEAL

19.(1) A corporation shall at all times have a registered office within Alberta.

(2) A notice of

(a) the registered office,

(b) a separate records office, if any, and

(c) the post office box designated as the address for service by mail, if any,

shall be sent to the Registrar in prescribed form together with the articles of incorporation.

(3) Subject to subsection (4), the directors of the corporation may at any time

(a) change the address of the registered office within Alberta,

(b) designate, or revoke or change a designation of, a records office within Alberta, or

(c) designate, or revoke or change a designation of, a post office box within Alberta as the address for service by mail of the corporation.

(4) If the directors of a corporation designate a post office box as the corporation's address for service by mail, they shall by the same resolution revoke any designation of a records office filed with the Registrar.

(5) A corporation shall send to the Registrar within 15 days of any change under subsection (3) or (4), a notice of that change in prescribed form and the Registrar shall file it.

(6) The corporation shall ensure that its registered office and its records office, if any, are

(a) accessible to the public during normal business hours, and

(b) readily identifiable from the address or other description given

in the notice referred to in subsection (2).

(7) Unless the directors designate a separate records office, the registered office of a corporation is also its records office.

NOTE: Registered office, records office and designated P.O. Box as an address for service by mail. CBCA s. 19 varied; ACA s. 73.

Comments

1. See our Report p. 33-35.

2. S. 19(1) differs from the CBCA in that it would permit a corporation to have a registered office and a separate records office it it chooses to do so. In many cases the registered office will be the office of the corporation's solicitors and it will be impractical for the corporation to keep all of the required records there.

3. The draft Act which we circulated for discussion carried forward the principle of ACA s. 74(1)(a) by requiring a corporation to display its name outside its registered office. We have been persuaded that that requirement serves little purpose; is a burden upon those who comply with it, and we have therefore deleted it. We have substituted s. 19(6) which embodies a suggestion made to us during consultation for the benefit of those trying to locate a corporation's registered office.

4. The time period for filing the notice of any change is the same as in the present section 73(2)(b) of the ACA. A corporation which does not file a notice of change acts at its peril since it must at all times have an address for service, and that address is deemed to be the address for service until it is changed, so that the corporation will be bound by service effected at that address.

20.(1) A corporation shall prepare and maintain at its records office records containing

(a) the articles and the by-laws, all amendments to the articles and by-laws, a copy of any unanimous shareholder agreement and any amendment to a unanimous shareholder agreement,

(b) minutes of meetings and resolutions of shareholders,

(c) copies of all notices required by

section 101 or 108,

(d) a securities register complying with section 46,

(e) copies of the financial statements, reports and information referred to in section 149(1), and

(f) a register of disclosures made pursuant to section 115.

(2) Notwithstanding subsection (1), a central securities register may be maintained at an office in Alberta of a corporation's agent referred to in section 46(2)(a), and a branch securities register may be kept at any place in or out of Alberta designated by the directors.

(3) If a central securities register or registers are maintained under subsection (2) at a place other than the records office, the corporation shall maintain at its records office a record containing the names and addresses of all such agents and offices and descriptions of all such central securities registers.

(4) A corporation which

(a) complies with section 22(2), and

(b) maintains in Canada a register or record referred to in section 20(3).

complies with subsection (1).

(5) In addition to the records described in subsection (1), a corporation shall prepare and maintain adequate accounting records and records containing minutes of meetings and resolutions of the directors and any committee of the directors.

(6) For the purposes of subsections (1)(b) and (2), if a body corporate is continued under this Act, "records" includes similar records required by law to be maintained by the body corporate before it was so continued.

(7) The records described in subsection (5) shall be kept at the registered office or records office of the corporation or at any other place the directors think fit and shall at all reasonable times be open to examination by the directors.

(8) If accounting records of a corporation are kept at a place outside Alberta, there shall be kept at the registered office or records office or at any other place in Alberta the directors think fit, accounting records adequate to enable the directors to ascertain the financial position of the corporation with reasonable accuracy on a quarterly basis and those records shall at all reasonable times be open to examination by the directors.

(9) A corporation that, without reasonable cause, fails to comply with this section is guilty of an offence and liable on summary conviction to a fine not exceeding $5000.

NOTE: Corporate records. CBCA 20, varied.

Comments

1. Most of s. 20 is really no more onerous than the present provisions of the ACA. By implication an Alberta company is presently required to keep a copy of its memorandum and articles, since, under ACA s. 52, it must provide a copy to a member upon request. ACA s. 145 requires that minutes of all general meetings and meetings of the directors be maintained. While there is no specific requirement in the ACA that a company keep a copy of a notice of directors or of a change of directors (these being the notices required by ss. 101 and 108 of the draft Act), ACA s. 79 requires the maintenance of a register of directors. The securities register referred to in s. 20(1)(d) of the draft Act is a combination of the register of members under ACA s. 53 and the register of holders of debentures under ACA s. 101(1). The requirement that a copy of any unanimous shareholder agreement must be kept at the records office of the corporation, reflects the importance of the statutory effect given to a unanimous shareholder agreement by s. 140 of the draft Act.

2. S. 20(1)(e) does not appear in the CBCA. It would require the corporation to keep available for shareholders copies of annual financial statements. S. 151 ofthe draft Act would require it to keep copies of the accounts of subsidaries and bodies corporate whose accounts are consolidated with those of the corporation. S. 20(2) of the draft Act, when read in conjunction with s. 46(2)(a), would allow a corporation to keep its securities register at the office of a trust company, or even to keep registers of different securities at different trust companies; s. 20(3) would require a list of names and addresses of the trust companies to be kept at the records office. "Branch" securities registers are provided for, but, since the information from a branch securities register would be required to go into a central securities register, no substantial formalities are required for them. The two subsections come from a suggestion made

to us during consultation.

3. S. 22(1) and (2) would make it unnecessary for a record to be physically present at the records office if the corporation makes available at the records office a reproduction of the record or facilities to examine it. It would therefore allow a computer record to be stored elsewhere, with a terminal at the registered office; that is because the object of the requirement is to enable a person to obtain the recorded information at the registered office; it is the accessibility of the record, and not its physical location, which is important. We have, however, accepted the suggestion of the Alberta Institute of Chartered Accountants that the physical location of the record should be in Canada; we think that it should be under the jurisdiction of Canadian courts.

4. S. 115 of the draft Act would require disclosure by directors and officers of adverse material interests in contracts entered into by the corporation. S. 20(1)(f) would require the corporation to make a record of such disclosures available to shareholders. See the discussion at p. 63 of our Report.

5. S. 20(5) would cover the requirement to keep minutes of directors presently imposed by ACA s. 145 and the requirement to keep adequate accounting records presently imposed by ACA s. 119(1).

> 21.(1) The directors and shareholders of a corporation, their agents and legal representatives may examine the records referred to in section 20(1) during the usual business hours of the corporation free of charge.
>
> (2) A shareholder of a corporation is entitled upon request and without charge to one copy of the articles and by-laws and of any unanimous shareholder agreement, and amendments to them.
>
> (3) Creditors of a corporation and their agents and legal representatives may examine the records referred to in section 20(1)(a), (c) and (d), other than a unanimous shareholder agreement or an amendment to a unanimous shareholder agreement, during the usual business hours of the corporation upon payment of a reasonable fee and may make copies of those records.
>
> (4) Any person may examine the records referred to in section 20(1)(c) and (d) during the usual business hours of the corporation upon payment of a reasonable fee and may make copies of those records.
>
> (5) If the corporation is a

distributing corporation, any person, upon payment of a reasonable fee and upon sending to a corporation or its agent the statutory declaration referred to in subsection (9), may upon application require the corporation or its agent to furnish within 10 days from the receipt of the statutory declaration a list (in this section referred to as the "basic list") made up to a date not more than 10 days before the date of receipt of the statutory declaration setting out

(a) the names of the shareholders of the corporation,

(b) the number of shares owned by each shareholder, and

(c) the address of each shareholder,

as shown on the records of the corporation.

(6) A person requiring a corporation to supply a basic list may, if he states in the statutory declaration referred to in subsection (5) that he requires supplemental lists, require the corporation or its agent upon payment of a reasonable fee to furnish supplemental lists setting out any changes from the basic list in the information provided in it for each business day following the date the basic list is made up to.

(7) The corporation or its agent shall furnish a supplemental list required under subsection (6)

(a) on the date the basic list is furnished, if the information relates to changes that took place prior to that date, and

(b) on the business day following the day to which the supplemental list relates, if the information relates to changes that take place on or after the date the basic list is furnished.

(8) A person requiring a corporation to supply a basic list or a supplemental list may also require the corporation to include in that list the name and address of any known holder of an option or right to acquire shares in the corporation.

(9) The statutory declaration required under subsection (5) shall state

(a) the name and address of the applicant,

(b) the name and address for service of the body corporate if the applicant is a body corporate, and

(c) that the basic list and any supplemental lists obtained pursuant to subsection (6) will not be used except as permitted under subsection (11).

(10) If the applicant is a body corporate, the statutory declaration shall be made by a director or officer of the body corporate.

(11) A list of shareholders obtained under this section shall not be used by any person except in connection with

(a) an effort to influence the voting of shareholders of the corporation,

(b) an offer to acquire shares of the corporation, or

(c) any other matter relating to the affairs of the corporation.

(12) A person who, without reasonable cause, contravenes this section is guilty of an offence and liable on summary conviction to a fine of not more than $5000 or to imprisonment for a term of not more than 6 months or to both.

NOTE: Access to corporate records. CBCA s. 21, varied.

Comments

1. See the discussion of access to corporate records at pp. 34-35 of our Report.

2. S. 21 of the draft Act has been divided to distinguish more clearly the classes of people who would have access to different classes of corporate records. Anyone would have the right to see the securities register and notices of directors; creditors would in addition have the right to see the articles of incorporation and by-laws; shareholders would have the right to see all these and any unanimous shareholder agreement, shareholders minutes and disclosures of directors' interests in contracts. Directors would have the right to see all records.

3. A shareholder is entitled under ACA s. 52(1) to obtain a copy of the memorandum and articles of association. S. 21(2) has much the same effect.

4. S. 21(5) of the draft Act provides for the furnishing of a list of shareholders and addresses for use in a take-over bid or proxy fight. It would apply only to a distributing corporation, unlike CBCA s. 21(3).

22.(1) All registers and other records required by this Act to be prepared and maintained may be in a bound or loose-leaf form or in a photographic film form, or may be entered or recorded by any system of mechanical or electronic data processing or any other information storage device that is capable of reproducing any required information in intelligible written form within a reasonable time.

(2) If a person is entitled to examine any register or record that is maintained by a corporation in a form other than a written form and makes a request of the corporation to do so, the corporation shall

(a) make available to that person within a reasonable time a reproduction of the text of the register or record in intelligible written form, or

(b) provide facilities to enable that person to examine the text of the register or record in an intelligible written form otherwise than by providing a reproduction of that text,

and shall allow that person to make copies of that register or record.

(3) A corporation and its agents shall take reasonable precautions to

(a) prevent loss or destruction of,

(b) prevent falsification of entries in, and

(c) facilitate detection and correction of inaccuracies in,

the registers and other records required by this Act to be prepared and maintained.

(4) A person who, without reasonable cause, contravenes this section is guilty of an offence and liable on summary conviction

to a fine of not more than $5000 or to imprisonment for a term of not more than 6 months or both.

NOTE: Form of records. CBCA s. 22, with the addition of new s. 22(2).

Comments

1. S. 22(1) would effect a minor technical reform. It recognizes that registers and records are not kept in massively bound books as they were in olden days.

2. We think that s. 22(2) is necessary in order to ensure that the person attending at the records office to examine records which he is entitled to examine, is not simply handed a piece of computer tape and told to go ahead.

23.(1) A corporation may adopt and change a corporate seal which shall contain the name of the corporation.

(2) A document executed on behalf of a corporation by a director, an officer or an agent of the corporation, is not invalid merely because the corporate seal is not affixed to the document.

(3) Share certificates of a corporation may be issued under its corporate seal or a facsimile of that corporate seal.

(4) A document requiring authentication by a corporation may be signed by a director or the secretary or other authorized officer of the corporation and need not be under its corporate seal.

(5) A corporation may adopt a facsimile of its corporate seal for use in any other jurisdiction outside Alberta that complies with the laws of that jurisdiction.

NOTE: Corporate seal. CBCA s. 23 as to subsection (2).

Comment

1. S. 23.(1) would allow a corporation to have a corporate seal but would not compel it to do so. See our Report, p. 45 for a discussion of the subject.

2. None of the modern business corporations Acts prohibit a corporate seal and we do not think that the proposed ABCA should do so. Having made this recommendation, however, we recommend that it make additional provisions regarding the corporate seal to provide that if a corporation does adopt a

seal, it must have the name of the corporation upon it; and that if a corporation has a seal, it may use a facsimile on its share certificates if it desires to issue its share certificates under seal, which we think is necessary for a corporation distributing its share certificates to the public; we have retained the ACA s. 290 in s. 23(4); and we have retained the provisions of the ACA s. 152(1) in s. 23(5).

PART 5

CORPORATE FINANCE

24.(1) Shares of a corporation shall be in registered form and shall be without nominal or par value.

(2) If a body corporate is continued under this Act, a share with nominal or par value issued by the body corporate before it was so continued is, for the purpose of subsection (1), deemed to be a share without nominal or par value.

(3) If a corporation has only one class of shares, the rights of the holders of those shares are equal in all respects and include the rights

(a) to vote at any meeting of shareholders of the corporation,

(b) to receive any dividend declared by the corporation, and

(c) to receive the remaining property of the corporation on dissolution.

(4) The articles may provide for more than one class of shares and, if they so provide,

(a) the rights, privileges, restrictions and conditions attaching to the shares of each class shall be set out in the articles, and

(b) the rights set out in subsection (3) shall be attached to at least one class of shares but all of those rights are not required to be attached to one class.

(5) Subject to section 27, if a corporation has more than one class of shares, the rights of the holders of the shares of any class are equal in all respects.

NOTE: Shares and classes of shares. CBCA s. 24 with the addition of subsection (5).

Comment

1. S. 24(1) would abolish par value shares. See the discussion

at p. 72-74 of our Report.

2. S. 24(1) would require that the shares be in registered form. ACA s. 72 permits a company to issue a share warrant stating that the bearer is entitled to the shares covered by the warrant (which should not be confused with a share warrant entitling the holder to acquire shares). We see no reason for the use of share warrants as provided by the ACA, and we accordingly recommend adoption of the CBCA provision.

3. When a body corporate continues under the proposed ABCA, s. 24(2) would treat par value shares issued by it before continuance as shares without nominal or par value. Note that s. 181(11) would allow the Registrar to permit the body corporate under some circumstances to refer in its articles of continuance to a class of shares as having a nominal or par value.

4. Under s. 24(3), if there is only one class of shares, the rights of the holders would be equal and include the rights to vote, to receive dividends, and to receive property on dissolution; that is the same as CBCA s. 24(3). S. 24(5) however goes beyond the CBCA to provide that in every case the rights of the holders of a class of shares would be equal in all respects, though s. 27 would permit differences to be made between different series of the same class. See the general discussion at p. 74-75 of our Report.

> 25.(1) Subject to the articles, the by-laws and any unanimous shareholder agreement and to section 28, shares may be issued at such times and to such persons and for such consideration as the directors may determine.
>
> (2) Shares issued by a corporation are non-assessable and the holders are not liable to the corporation or to its creditors in respect of those shares.
>
> (3) A share shall not be issued until the consideration for the share is fully paid in money or in property or past service that is not less in value than the fair equivalent of the money that the corporation would have received if the share had been issued for money.
>
> (4) In determining whether property or past service is the fair equivalent of a money consideration, the directors may take into account reasonable charges and expenses of organization and re-organization and payments for property and past services reasonably expected to benefit the corporation.
>
> (5) For the purposes of this section, "property" does not include a promissory note

or a promise to pay.

NOTE: Issue of shares. CBCA s. 25.

Comment

1. The reference to s. 28 in s. 25(1) preserves any pre-emptive right which shareholders may have to acquire shares from a new issue.

2. In exercising their powers under s. 25(1) the directors are subject to a liability imposed under s. 113(1) if the consideration received for the shares is less than the fair equivalent in money and to their duties of honesty, good faith, care, diligence and skill under s. 117(1), and if the powers are abused the shareholder would have recourse by a derivative action under s. 232 or an application based on oppression under s. 234.

3. It will be noted that the powers of the directors under s. 25(1) could be restricted by the articles, the by-laws, or by a unanimous shareholder agreement.

4. S. 25(2) and (3) would prevent a corporation from issuing partly paid shares.

5. S. 25(3) would require the share to be fully paid for upon issue, particularly when read in conjunction with s. 25(5), which by saying that a promissory note or a promise to pay it is not "property", limits the kinds of consideration which the corporation may accept for the shares.

6. S. 25(4) would allow a corporation to issue shares to promoters and others in recognition of, and as payment for the value of services given, expenses incurred, and property contributed, by them.

7. S. 25(3) would require the directors, if they issue a share in consideration of property or past service, to stipulate for and receive a consideration which is not less in value than the fair equivalent of the money that the corporation would have received if the share had been issued for money. It is implicit in the provision that what the corporation would have received if the share had been issued for money would have been an amount at least equal to the true value of the share. Note that s. 113(1) would impose liability upon directors for any deficiency in the consideration where the share is issued for a consideration other than money.

26.(1) A corporation shall maintain a separate stated capital account for each class and series of shares it issues.

(2) A corporation shall add to the appropriate stated capital account the full amount of any consideration it receives for any shares it issues.

(3) Notwithstanding section 25(3) and subsection (2) of this section, if a corporation issues shares

(a) in exchange for

(i) property other than a promissory note or promise to pay, or

(ii) issued shares of the corporation of a different class or series,

and all the shares issued by the corporation in the exchange are redeemable shares created for that purpose, or shares which the corporation is required to issue pursuant to conversion rights or privileges attached to the shares to be exchanged at the time that they were issued, or

(b) pursuant to

an amalgamation agreement referred to in sections 176 or 180.1 or

(ii) an arrangement referred to in section 186(1)(b) or (c)

to shareholders of an amalgamating body corporate who receive the shares in addition to or instead of securities of the amalgamated body corporate,

the corporation may add to the stated capital accounts maintained for the shares of the classes or series issued the whole or any part of the amount of the consideration it received in the exchange.

(4) On the issue of a share a corporation shall not add to a stated capital account in respect of the share it issues an amount greater than the amount of the consideration it received for the share.

(5) If a corporation proposes to add any amount to a stated capital account it maintains in respect of a class or series of shares and

(a) the amount to be added was not received by the corporation as consideration for the issue of shares, and

(b) the corporation has issued any outstanding shares of more than one class or series,

the addition to the stated capital account must be approved by special resolution unless all the issued and outstanding shares are shares of not more than 2 classes of convertible shares referred to in section 37(5).

(6) When a body corporate is continued under this Act, it may add to a stated capital account any consideration received by it for a share it issued.

(7) A corporation at any time may, subject to subsection (5), add to a stated capital account any amount it credited to a retained earnings or other surplus account.

(8) When a body corporate is continued under this Act, subsection (2) does not apply to the consideration received by it before it was so continued unless the share in respect of which the consideration is received is issued after the corporation is so continued.

(9) When a body corporate is continued under this Act, any amount unpaid in respect of a share issued by the body corporate before it was so continued and paid after it was so continued shall be added to the stated capital account maintained for the shares of that class or series.

(10) For the purposes of sections 32(2), 36(3), 40, 42(1) and 179(2)(a), when a body corporate is continued under this Act, its stated capital is deemed to include the amount that would have been included in the stated capital of the body corporate if it had been incorporated under this Act.

(11) A corporation shall not reduce its stated capital or any stated capital account except in the manner provided in this Act.

(12) Subsections (1) to (11) and any other provisions of this Act relating to stated capital do not apply to an open-end mutual fund.

(13) For the purposes of this section, "open-end mutual fund" means a corporation that makes a distribution to the public of its shares and that carries on only the business of investing the consideration it receives for the shares it issues, and all or substantially all of those shares are

redeemable upon the demand of a shareholder.

NOTE: Stated capital accounts. CBCA s. 26.

Comment

1. S. 26(1) would require a corporation to maintain on its balance sheet a separate stated capital account for each class of shares it issues; s. 26(2) would require the corporation to add to the appropriate stated capital account the full amount of any consideration it receives for any shares it issues; and s. 26(11) would require the corporation not to reduce its stated capital or any stated capital account except in the manner provided by the proposed Act. It will be noted that s. 36 of the draft Act would allow a reduction by special resolution for any purpose, including the purpose of extinguishing or reducing a liability in respect of an amount unpaid on a share, the purpose of a distribution of capital to shareholders, or the purpose of writing off an amount not represented by assets; though s. 36(3) would preclude such a reduction if a liquidity test or a solvency test is not met. Except as against such a reduction, the stated capital account would be protected by the provision in s. 40 that a dividend cannot be paid unless there are reasonable grounds for believing that after it is paid the realizable value of the corporation's assets would be equal to the aggregate of its liabilities and stated capital of all classes, by a somewhat similar provisions applicable to a redemption of shares under s. 34, and by other prohibitions in the draft Act against payments which do not meet liquidity or solvency tests.

2. S. 26(4) would preclude the corporation from adding to a stated capital account in respect of a share an amount greater than the amount of the consideration it receives for the share and s. 26(5) would require a special resolution for any other addition to a stated capital account unless there is only one class of shares, or two classes of mutually convertible shares. In the absence of such provisions, a class of shareholders could receive a return of capital in excess of that provided by them, to the detriment of other shareholders.

3. CBCA s. 26(1.2) makes an exception to the rule that the corporation must add to a stated capital account the whole of the consideration received for the sale of a share. That exception applies only if the share is issued for property of a person or for shares of a body corporate, and if the person or body corporate does not deal at arm's length with the corporation. Representations were made to us that the exception should be extended to include transactions involving a person or body corporate dealing at arm's length. It appears to us, however, that the exception would then trench substantially upon the provisions for requiring stated capital, and that, as there is no reason to distinguish for this purpose between monetary and non-monetary proceeds of sale, the exception as extended

would destroy the rational foundation for what would remain of those provisions. S. 26(3)(a) of the draft Act would approach the problem somewhat differently; it would make an exception for a case in which a corporation exchanges for property redeemable shares created for the purpose of the exchange. We think that that restriction would leave the provisions for stated capital intact while allowing the corporation enough flexibility to achieve the desired objectives. S. 26(3)(b) comes directly from CBCA s. 26(1.2)(b). We have some reservations about provisions which are designed to allow a limited number of individuals to obtain income tax relief, but we concluded that a business corporations Act should not consciously place a bar in the way of transactions which are sanctioned by other parts of the law.

4. Under s. 26(6) a company or corporation that had issued par value shares before its continuation under the new Act, and had issued those shares at a price in excess of the par value, might include the excess in its stated capital and thus convert what was formerly a designated surplus to part of its stated capital. It will be noted that in applying the solvency test under ss. 32(2), 36, 40, 42 and 179, such a designated surplus, if not included as part of the stated capital, must nevertheless be treated as though it had been in order to meet the solvency test: see s. 26(10).

5. The rules about stated capital would make it difficult, if not impossible, for an open-end mutual fund corporation to carry on its business of distributing shares to the public, investing the proceeds, and redeeming the shares on demand. Further, the protection of the rules is not needed when that is the corporation's only business. S. 26(12) therefore exempts open-end mutual funds from s. 26.

> 27.(1) The articles may authorize the issue of any class of shares in one or more series and may authorize the directors to fix the number of shares in each series and to determine the designation, rights, privileges, restrictions and conditions attaching to the shares of each series, subject to the limitations set out in the articles.
>
> (2) If any cumulative dividends or amounts payable on return of capital in respect of a series of shares are not paid in full, the shares of all series of the same class participate rateably in respect of accumulated dividends and return of capital.
>
> (3) No rights, privileges, restrictions or conditions attached to a series of shares authorized under this section shall confer upon a series a priority in respect of voting, dividends or return of capital over any other series of shares of the same class that are then outstanding.

(4) Subsection (3) does not apply to a right or privilege to exchange a share or shares for, or to convert a share or shares into, a share or shares of another class.

(5) Before the issue of shares of a series authorized under this section, the directors shall send to the Registrar articles of amendment in prescribed form to designate a series of shares.

(6) Upon receipt of articles of amendment designating a series of shares, the Registrar shall issue a certificate of amendment in accordance with section 255.

(7) The articles of the corporation are amended accordingly on the date shown in the certificate of amendment.

NOTE: Shares in series. CBCA s. 27.

Comment

1. S. 27 provides for the issue of classes of shares in one or more series, but leaves it to the articles of incorporation to provide for necessary authority. The articles, however, may delegate to the directors authority to fix the number of, and to determine the rights and restrictions attaching to, the shares in a series. S. 27(3) and (4) together define the fundamental respects in which the equality of the shares within the class, as provided for in s. 24(5) of the draft Act, cannot be subverted. The inclusion of voting in s. 27(3) is a departure from the CBCA.

2. S. 27(2) provides for rateable sharing of accumulated unpaid dividends and returns of capital among all the shares of every series of a class, and s. 27(3) prohibits the giving of priority in respect of dividend or return of capital to a later series over an earlier series of the same class.

3. S. 27(5) to s. 27(7) are procedural.

28.(1) If the articles or a unanimous shareholders agreement so provide, no shares of a class shall be issued unless the shares have first been offered to the shareholders holding shares of that class, and those shareholders have a pre-emptive right to acquire the offered shares in proportion to their holdings of the shares of that class, at the same price and on the same terms as those shares are to be offered to others.

(2) Notwithstanding that the articles provide the pre-emptive right referred to in subsection (1), shareholders have no

pre-emptive right in respect of shares to be issued

(a) for a consideration other than money,

(b) as a share dividend, or

(c) pursuant to the exercise of conversion privileges, options or rights previously granted by the corporation.

NOTE: Shareholder's pre-emptive right. CBCA s. 28.

Comment

See the discussion of the subject of pre-emptive rights at pp. 79-80 of our Report.

29.(1) A corporation may issue certificates, warrants or other evidences of conversion privileges, options or rights to acquire securities of the corporation, and shall set out their conditions

(a) in the certificates, warrants or other evidences, or

(b) in certificates evidencing the securities to which the conversion privileges, options or rights are attached.

(2) Conversion privileges, options and rights to purchase securities of a corporation may be made transferable or non-transferable, and options and rights to purchase may be made separable or inseparable from any securities to which they are attached.

(3) If a corporation has granted privileges to convert any securities issued by the corporation into shares, or into shares of another class or series, or has issued or granted options or rights to acquire shares, the corporation shall reserve and continue to reserve sufficient authorized shares to meet the exercise of those conversion privileges, options and rights.

NOTE: Options and other rights to acquire securities. CBCA s. 29.

Comment

S. 29 authorizes the issue of instruments entitling holders to convert or acquire securities. The provisions are flexible and are necessary to the efficient carrying on of corporate financing.

30.(1) Except as provided in subsection (2) and sections 31 to 34, a corporation

(a) shall not hold shares in itself or in its holding body corporate, and

(b) shall not permit any of its subsidiary bodies corporate to acquire shares of the corporation.

(2) Notwithstanding subsection (1), not more than 1% of the issued shares of each class of shares of a holding body corporate may be held by all the subsidiaries of the holding body corporate.

(3) Subject to subsections (2) and (4), a corporation shall cause a subsidiary body corporate of the corporation that holds shares of the corporation to sell or otherwise dispose of those shares within 5 years from the date

(a) the body corporate became a subsidiary of the corporation, or

(b) the corporation was continued under this Act.

(4) Subsection (3) does not apply to shares acquired by the subsidiary body corporate before the commencement of this Act.

NOTE: Prohibited share holdings in a corporation or its holding body corporate. CBCA s. 30 with the addition of subsections (2) and (4).

Comment

1. S. 30(1) is necessary to prevent a corporation from using the purchase of its shares by a subsidiary as a means of avoiding the requirements of the proposed ABCA with regard to the acquisition of its own shares. ACA s. 41.8(1) already prohibits a subsidiary company from acquiring any shares of its holding company in excess of 1% of the number of issued shares of the holding company; the subsection was enacted as a result of the Institute's Report 21: "Purchase by a Company of Shares which it has Issued".

2. S. 30(1) is also desirable in order to prevent management of the holding company from causing a subsidiary to buy in shares of the holding company so as to get rid of the opposition of those from whom the shares are bought. S. 31(3), which would prevent the shares being voted, would deal with part of the problem but not with all of it.

3. The holding of 1% of the parent's shares by a subsidiary, though difficult to explain in logic, does not appear likely to cause any serious results. There may be reasons why the resulting flexibility is desirable, particularly in connection with certain tax roll-overs.

4. Under the proposed ABCA there would be two kinds of situations in which a subsidiary could legitimately hold more than 1% of the shares in its holding company. One case is that in which a holding company acquires control of a subsidiary which already owns shares in the holding company. The other is the case in which the holding company was incorporated under another Act and continues under the proposed ABCA. In either case, s. 30(3) would give the subsidiary a reasonable time to divest itself of the shares.

5. S. 30(4) is a departure from CBCA s. 30(2) in that it would not require the divestment of shares acquired before the coming in force of the proposed ABCA. We are not aware of any existing problem arising from the holding of shares by subsidiaries in parents in Alberta; the concern is primarily over the prospective use of the device. S. 30(3) and (4) would avoid upsetting existing arrangements, if there are any, upon which people have acted.

> 31.(1) A corporation may in the capacity of a legal representative hold shares in itself or in its holding body corporate unless it or the holding body corporate or a subsidiary of either of them has a beneficial interest in the shares.
>
> (2) A corporation may hold shares in itself or in its holding body corporate by way of security for the purposes of a transaction entered into by it in the ordinary course of a business that includes the lending of money.
>
> (3) A corporation holding shares in itself or in its holding body corporate shall not vote or permit those shares to be voted unless the corporation
>
> (a) holds the shares in the capacity of a legal representative, and
>
> (b) has complied with section 147.

NOTE: Exception to prohibitions in s. 30. CBCA s. 31.

Comment

S. 31(1) and s. 31(2) would allow a corporation to hold shares that it or its holding company has issued in two cases. One is the case in which it holds the shares as a legal representative only. The other is the case in which it holds shares by way of security for the purposes of a transaction in the ordinary course of a business that includes the lending of money. These provisions would, we think, allow flexibility without giving rise to any problem, particularly in view of s. 31(3) under which the shares are not to be voted unless they are held in the capacity of a legal representative and the corporation has obtained authority to vote.

32.(1) Subject to subsection (2) and to its articles, a corporation may purchase or otherwise acquire shares issued by it.

(2) A corporation shall not make any payment to purchase or otherwise acquire shares issued by it if there are reasonable 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 corporation's assets would after the payment be less than the aggregate of its liabilities and stated capital of all classes.

(3) Subject to any unanimous shareholder agreement, a corporation that is not a distributing corporation shall, within 30 days of the purchase of any of its issued shares, notify its shareholders in accordance with section 246 of

(a) the number of shares it has purchased,

(b) the names of the shareholders from whom it has purchased the shares,

(c) the price paid for the shares,

(d) if the consideration was other than cash, the nature of the consideration given and the value attributed to it, and

(e) the balance, if any, remaining due to shareholders or shareholders from whom it purchased the shares.

(4) Subject to any unanimous

shareholder agreement, a shareholder of a corporation other than a distributing corporation is entitled upon request and without charge to a copy of the agreement between the corporation and any of its other shareholders under which the corporation has agreed to purchase, or has purchased, any of its own shares.

NOTE: Acquisition by corporation of its own shares. CBCA s. 32 with the addition of subsections (3) and (4).

Comment

1. S. 32 would replace the rather complex provisions of ACA s. 41.1 to 41.9. The complexity of the ACA provisions is needed for the protection of shareholders under an Act (the ACA) that does not provide the remedies for shareholders which are provided by the CBCA and which would be provided by the proposed ABCA. See the discussion at pp. 80-82 of our Report.

2. S. 32(2) would require that after the purchase of its own shares the corporation must be able to meet two tests, a liquidity test and a solvency test. The solvency test requires the corporation to have assets the realizable value of which would be at least equal to the aggregate of the corporation's liabilities and its stated capital of all classes. The two tests would give protection to both creditors and other shareholders.

3. We have added s. 32(3) and (4) to the draft Act to ensure that, in the case of a non-distributing corporation, the shareholders whose shares have not been purchased would receive information upon the basis of which they decide whether there has been an abuse that should be remedied by a derivative action under s. 232 or an action based on oppression or unfair discrimination under s. 234.

4. The civil liability of an insider would be imposed upon a non-distributing corporation by Part 10 of the draft Act.

33.(1) Notwithstanding section 32(2), but subject to subsection (3) and to its articles, a corporation may purchase or otherwise acquire shares issued by it to

(a) settle or compromise a debt or claim asserted by or against the corporation,

(b) eliminate fractional shares, or

(c) fulfil the terms of a non-assignable agreement under which the corporation has an option or is obliged to purchase shares

owned by a director, an officer or an employee of the corporation.

(2) Notwithstanding section 32(2), a corporation may purchase or otherwise acquire shares issued by it to

(a) satisfy the claim of a shareholder who dissents under section 184, or

(b) comply with an order under section 234.

(3) A corporation shall not make any payment to purchase or acquire under subsection (1) shares issued by it if there are reasonable 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 corporation's assets would after the payment be less than the aggregate of its liabilities and the amounts required for payment on a redemption or in a liquidation of all shares the holders of which have the right to be paid prior to the holders of the shares to be purchased or acquired.

NOTE: Alternative acquisition by corporation of its own shares. CBCA s. 33.

Comment

1. S. 32 would authorize any purchase by a corporation of shares issued by it. It would impose, however, two tests, each of which must be satisfied. The first is a liquidity test. The second is a solvency test which requires that th realizable value of the corporation's assets would after th payment be less than the aggregate of its liabilities and stated capital of all classes.

2. S. 33(1) and (3) would relax the solvency test in three cases, so that, after the purchase, the corporation would only have to satisfy its liabilities and provide upon a redemption or liquidation for the amounts payable to the holders of shares with rights prior to those being purchased; in other words, the corporation would not have be able to cover the capital due to shareholders with positions equal or junior to the positions of the holders the shares being purchased. The effect is to facilitate certain kinds of purchases which are more likely to be in the interests of the corporation and less likely to be abused than are purchases of the corporation's own shares

general.

34.(1) Notwithstanding section 32(2) or 33(3), but subject to subsection (2) and to its articles, a corporation may purchase or redeem any redeemable shares issued by it at prices not exceeding the redemption price of those shares stated in the articles or calculated according to a formula stated in the articles.

(2) A corporation shall not make any payment to purchase or redeem any redeemable shares issued by it if there are reasonable 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 corporation's assets would after the payment be less than the aggregate of

(i) its liabilities, and

(ii) the amount that would be required to pay the holders of shares that have a right to be paid, on a redemption or in a liquidation, rateably with or prior to the holders of the shares to be purchased or redeemed.

NOTE: Redemption of shares. CBCA s. 34.

Comment

1. S. 34 would allow the corporation to purchase or redeem redeemable shares, but it could not do so at a price higher than the price which is stated in the articles of incorporation or which is calculated according to a formula stated in the articles.

2. S. 34 would give the corporation much flexibility. It would do away with the ACA requirement that, unless the redemption is effected from the proceeds of a new issue, there must either be a capital redemption reserve fund established in an amount equal to the amount used to redeem the shares, or a reduction of capital which would require a court order. Instead, s. 34(2) would establish a liquidity test and a solvency test. The latter would require the corporation, in addition to being able to pay its liabilities, to be able to make the appropriate distribution of capital to the holders of shares which rank equally with or are preferred as to

capital over the shares being redeemed.

35.(1) A corporation may accept from any shareholder a share of the corporation

(a) that is surrendered to it as a gift, or

(b) that has been held in escrow pursuant to an escrow agreement required by the Commission and that is surrendered pursuant to that agreement.

(2) The corporation may not extinguish or reduce a liability in respect of an amount unpaid on a share surrendered under subsection (1)(a) except in accordance with section 36.

NOTE: Donated and escrowed shares. CBCA s. 35, varied to cover escrowed shares.

Comment

1. S. 35 would authorize a corporation to accept a surrender of a share to it as a gift, which a company can do presently under ACA s. 36(1)(c). There is no reason why a corporation should not be able to do so.

2. S. 35(2) would preclude the extinction or reduction of liability in respect of an amount unpaid on a donated share unless the stated capital has been reduced in accordance with s. 36. Under s. 25(3), there could only be an amount unpaid if the share were issued before the corporation continues under the proposed ABCA.

3. S. 35(1)(b) provides for the surrender of shares under an escrow agreement which is required by the Alberta Securities Commission, and was inserted at the suggestion of our lawyer consultants.

36.(1) Subject to subsection (3), a corporation may by special resolution reduce its stated capital for any purpose including, without limiting the generality of the foregoing, the purpose of

(a) extinguishing or reducing a liability in respect of an amount unpaid on any share,

(b) distributing to the holders of the issued shares of any class or series of shares an amount not exceeding the stated capital of the

class or series, and

(c) declaring its stated capital to be reduced by an amount that is not represented by realizable assets.

(2) A special resolution under this section shall specify the capital account or accounts from which the reduction of stated capital effected by the special resolution will be deducted.

(3) A corporation shall not reduce its stated capital for any purpose other than the purpose mentioned in subsection (1)(c) if there are reasonable grounds for believing that

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

(b) the realizable value of the corporation's assets would thereby be less than the aggregate of its liabilities.

(4) A creditor of a corporation is entitled to apply to the Court for an order compelling a shareholder or other recipient

(a) to pay to the corporation an amount equal to any liability of the shareholder that was extinguished or reduced contrary to this section, or

(b) to pay or deliver to the corporation any money or property that was paid or distributed to the shareholder or other recipient as a consequence of a reduction of capital made contrary to this section.

(5) An action to enforce a liability imposed by this section may not be commenced after 2 years from the date of the action complained of.

(6) This section does not affect any liability that arises under section 113.

NOTE: Other reduction of stated capital. CBCA s. 36.

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S. 36 would give effect to the general policy of the draft

Act in favour of flexibility. All that the corporation would need to do to reduce its stated capital would be to adopt a special resolution which makes the reduction and specifies the stated capital account or accounts from which the reduction is made. This could be done "for any purpose including, without limiting the generality of the foregoing" the three purposes listed in s. 36(1).

2. CBCA s. 36(1)(b) appears to permit the distribution to one shareholder of the whole of the stated capital of the class. We have changed the wording of s. 36(1)(b) of the draft Act to avoid that interpretation.

3. The ACA protects creditors (and, to some extent, shareholders) by requiring a court order for many reductions of capital. The draft Act does not: instead, s. 36(3) would provide a liquidity and solvency test; s. 36(4) would allow a creditor to apply for an order compelling a shareholder to pay any amount for which his liability was extinguished by the special resolution, or to repay any money or property distributed as a result of the reduction of capital; and the liability of the directors under s. 113 would remain. We think these remedies to be sufficient.

37.(1) Upon a purchase, redemption or other acquisition by a corporation under section 32, 33, 34, 43, 184 or 234(3)(g) of shares or fractions of shares issued by it, the corporation shall deduct from the stated capital account maintained for the class or series of shares purchased, redeemed or otherwise acquired an amount equal to the result obtained by multiplying the stated capital of the shares of that class or series by the number of shares or fractions of shares of that class or series purchased, redeemed or otherwise acquired, divided by the number of issued shares of that class or series immediately before the purchase, redemption or other acquisition.

(2) A corporation shall deduct the amount of a payment made by the corporation to a shareholder under section 234(3)(h) from the stated capital account maintained for the class or series of shares in respect of which the payment was made.

(3) A corporation shall adjust its stated capital account or accounts in accordance with a special resolution referred to in section 36(2).

(4) Upon a conversion or a change under section 167, 185, 186 or 234 of issued shares of a corporation into shares of another class or series, the corporation shall

(a) deduct from the stated capital

account maintained for the class or series of shares converted or changed an amount equal to the result obtained by multiplying the stated capital of the shares of that class or series by the number of shares of that class or series converted or changed, divided by the number of issued shares of that class or series immediately before the conversion or change, and

(b) add the result obtained under clause (a) and any additional consideration pursuant to the conversion or change to the stated capital account maintained or to be maintained for the class or series of shares into which the shares have been converted or changed.

(5) For the purposes of subsection (4) and subject to its articles, if a corporation issues 2 classes of shares and there is attached to each class a right to convert a share of the one class into a share of the other class and a share of one class is converted into a share of the other class, the amount of stated capital attributable to a share in either class is the aggregate of the stated capital of both classes divided by the number of issued shares of both classes immediately before the conversion.

(6) Shares or fractions of shares issued by a corporation and purchased, redeemed or otherwise acquired by it shall either be cancelled or restored to the status of authorized but unissued shares.

(7) For the purposes of this section, a corporation holding shares in itself as permitted by section 31(1) and (2) is deemed not to have purchased, redeemed or otherwise acquired those shares.

(8) Shares issued by a corporation and converted pursuant to their terms or changed under section 167, 185, 186 or 234 into shares of another class or series shall become issued shares of the class or series of shares into which the shares have been converted or changed.

(9) If issued shares of a class or series have become, pursuant to subsection (8), issued shares of another class or series, the number of unissued shares of the first-mentioned class or series shall, unless the articles of amendment or reorganization

otherwise provide, be increased by the number of shares that, pursuant to subsection (8), became shares of another class or series.

NOTE: Adjustment of stated capital account; procedures following acquisition. CBCA s. 37(1) to (8).

Comment

1. S. 37(1) to (4) would lay down necessary rules for the adjustment of stated capital accounts in specified circumstances.

2. S. 37(6) and (7) would specify the treatment to be given to shares which a corporation acquires in itself.

3. S. 37(8) and (9) would deal with the situation resulting from the conversion of shares into shares of another class or series. S. 37(8) has been extended to apply to shares converted pursuant to their terms; this follows a suggestion made by the Ontario branch of the Canadian Bar Association with regard to a similar section in the proposed Ontario Business Corporations Act. CBCA s. 37(7) does not refer to such shares.

37.1(1) Debt obligations issued, pledged, hypothecated or deposited by a corporation are not redeemed by reason only that the indebtedness evidenced by the debt obligations or in respect of which the debt obligations are issued, pledged, hypothecated or deposited is repaid.

(2) Debt obligations issued by a corporation and purchased, redeemed or otherwise acquired by it may be cancelled or, subject to any applicable trust indenture or other agreement, may be reissued, pledged or hypothecated to secure any obligation of the corporation then existing or thereafter incurred, and any such acquisition and reissue, pledge or hypothecation is not a cancellation of the debt obligations.

NOTE: Repayment; acquisition and reissue of debt obligations. CBCA s. 37(9) and (10).

Comment

S. 37.1 of the draft Act would deal with debt obligations. It follows CBCA s. 37(9) and (10). It would provide firstly that payment of the debt does not itself redeem a debt obligation (allowing, for example, a debenture to be left with a bank to secure a line of credit not always drawn upon) and secondly that repurchased or redeemed debt

obligations may either be cancelled or re-issued.

38.(1) A contract with a corporation providing for the purchase by it of shares of the corporation is specifically enforceable against the corporation except to the extent that the corporation cannot perform the contract without thereby being in breach of section 32 or 33.

(2) In an action brought on a contract referred to in subsection (1), the corporation has the burden of proving that performance of the contract is prevented by section 32 or 33.

(3) Until the corporation has fully performed a contract referred to in subsection (1), the other party to that contract retains the status of a claimant and is 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 contracted to sell to the corporation, but in priority to the rights of the other shareholders.

NOTE: Enforceability of contract against corporation. CBCA s. 38 varied as to subsection (3).

Comment

1. Under s. 38(1), a person who enters into a contract to sell to the corporation shares issued by the corporation would be entitled to compel the corporation to buy the shares. The exception would preserve the liquidity and solvency tests set out in s. 32 and s. 33.

2. CBCA s. 38(3) gives the shareholder who contracted to sell shares to the corporation the status of a claimant to be ranked subordinate to the rights of creditors but in priority to "the other shareholders". We prefer ACA s. 41.7(3) because the only shareholders to whom it subordinates a selling shareholder are those whose rights were prior to his own. We have accordingly varied the wording of CBCA to give effect to the principle of ACA s. 41.7(3).

39. The directors may authorize the corporation to pay a reasonable commission to any person in consideration of his purchasing or agreeing to purchase shares of the corporation from the corporation or from any

other person, or procuring or agreeing to procure purchasers for shares of the corporation.

NOTE: Commission on sale of shares. CBCA s. 39.

Comment

S. 39 would not impose any limit upon the amount of commission which the directors might pay except that it must be reasonable. S. 113(3)(b) would however impose a liability upon directors who vote for or consent to a resolution authorizing a commission which is not reasonable.

40. A corporation shall not declare or pay a dividend if there are reasonable 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 corporation's assets would thereby be less than the aggregate of its liabilities and stated capital of all classes.

NOTE: Dividends. CBCA s. 40.

Comment

1. S. 40 would make a change from the present Alberta law. The English cases hold that, under the English prototypes of the ACA, losses in fixed capital need not be made up before a dividend can be declared. S. 40(b) of the CBCA precludes a corporation from paying a dividend unless both the liabilities and "stated capital" are protected. It will be remembered that "stated capital" is, or at least includes, what is received by the corporation from the sale of shares, and it follows that this must be made up before a dividend can be paid. The CBCA appears to have adopted American theory, which has treated the stated capital or its counterpart as sacrosanct.

2. It should be noted, however, that the policy change is not entirely rigid. The corporation could under s. 36(1)(c) reduce its stated capital and thus put itself into a position to declare the dividend.

3. We have considered whether to recommend the bringing forward of ACA s. 89(2) which provides that in determining the solvency of a company for the purpose of declaring a dividend, no account is to be taken of any increase in the surplus or reserves of the company resulting merely from the

writing-up of the value of assets, unless the writing-up was done more than five years before the date of the declaration of the dividend. We have concluded that it is not necessary or desirable to bring forward the provision. With or without it, the ultimate remedy is the personal liability of the directors, and the relevant question is whether the appropriate tests are satisfied at the time of the declaration of the dividend.

4. We have also considered whether to recommend the bringing forward of ACA s. 91. That section allows a company of which at least 75% in value of the assets are of a wasting character, and a mining company, to declare and pay dividends if the payment does not reduce the value of its remaining assets so that they will be insufficient to meet all the liabilities of the company then existing, exclusive of its paid up capital. We are divided on the question, but the majority view is that under the draft Act it would be open to a corporation to reduce its stated capital under s. 36 by special resolution if the stated capital is not founded upon existing assets, and that that power is sufficient to enable the corporation to pay dividends when it is appropriate to do so.

> 41.(1) A corporation may pay a dividend by issuing fully paid shares of the corporation and, subject to section 40, a corporation may pay a dividend in money or property.
>
> (2) If shares of a corporation are issued in payment of a dividend, the declared amount of the dividend stated as an amount of money shall be added to the stated capital account maintained or to be maintained for the shares of the class or series issued in payment of the dividend.

NOTE: Form of dividend. CBCA s. 41.

Comment

S. 41 would allow dividends in property or shares as well as dividends in money. The requirement that the declared amount of a stock dividend stated as an amount of money is to be added to the stated capital account would mean that a stock dividend cannot be declared unless the corporation has retained earnings or other equity accounts equal to the value of the dividend.

> 42.(1) Except as permitted under subsection (2), a corporation shall not, directly or indirectly, give financial assistance by means of a loan, guarantee or otherwise

(a) to a shareholder or director of the corporation or of an affiliated corporation,

(b) to an associate of a shareholder or director of the corporation or of an affiliated corporation, or

(c) to any person for the purpose of or in connection with a purchase of a share issued or to be issued by the corporation or affiliated corporation.

if there are reasonable grounds for believing that

(d) the corporation is, or after giving the financial assistance would be, unable to pay its liabilties as they become due, or

(e) the realizable value of the corporation's assets, excluding the amount of any financial assistance in the form of a loan or in the form of assets pledged or encumbered to secure a guarantee, after giving the financial assistance, would be less than the aggregate of the corporation's liabilities and stated capital of all classes.

(2) A corporation may give financial assistance by means of a loan, guarantee or otherwise

(a) to any person in the ordinary course of business if the lending of money is part of the ordinary business of the corporation,

(b) to any person on account of expenditures incurred or to be incurred on behalf of the corporation,

(c) to a holding body corporate if the corporation is a wholly owned subsidiary of the holding body corporate,

(d) to a subsidiary body corporate of the corporation, or

(e) to employees of the corporation or any of its affiliates

(i) to enable or assist them to

purchase or erect living accommodation for their own occupation, or

(ii) in accordance with a plan for the purchase of shares of the corporation or any of its affiliates to be held by a trustee.

(3) A contract made by a corporation in contravention of this section may be enforced by the corporation or by a lender for value in good faith without notice of the contravention.

(4) Unless disclosure is otherwise made by a corporation, a financial statement referred to in section 149(1)(a) shall contain the following information with respect to each case in which financial assistance is given by the corporation by way of gift, loan or otherwise, whether in contravention of this section or not, to any of the persons referred to in subsection (1)(a), (b) or (c), if the financial assistance was given during the financial year or period to which the statement relates or remains outstanding at the end of that financial year or period:

(a) the identity of the person to whom the financial assistance was given;

(b) the nature of the financial assistance given;

(c) the terms upon which the financial assistance was given;

(d) the amount of the financial assistance initially given and the amount, if any, outstanding.

NOTE: Prohibited financial assistance by corporation. CBCA s. 42 varied.

Comment

1. See the discussion of this subject at pp. 78-79 of our Report.

2. S. 42 diverges from CBCA s. 42 in the following ways:

(1) The prohibition against financial assistance to officers and employees has been deleted from s. 42(1)(a). It appears to us that what is to be regulated is loans to those who control the

corporation, and not its officers and employees.

(2) S. 42(4) has been added, providing for disclosure in the financial statements of financial assistance to any person under s. 42(1). It appears to us that the shareholders should have this information in order to take any steps necessary to protect themselves. Representations were made to us against the proposed requirement of individual disclosure, but it appears to us that the giving of financial assistance is sufficiently removed from a routine transaction that it should be specifically disclosed.

3. Financial assistance referred to in s. 42(1) might be given upon satisfaction of the liquidity and solvency tests set out in s. 42(1)(d) and (e) and the disclosure set out in s. 42(4). Directors who vote for or consent to a resolution authorizing financial assistance contrary to s. 42 would be liable under s. 113(3)(d) of the draft Act to make good any loss.

> 43.(1) The shareholders of a corporation are not, as shareholders, liable for any liability, act or default of the corporation except under section 36(4), 140(7) or 219(4).
>
> (2) Subject to section 45(8), the articles may provide that the corporation has a lien on a share registered in the name of a shareholder or his legal representative for a debt of that shareholder to the corporation, including an amount unpaid in respect of a share issued by a body corporate on the date it was continued under this Act.
>
> (3) A corporation may enforce a lien referred to in subsection (2) in accordance with its by-laws.

NOTE: Shareholder immunity. CBCA s. 43.

Comment

1. S. 43(1) is the fundamental provision which would limit the liability of the shareholders of a corporation. It would be subject only to the rights of creditors under s. 36(4) to recover the proceeds of an improper reduction of capital; the duties and liabilities of shareholders who have assumed the rights and powers of the directors under s. 140(7); and the continuing liabilities, if any, following dissolution which are imposed by s. 219(4).

2. S. 43(2) and (3) would preserve the company's ability to impose a lien upon its shares. The lien would not be valid against a transferee unless noted on the share certificate (s. 45(8)).

PART 6

SECURITY CERTIFICATES, REGISTERS AND TRANSFERS

Interpretation and General

44.(1) The transfer or transmission of a security shall be governed by this Part.

Comment:

S. 44(1) defines the scope of Part 6. Because of the definition of "security" in s. 44(2)(n), Part 6 governs instruments covering shares and other interests in the corporation, and instruments covering bearer, order and registered debt obligations. However, it governs instruments only if they are of a kind which are dealt with in security markets or which are recognized as a medium for investment. It includes debt securities of closely held companies.

(2) In this Part,

(a) "adverse claim" includes a claim that a transfer was or would be wrongful or that a particular adverse person is the owner of or has an interest in the security;

Comment

1. "Adverse claim" appears

(1) In the definition of "bona fide purchaser" below.

(2) In s. 56(2) which protects a bona fide purchaser from adverse claims.

(3) In s. 57(1) where certain things give notice of adverse claims, and in s. 57(2) where a purchaser is protected against notice of trusts unless he knows that the transaction is for the personal benefit of the fiduciary or is otherwise in breach of the fiduciary's duty.

(4) In s. 58 where staleness gives notice of an adverse claim.

(5) In s. 63, which refers back to s. 57.

(6) In s. 66(4) where notice of an adverse claim is ineffective after a broker takes delivery as a holder for value.

(7) In secs. 71, 73 and 74, the combined effect of which is to give an issuer a simple means of disposing of adverse claims of which he has notice, and to protect

him against liability for registering a transfer if he does not have notice of an adverse claim or if he has discharged his duty to inquire into one.

2. A person may claim ownership of a security in registered form on the grounds that he had been the owner and that what purports to be his endorsement was forged or made without authority. His claim would fall within the definition of "adverse claim" because he would be an "adverse person" to a purchaser, and because he claims to be the owner. Part 6 of the draft Act, however, would deal with his claim differently from other kinds of adverse claims, e.g., a claim that a transfer was induced by fraud or was in breach of a fiduciary obligation, or a claim that the purchaser's transferor had no title. Attention is drawn to the following:

   (1) S. 56(2) would provide that a "bona fide purchaser" acquires the security free from any adverse claim. It would not, however, protect a purchaser of a security in registered form who relies upon an unauthorized endorsement because such a purchaser is not a "bona fide purchaser" under the definition which appears below: the security, though apparently "endorsed to him or endorsed in blank" would not be not endorsed at all because an unauthorized endorsement is not an endorsement (s. 61(3)).

   (2) On the other hand, s. 64 would deal with unauthorized endorsements. Its effect would be that a purchaser for value without notice who acquires a new certificate is protected against the original owner.

   (3) S. 73 would impose upon the issuer to whom a transfer is presented a duty to enquire into "adverse claims" and would prescribe a way in which the issuer may discharge the duty. S. 74 would then go on to exonerate it if the duty has not arisen or, having arisen, has been discharged, and if the necessary endorsements are there. The effect of this section and s. 64(2) of the CBCA (which we have included as s. 73(5)) of the draft Act), would be that the issuer could exonerate itself from liability for other adverse claims but not from liability for registering a transfer based upon an unauthorized endorsement. The reasons for imposing liability upon the issuer are discussed in the part of our Report dealing with Part 6.

3. We have had great difficulty in interpreting CBCA Part 6 insofar as the different treatment of claims of ownership based upon forgery or other lack of authority and other claims of ownership are concerned. In order to lessen these difficulties we have made the following drafting changes, which we think will assist the reader.

   (1) We have inserted at the end of the definition of "bona fide purchaser" words intended to make it clear that one who relies on an endorsement of a security in registered form is not a "bona fide purchaser" under

the Act (even though acting in good faith and for value) if the endorsement is unauthorized. This is to warn the reader that s. 56(2) is deceptive when it purports to give protection against all adverse claims; it is deceptive because one kind of purchaser against whom one kind of claim is made is excluded from the definition of bona fide purchaser and is therefore not included in the protection of the section. The change in the definition makes explicit what is implicit in the CBCA definition and in CBCA s. 61.

(2) We have added a new s. 56(4) declaring that s. 56 does not confer any rights upon a purchaser unless all necessary endorsements are made by appropriate persons as defined in s. 61. This again makes explicit what is implicit in CBCA s. 56(2) and is inserted to warn the reader against accepting s. 56(2) at face value.

(3) We have redrafted CBCA s. 64(1) to use more of the language of its prototype, UCC s. 8-311. CBCA s. 64(1) suggests that there is a class of "ineffective" endorsements of which an "unauthorized" endorsement is only one, and thereby leads to speculation as to whether other endorsements are "ineffective," such as those made without capacity or under a mistake as to their nature. UCC s. 8-311, on the other hand, commences by referring to "unauthorized" endorsements, and then refers to their "ineffectiveness", so that it clearly deals only with one defined category. Since anything else is inconsistent with the pattern of the draft Act, we prefer the latter drafting.

(4) We have moved CBCA s. 64(2) to a new position as s. 73(5). It appears to us to be better associated with matters relating to liabilities of the issuer than with matters related to the effect of an unauthorized endorsement. However, our reason for suggesting its removal is to make secs. 73 and 74 easier to understand. S. 73 makes elaborate provision for the imposition and discharge of a duty to inquire into "adverse claims" (which, by definition, include claims by owners that apparent endorsements are unauthorized so that the section suggests that the issuer can discharge his duty to enquire into such claims), and it is only the words "if a security . . .is endorsed by the appropriate person as defined in section 61" which signals that it cannot. S. 74 involves a similar, though lesser, problem for the reader: while s. 74(1)(a) calls for all necessary endorsements and is cumulative with s. 74(1)(b), the latter suggests that the issuer can be exonerated from all adverse claims, including the lack of an authorized endorsement. We think that the new s. 73(5) will emphasize the issuer's liability and protect the reader from falling into an error which might otherwise befall all but the most careful and analytical.

(b) "bearer" means the person in possession of a security payable to

bearer or endorsed in blank;

(c) "bona fide purchaser" means a purchaser for value in good faith and without notice of any adverse claim who takes delivery of a security in bearer form or order form or of a security in registered form

(i) issued to him, or

(ii) endorsed to him or endorsed in blank by an appropriate person as defined in section 61;

Comment

1. The words "by an appropriate person as defined in s. 61" have been added to the CBCA definition to warn the reader that one who takes under an unauthorized endorsement is not a "bona fide purchaser" for the purposes of Part 6. (See the commentary on the definition of "adverse claim," above.)

2. The definition of "bona fide purchaser" is particularly important because it determines who is entitled to protection against adverse claims under s. 56(2) of the draft.

(d) "broker" means a person who is engaged for all or part of his time in the business of buying and selling securities and who, in the transaction concerned, acts for, or buys a security from, or sells a security to, a customer;

(e) "delivery" means voluntary transfer of possession;

(f) "fiduciary" means a trustee, guardian, committee, curator or tutor, an executor, administrator or representative of a deceased person, or any other person acting in a fiduciary capacity;

(g) "fungible" in relation to securities means securities of which any unit is, by nature or usage of trade, the equivalent of any other like unit;

(h) "genuine" means free of forgery or counterfeiting;

(i) "good faith" means honesty in fact in the conduct of the transaction

concerned;

(j) "holder" means a person in possession of a security issued or endorsed to him or to bearer or in blank;

(k) "issuer" includes a corporation

(i) that is required by this Act to maintain a securities register, or

(ii) that directly or indirectly creates fractional interests in its rights or property and that issues securities as evidence of those fractional interests;

(l) "overissue" means the issue of securities in excess of any maximum number of securities that the issuer is authorized by its articles or a trust indenture to issue;

(m) "purchaser" means a person who takes by sale, mortgage, hypothec, pledge, issue, reissue, gift or any other voluntary transaction creating an interest in a security;

(n) "security" or "security certificate" means an instrument issued by a corporation that is

(i) in bearer, order or registered form,

(ii) of a type commonly dealt in upon securities exchanges or markets or commonly recognized in any area in which it is issued or dealt in as a medium for investment,

(iii) one of a class or series or by its terms divisible into a class or series of instruments, and

(iv) evidence of a share, participation or other interest in or obligation of a corporation;

Comment:

1. The definition of "security" is fundamental to Part 6 as it is used to define the application of the Part in s. 44(1).

2. This definition refers only to the "instrument," and does not refer to the share itself or to the debt obligation. However, it is clear that, as in the case of other negotiable instruments, the ownership of the certificate carries with it the ownership of the rights which it evidences. It should be noted that "security" is defined in s. 1(1)(u) of the draft Act where it "means" the share or debt obligation and "includes" the certificate; we have drafted that definition to make it clear that it does not apply to Part 6.

3. It might be argued that a share of a closely held company is not "of a type commonly dealt in upon securities, exchanges or markets," and that it is not "commonly recognized in any area in which it is issued or dealt in as a medium for investment." However, s. 45(8) of the draft Act makes it clear that all share certificates are included, whether or not the shares of the particular corporation are traded, and the CBCA definition has for the sake of uniformity been carried forward untouched.

(o) "transfer" includes transmission by operation of law;

(p) "trust indenture" means a trust indenture as defined in section 77;

(q) "unauthorized" in relation to a signature or an endorsement means one made without actual, implied or apparent authority and includes a forgery;

(r) "valid" means issued in accordance with the applicable law and the articles of the issuer or validated under section 48.

(3) A security is a negotiable instrument except

(a) where its transfer is restricted and noted on the security in accordance with section 45(8), or

(b) it is stated conspicuously on the security certificate that it is non-negotiable.

Comment

S. 44(3) is the fundamental statement that a "security" is a

negotiable instrument unless it is apparent on the face of it that it is not. S. 44(3)(b) does not appear in the CBCA.

(4) A security is in registered form if

(a) it specifies a person entitled to the security or to the rights it evidences, and

(b) either its transfer is capable of being recorded in a securities register or the security so states.

Comment

1. CBCA s. 44(4) is as follows:

(4) A security is in registered form if

(a) it specifies a person entitled to the security or to the rights it evidences, and its transfer is capable of being recorded in a securities register; or

(b) it bears a statement that it is in registered form.

2. It appears to us that the CBCA version would allow a security to be in registered form if it complies with either of two alternatives. The second of those alternatives is that the security state that it is in registered form, and we are concerned that a security which contained such a statement would come within the definition whatever its form. It seems to us that the definition should require two things. One is that the instrument must specify a person entitled to the security and the second is that either the transfer of the security must be registrable or the security must say that the transfer is registrable. We have redrafted s. 44(4) accordingly.

3. It should be noted that the time for deciding whether an instrument is in registered form or in bearer form is at the time of the issue of the instrument. A security in registered form is still in registered form if it is endorsed in blank and a security in bearer form is still in bearer form if it is endorsed to a named person. The terms are used differently here from the way in which they are used in relation to bills of exchange, promissory notes and cheques.

(5) A debt obligation is in order form if by its terms it is payable to the order or assigns of any person specified in it with reasonable certainty or to him or his order.

Comment

We understand that CBCA s. (4.1) was added to settle doubts, and we think that it should be followed for that reason and for uniformity.

(6) A security is in bearer form if it is payable to bearer according to its terms and not by reason of any endorsement.

(7) A guarantor for an issuer is deemed to be an issuer to the extent of his guarantee whether or not his obligation is noted on the security.

NOTE: Application and interpretation of Part 6. CBCA s. 44 varied as to subsection (4).

45.(1) Every security holder is entitled at his option to a security certificate that complies with this Act or a non-transferable written acknowledgment of his right to obtain a security certificate from a corporation in respect of the securities of that corporation held by him.

(2) A corporation may charge a fee of not more than $3 for a security certificate issued in respect of a transfer.

(3) A corporation is not required to issue more than one security certificate in respect of securities held jointly by several persons, and delivery of a certificate to one of several joint holders is sufficient delivery to all.

(4) A security certificate shall be signed manually by at least one director or officer of the corporation or by or on behalf of a registrar, transfer agent or branch transfer agent of the corporation, or by a trustee who certifies it in accordance with a trust indenture, and any additional signatures required on a security certificate may be printed or otherwise mechanically reproduced on it.

(5) Notwithstanding subsection (4), a manual signature is not required on

(a) a security certificate representing

(i) a fractional share, or

(ii) an option or a right to

acquire a security, or

(b) a scrip certificate.

(6) If a security certificate contains a printed or mechanically reproduced signature of a person, the corporation may issue the security certificate, notwithstanding that the person has ceased to be a director or an officer of the corporation, and the security certificate is as valid as if he were a director or an officer at the date of its issue.

(7) There shall be stated upon the face of each share certificate issued by a corporation

(a) the name of the corporation,

(b) the words "Incorporated under The Alberta Business Corporations Act",

(c) the name of the person to whom it was issued, and

(d) the number and class of shares and the designation of any series that the certificate represents.

(8) If a security certificate issued by a corporation or by a body corporate before the body corporate was continued under this Act is or becomes subject to

(a) a restriction on its transfer other than a constraint under section 168, or

(b) a lien in favour of the corporation,

the restriction or lien is ineffective against a transferee of the security who has no actual knowledge of it unless

(c) it or a reference to it is noted conspicuously on the security certificate,

(d) the security certificate contains a conspicuous statement that it is non-negotiable, or

(e) the transferee is not

(i) a bona fide purchaser, or

(ii) a purchaser against whom the owner of the security may not

assert the ineffectiveness of an endorsement under section 64.

(9) A distributing corporation shall not restrict the transfer of its shares except by way of a constraint permitted under section 168.

(10) There shall be stated legibly on a share certificate issued by a corporation that is authorized to issue shares of more than one class or series

(a) the rights, privileges, restrictions and conditions attached to the shares of each class and series that exists when the share certificate is issued, or

(b) that the class or series of shares that it represents has rights, privileges, restrictions or conditions attached to it and that the corporation will furnish to a shareholder, on demand and without charge, a full copy of the text of

(i) the rights, privileges, restrictions and conditions attached to each class authorized to be issued and to each series in so far as they have been fixed by the directors, and

(ii) the authority of the directors to fix the rights, privileges, restrictions and conditions of subsequent series.

(11) If a share certificate issued by a corporation contains the statement mentioned in subsection (10)(b), the corporation shall furnish to a shareholder on demand and without charge a full copy of the text of

(a) the rights, privileges, restrictions and conditions attached to each class authorized to be issued and to each series in so far as they have been fixed by the directors, and

(b) the authority of the directors to fix the rights, privileges, restrictions and conditions of subsequent series.

(12) A corporation may issue a

certificate for a fractional share or may issue in its place scrip certificates in a form that entitles the holder to receive a certificate for a full share by exchanging scrip certificates aggregating a full share.

(13) The directors may attach conditions to any scrip certificates issued by a corporation, including conditions that

(a) the scrip certificates become void if they are not exchanged for a share certificate representing a full share before a specified date, and

(b) any shares for which those scrip certificates are exchangeable may, notwithstanding any pre-emptive right, be issued by the corporation to any person and the proceeds thereof distributed rateably to the holders of the scrip certificates.

(14) A holder of a fractional share issued by a corporation is not entitled to exercise voting rights or to receive a dividend in respect of the fractional share, unless

(a) the fractional share results from a consolidation of shares, or

(b) the articles of the corporation otherwise provide.

(15) A holder of a scrip certificate is not entitled to exercise voting rights or to receive a dividend in respect of the scrip certificate.

NOTE: Security certificates. CBCA s. 45 with changes in subsections (5), (8), and (9).

Comment

1. A shareholder who does not want the benefits of negotiability would be able to avoid its risks by asking for a written acknowledgment under s. 45(1). An acknowledgement may also be issued pending the issue of the share certificate itself.

2. We have some reservations about s. 45(2) which provides for the charging of a fee for a share certificate and which, if implemented by a corporation, would interfere with facility of transfer of shares; and the administrative costs of collection and payment would be rather large for what is involved. However, some provision should be made so as to

avoid occasional abuse by excessive charges, and s. 45(2) appears to us to strike a reasonable balance.

3. 1978-79 S.C. c. 9, s. 19(1) added to the list of instruments in s. 45(5) a promissory note that is not issued under a trust indenture. The addition has not been made to the draft Act because the Province has no power to legislate in the area of promissory notes.

4. Under s. 6(1)(c) of the draft Act, if there is to be a restriction on the transfer of shares, there must be a statement to that effect in the articles of incorporation, and the nature of the restrictions must be shown. Two policies of the draft Act (abolition of contructive notice (s. 17) and adoption of the principle of negotiability (s. 44(3)) make it necessary for the draft Act to provide that the statements in the articles are not enough to bind a bona fide purchaser for value without notice; and s. 45(8) would therefore provide that in such a case a restriction is not effective unless the security certificate refers to it or is marked "non-negotiable". It should be noted, however, that if the restriction is contained in a unanimous shareholder agreement, it is s. 140(2) and (3) (which would make the agreement binding) and not s. 45(8) which would prevail.

5. S. 45(8) would depart from CBCA s. 45(8) in two ways:

   (1) CBCA s. 45(8) would protect a "transferee of the security". A "transferee" could be a donee, a beneficiary of an estate, or even (because s. 44(2)(o) defines "transfer" to include "transmission") a personal representative. We do not think that such a person should have a better position than the person through whom he claims, and the draft Act would therefore protect only the bona fide purchaser as defined in s. 44(2) and the "bona fide purchaser" under a forged endorsement who, upon registration, would be protected by s. 64 (see s. 45(8)(e)).

   (2) S. 44(3) of the draft Act would provide for marking the security "non-negotiable", and this provision would be carried forward into s. 45(8). It appears to us that such a marking should be sufficient to put a purchaser on his guard.

6. S. 45(9) would prevent a distributing corporation from restricting the transfer of its shares. While an issue of shares is in the hands of the public, the shares should be freely transferable.

7. CBCA s. 45(9) provides that, in the case of a body corporate which continues under the CBCA, the words "private company" on outstanding certificates are deemed to be notice of the things listed in CBCA s. 45(8). S. 45(8) of the draft Act would allow the words "non-negotiable" to perform that office in all cases, and s. 261(5) provides for getting in the shares of an existing Alberta company continuing under the proposed ABCA: we think these provisions to be sufficient and we have accordingly deleted CBCA s. 45(9).

8. In addition to restrictions on transfer, CBCA s. 45(8), in the absence of a reference to them on the share certificate, makes ineffective a lien in favour of the corporation, an endorsement under s. 184, and a unanimous shareholder agreement. Since s. 140 of the draft Act deals differently with unanimous shareholder agreements, they have been omitted from s. 45(8). Both CBCA s. 45(8) and s. 45(8) of the draft Act except from their operation constraints under s. 168 which, as a matter of public policy, should apply even to a purchaser without notice.

46.(1) A corporation shall maintain a securities register in which it records the securities issued by it in registered form, showing with respect to each class or series of securities

(a) the names, alphabetically arranged, and the latest known address of each person who is or has been a security holder,

(b) the number of securities held by each security holder, and

(c) the date and particulars of the issue and transfer of each security.

(2) A corporation may appoint

(a) one or more trust companies registered under The Trust Companies Act as its agent or agents to maintain a central securities register or registers, and

(b) an agent or agents to maintain branch securities register or registers.

(3) Registration of the issue or transfer of a security in the central securities register or in a branch securities register is complete and valid registration for all purposes.

(4) A branch securities register shall contain particulars of securities issued or transferred at that branch.

(5) Particulars of each issue or transfer of a security registered in a branch securities register shall also be kept in the corresponding central securities register.

(6) Neither a corporation, its agent nor a trustee defined in section 77(1) is

required to produce

(a) a cancelled security certificate in registered form, an instrument referred to in section 29(1) that is cancelled or a like cancelled instrument in registered form 6 years after the date of its cancellation,

(b) a cancelled security certificate in bearer form or an instrument referred to in section 29(1) that is cancelled or a like cancelled instrument in bearer form after the date of its cancellation, or

(c) an instrument referred to in section 29(1) or a like instrument, irrespective of its form, after the date of its expiry.

NOTE: Securities records. CBCA s. 46 varied.

Comment

1. The "securities" to be recorded in the securities register would be those defined in s. 44(2)(n) and include debt securities as well as equity securities.

2. CBCA s. 46(3) deals with the places at which registers are to be kept. See s. 20 of the draft Act.

47.(1) A corporation or a trustee as defined in section 77(1) may, subject to sections 128, 129 and 132, treat the registered owner of a security as the person exclusively entitled to vote, to receive notices, to receive any interest, dividend or other payments in respect of the security, and otherwise to exercise all the rights and powers of an owner of the security.

(2) Notwithstanding subsection (1), but subject to a unanimous shareholder agreement, a corporation whose articles restrict the right to transfer its securities shall, and any other corporation may, treat a person as a registered security holder entitled to exercise all the rights of the security holder he represents if that person furnishes evidence as described in section 72(4) to the corporation that he is

(a) the executor, administrator, heir or legal representative of the

heirs, of the estate of a deceased security holder,

(b) a guardian, committee, trustee, curator or tutor representing a registered security holder who is an infant, an incompetent person or a missing person, or

(c) a liquidator of, or a trustee in bankruptcy for, a registered security holder.

(3) If a person upon whom the ownership of a security devolves by operation of law, other than a person described in subsection (2), furnishes proof of his authority to exercise rights or privileges in respect of a security of the corporation that is not registered in his name, the corporation shall treat that person as entitled to exercise those rights or privileges.

(4) A corporation is not required to inquire into the existence of, or see to the performance or observance of, any duty owed to a third person by a registered holder of any of its securities or by anyone whom it treats, as permitted or required by this section, as the owner or registered holder of the securities.

(5) If an infant exercises any rights of ownership in the securities of a corporation, no subsequent repudiation or avoidance is effective against the corporation.

(6) A corporation shall treat as owner of a security the survivors of persons to whom the security was issued if

(a) it receives proof satisfactory to it of the death of any joint holder of the security, and

(b) the security provides that the persons to whom the security was issued are joint holders with right of survivorship.

(7) Subject to any applicable law relating to the collection of taxes, a person referred to in subsection (2)(a) is entitled to become a registered holder or to designate a registered holder, if he deposits with the corporation or its transfer agent

(a) the original grant of probate or of letters of administration, or a

copy of it certified to be a true copy by

(i) the court that granted the probate or letters of administration,

(ii) a trust company incorporated under the laws of Canada or a province, or

(iii) a lawyer or notary acting on behalf of the person referred to in subsection (2)(a),

or

(b) in the case of transmission by notarial will in the Province of Quebec, a copy of the will authenticated pursuant to the laws of that province,

together with

(c) an affidavit, statutory declaration or declaration of transmission made by a person referred to in subsection (2)(a), stating the particulars of the transmission, and

(d) the security certificate that was owned by the deceased holder

(i) in the case of a transfer to a person referred to in subsection (2)(a), with or without the endorsement of that person, and

(ii) in the case of a transfer to any other person, endorsed in accordance with section 61,

and accompanied by any assurance the corporation may require under section 72.

(8) Notwithstanding subsection (7), if the laws of the jurisdiction governing the transmission of a security of a deceased holder do not require a grant of probate or of letters of administration in respect of the transmission, a legal representative of the deceased holder is entitled, subject to any applicable law relating to the collection of taxes, to become a registered holder or to designate a registered holder, if he deposits with the corporation or its transfer agent

(a) the security certificate that was owned by the deceased holder, and

(b) reasonable proof of the governing laws, of the deceased holder's interest in the security and of the right of the legal representative or the person he designates to become the registered holder.

(9) Deposit of the documents required by subsection (7) or (8) empowers a corporation or its transfer agent to record in a securities register the transmission of a security from the deceased holder to a person referred to in subsection (2)(a) or to such person as the person referred to in subsection (2)(a) may designate and, thereafter, to treat the person who thus becomes a registered holder as the owner of the security.

NOTE: Dealings with the registered holders; transmission of securities on death of holder. CBCA s. 47 with the addition of clause (b) in subsection (6).

Comment:

1. It is essential that the corporation and its transfer agent be entitled to treat as owner of the shares the person named in the securities register. The effect of s. 47(1) is that anyone who wishes to exercise the rights of ownership must get himself registered.

2. S. 47(1) must be read subject to the effect of a transfer by the registered owner which is known to the corporation. The owner cannot exercise the power of transfer without a share certificate, and once a properly supported transfer is brought to the corporation's attention it must, subject to to any valid restrictions on transfer, register the transferee and treat him as owner.

3. S. 47(1) refers to s. 128 dealing with record dates for determination of shareholders, s. 129 with notices of meetings and s. 132 with preparation of lists of shareholders.

4. If a corporation restricts the transfer of its shares, it must still accept as a shareholder one whom the law empowers to exercise the rights of a shareholder upon the shareholder's death, disability, liquidation or bankruptcy. S. 47(2) may thus override the wishes of the shareholders of a closely held corporation by substituting another person for a shareholder whose personality was important. That provision appears necessary for the protection of the property rights of shareholders. We have, however, accepted a suggestion made to us in the course of consultation, and made the subsection subject to a unanimous shareholder

agreement. We can conceive of circumstances under which all the shareholders will agree on some other form of protection, and we agree that they should be free to do so.

5. S. 47(2) provides that, if there are no restrictions on transfer, the corporation may recognize the representative. If the corporation does not want to recognize him the representative can still achieve registration under s. 47(7) if he is legally entitled to exercise the shareholder's rights.

6. S. 47(3) covers cases of devolution by operation of law not covered by s. 47(2), if there are any such cases.

7. S. 47(4) supplements s. 47(1), which allows the corporation to treat a registered owner of a security as the person exclusively entitled to the rights of the shareholder.

8. S. 47(5) relieves a corporation of the burden of ensuring that each of its shareholders is an adult. The importance of relieving the corporation of that burden, and of relieving those dealing with the corporation of the burden of proving to it upon every transaction that the shareholder is an adult, outweighs the risk of occasional loss to an unprotected infant.

9. Our Report No. 14, Minors' Contracts, recommended that a disposition of property which is unenforceable against a minor be effective to transfer the property until the court orders its return. We do not think that enactment of our proposals under that Report would cause a conflict with s. 47(5) as s. 47(5) merely protects the corporation. However, for clarity, this subsection could, if Report No. 14 has been adopted, provide that it prevails over the Minors' Contracts Act.

10. CBCA s. 47(6) allows but does not require a corporation to treat as owner the survivor of joint holders of a security. S. 47(6) of the draft Act would require it to do so; it was suggested to us in the course of consultation that the survivor should have a legal right to be treated as owner, and we agree.

11. We think that in most cases in which two or more persons are registered as owners of a security a right of survivorship will not be intended, and we think the law relating to the creation of joint ownership is not too clear. We therefore think that, in order to avoid the inadvertent creation of rights of survivorship, the law should require those who wish to create one to say so in express terms; and s. 47(6)(b) so provides.

> 48.(1) The provisions of this Part that validate a security or compel its issue or reissue do not apply to the extent that validation, issue or reissue would result in overissue, but
>
> (a) if a valid security, similar in all

respects to the security involved in the overissue, is reasonably available for purchase, the person entitled to the validation or issue may compel the issuer to purchase and deliver such a security to him against surrender of the security that he holds, or

(b) if a valid security, similar in all respects to the security involved in the overissue, is not reasonably available for purchase, the person entitled to the validation or issue may recover from the issuer an amount equal to the price the last purchaser for value paid for the invalid security.

(2) When an issuer subsequently amends its articles or a trust indenture to which it is a party to increase its authorized securities to a number equal to or in excess of the number of securities previously authorized plus the amount of the securities overissued, the securities so overissued are valid from the date of their issue.

(3) Subsection (2) does not apply if the issuer has purchased and delivered a security in accordance with subsection (1)(a) or paid the amount referred to in subsection (1)(b).

(4) A purchase or payment by an issuer under subsection (1) is not a purchase or payment to which section 32, 33, 34 or 37 applies.

NOTE: Overissue. CBCA s.48, with s. 48(3) added.

Comment

1. Some provision dealing with the case of overissue is desirable. S. 48(1)(a) of the draft Act would cover most cases, as the purchaser could compel the issuer to purchase a similar security for him if one is reasonably available. S. 48(1)(b) represents the UCC's value judgment about the fairest result if there is no replacement available: see UCC s. 8-104. It may restrict the holder to what is no longer be an adequate value for the security, but the Official Comment to the UCC is to the effect that it is the fairest means of reducing the possibility of speculation by the purchaser.

2. UCC s. 8-104, goes on to allow the purchaser interest from the date of his demand. The CBCA does not. The draft Act follows the CBCA.

3. Under s. 48(2) the issuer would have the option of amending its articles or a trust indenture to which it is a party to increase its authorized securities to include the over-issue. This seems sensible. S. 48(3), which is not in the CBCA, would protect the issuer against finding that it had inadvertently validated a security which it had already replaced or paid for but omitted to get in.

4. S. 48 applies only to overissues brought about by the operation of Part 6. It would continue to be possible to have overissues that are brought about by other causes.

49. In an action on a security,

(a) unless specifically denied in the pleadings, each signature on the security or in a necessary endorsement is admitted,

(b) a signature on the security is presumed to be genuine and authorized but, if the effectiveness of the signature is put in issue, the burden of establishing that it is genuine and authorized is on the party claiming under the signature,

(c) if a signature is admitted or established, production of the instrument entitles a holder to recover on it unless the defendant establishes a defence or a defect going to the validity of the security, and

(d) if the defendant establishes that a defence or defect exists, the plaintiff has the burden of establishing that the defence or defect is ineffective against him or some person under whom he claims.

NOTE: Burden of proof in actions. CBCA s. 49.

Comment

See comment 2(i) on s. 51.

50. Unless otherwise agreed, and subject to any applicable law, regulation or stock exchange rule, a person required to deliver securities may deliver any security of the specified issue in bearer form or registered in the name of the transferee or endorsed to him or in blank.

NOTE: Securities are fungible, i.e., securities of the same issue are interchangeable. CBCA s. 50.

Issue - Issuer

51.(1) Even against a purchaser for value and without notice of a defect going to the validity of a security, the terms of the security include those stated on the security and those incorporated in it by reference to another instrument, statute, rule, regulation or order to the extent that the terms so referenced do not conflict with the stated terms, but such a reference is not of itself notice to a purchaser for value of a defect going to the validity of the security, notwithstanding that the security expressly states that a person accepting it admits such notice.

(2) A security is valid in the hands of a purchaser for value without notice of any defect going to its validity.

(3) Except as provided in section 53, the fact that a security is not genuine is a complete defence even against a purchaser for value and without notice.

(4) All other defences of an issuer, including non-delivery and conditional delivery of a security, are ineffective against a purchaser for value without notice of the particular defence.

NOTE: Notice of defects. CBCA s. 51.

Comment

1. It is obviously right that, as s. 51(1) provides, a purchaser should be bound by terms stated on the security which he purchased.

2. The relationship between the issuer of a security and the purchaser for value without notice is dealt with in s. 49 (burden of proof), s. 51(1) (effect of statements on the security and in instruments incorporated by reference), s. 51(2) (validity in hands of purchaser for value without notice of defect going to validity), s. 51(3) (lack of genuineness), s. 51(4) (ineffectiveness of defences of issuer other than lack of genuineness), s. 52 (staleness as notice of defect), s. 53 (unauthorized signature), s. 54 (completion or alteration), and s. 55 (warranties of agents). It is also affected by s. 18 (authority of directors, officers and agents). The effect of these sections is as follows:

(a) A security is valid in the hands of a purchaser for value without notice of a defect going to its validity (s. 51(2) and the issuer is precluded from raising a defence against a purchaser for value without notice of the defence (s. 51(4)).

(b) One exception to the statements made in (a) is that (unless the signature is one of those mentioned in s. 53) the fact that an instrument is not genuine is a defence (s. 51(3)). "Genuine" means "free of forgery or counterfeiting" (s. 44(2)(h)).

(c) Another exception (though s. 51(2) and s. 51(4) may at first blush be read to suggest otherwise) is that an "unauthorized signature" is "ineffective", except in certain cases, even if a purchaser for value without notice acquires the security (s. 53), and an "unauthorized signature" includes not only a forgery but also any other signature "made without actual, implied or apparent authority".

(d) The purchaser for value without notice, however, is given an important protection against the consequences of forgeries and other unauthorized signatures. Under s. 53 an unauthorized signature is effective in his favour if done by an employee of an issuer or of a registration or transfer agent who handles the security in the ordinary course of his duties. This provision greatly restricts, and in practice will virtually destroy, the exceptions mentioned in (b) and (c), as those exceptions will apply only to unauthorized signatures done by outsiders or by employees of the issuer or registrar or transfer agent who have no business handling the securities, the incidence of which kinds of unauthorized signatures must be rare. The purchaser may also rely on s. 18(e) under which the corporation would be precluded from denying that a document issued by a director, officer or agent with actual or usual authority to issue it is not valid or genuine, though in most, if not all, cases covered by it s. 53 would apply.

(e) Although a purchaser for value without notice would be bound by terms stated on the security and in an instrument incorporated by reference (a provision which is obviously appropriate), s. 51(1) would give him two important protections. The first is that he is not bound by terms in the incorporated instrument which conflict with those stated on the security. The second is that the reference does not affect him with notice of a defect going to validity, even though the security provides that it is notice.

(f) A purchaser could become a purchaser with notice if he takes the security more than one year after an event requiring payment of money or delivery of other securities upon surrender of the security, (though only if the funds or securities were available on the date), or more than 2 years after a date set for surrender or presentation of the security or a date on which

performance of the principal obligation became due (s. 52).

(g) A purchaser for value without notice would be able to enforce it even though blanks are incorrectly filled in (s. 54). If a completed security is improperly altered he would be able to enforce it according to its original terms.

(h) A purchaser for value without notice is given the benefit of warranties by the registrar, transfer agent, or other person authorized to sign securities. The warranties are that the security is genuine and the signature authorized, and that the signer has reasonable grounds to believe that the security is in proper form and within the amount the issuer is authorized to issue (s. 55(1)).

(i) The burden of proof of the validity of a signature is dealt with by s. 49 as follows:

(i) A signature is admitted and presumed unless put in issue.

(ii) When the signature is put in issue the burden of proving it is shifted to its proponent.

(iii) When the proponent has satisfied the burden of proving the signature, the burden of proving a defence or defect shifts to the defendant.

(iv) When the defendant shows that there is a defence or a defect, the burden of showing it inapplicable, (e.g. because the plaintiff is a bona fide purchaser) shifts to the plaintiff.

52. After an event that creates a right to immediate performance of the principal obligation evidenced by a security, or that sets a date on or after which a security is to be presented or surrendered for redemption or exchange, a purchaser is deemed to have notice of any defect in its issue or of any defence of the issuer,

(a) if the event requires the payment of money or the delivery of securities, or both, on presentation or surrender of the security, and such funds or securities are available on the date set for payment or exchange, and he takes the security more than one year after that date, or

(b) if he takes the security more than 2 years after the date set for surrender or presentation or the date on which such performance

became due.

NOTE: Staleness is notice of defect. CBCA s. 52.

Comment

1. See comment on s. 51.

2. S. 52 provides a standard of staleness as against the issuer. It might create a problem from the purchaser's point of view in that an event that creates a right to immediate performance (e.g., an acceleration upon the corporation missing a dividend or payment) might not appear on the face of the certificate. However, as the UCC Official Comment says, an issuer should at some point be placed in a position to determine definitely its liability on an invalid or improper issue.

53. An unauthorized signature on a security before or in the course of issue is ineffective, except that the signature is effective in favour of a purchaser for value and without notice of the lack of authority, if the signing has been done by

(a) an authenticating trustee, registrar, transfer agent or other person entrusted by the issuer with the signing of the security, or of similar securities, or their immediate preparation for signing, or

(b) an employee of the issuer or of a person referred to in clause (a) who in the ordinary course of his duties handles the security.

NOTE: Unauthorized signature. CBCA s. 53.

Comment

See comment on s. 51.

54.(1) If a security contains the signatures necessary to its issue or transfer but is incomplete in any other respect,

(a) any person may complete it by filling in the blanks in accordance with his authority, and

(b) notwithstanding that the blanks are incorrectly filled in, the security

as completed is enforceable by a purchaser who took it for value and without notice of the incorrectness.

(2) A completed security that has been improperly altered, even if fraudulently altered, remains enforceable but only according to its original terms.

NOTE: Completion or alteration. CBCA s. 54.

Comment

See comment on s. 51.

55.(1) A person signing a security as authenticating trustee, registrar, transfer agent or other person entrusted by the issuer with the signing of the security, warrants to a purchaser for value without notice that

(a) the security is genuine,

(b) his acts in connection with the issue of the security are within his authority, and

(c) he has reasonable grounds for believing that the security is in the form and within the amount the issuer is authorized to issue.

(2) Unless otherwise agreed, a person referred to in subsection (1) does not assume any further liability for the validity of a security.

NOTE: Warranties of agents. CBCA s. 55.

Comment

The Official Comment to the UCC indicates that s. 55(1) and s. 55(2) embody the prevailing case law in the United States. The two subsections appear to impose an appropriate responsibility upon agents.

Purchase

56.(1) Upon delivery of a security the purchaser acquires the rights in the security that his transferor had or had authority to

convey, except that a purchaser who has been a party to any fraud or illegality affecting the security or who as a prior holder had notice of an adverse claim does not improve his position by taking from a later bona fide purchaser.

(2) A bona fide purchaser, in addition to acquiring the rights of a purchaser, also acquires the security free from any adverse claim.

(3) A purchaser of a limited interest acquires rights only to the extent of the interest purchased.

(4) Nothing in subsection (2) confers any rights upon a purchaser unless all necessary endorsements are made by an appropriate person as defined in s. 61.

NOTE: Title of purchaser. CBCA s. 56 with the addition of subsection (4).

Comment

1. "Delivery" of the security (s. 56(1)) transfers the transferor's rights to a "purchaser." "Delivery" means "voluntary transfer of possession" (s. 44(2)(e)). The recipient is only a "purchaser" if he "takes" by a "voluntary transaction creating an interest in the security." (s. 44(2)(m)). He has a right to compel the transferor to provide any necessary endorsement (s. 60).

2. Under the exception in s. 56(1) a bona fide purchaser cannot give good title to a purchaser who has been a party to a fraud or illegality affecting the security or who, as a prior holder, had notice of an adverse claim. While this provision restricts the marketability of the security, the restriction appears to be minimal and in accordance with good conscience.

3. With regard to s. 56(2), see the comment on definition of "adverse claim" in s. 44(2).

4. S. 56(2) is basic to negotiability. The purchaser acquires good title despite an adverse claim if he is a bona fide purchaser (as defined in s. 44(2)(c), i.e., if

   (a) he is a" purchaser" as defined in s. 44(2)(m),

   (b) he gives value. Presumably "value" means valuable consideration in the sense in which that term is used in the law of contracts and negotiable instruments. (This requirement excludes a donee, who is included in the term "purchaser."),

   (c) he acts in good faith. "Good faith" means "honesty in

fact in the conduct of the transaction concerned" (s. 44(2)(i)),

(d) he does not have notice of an "adverse claim." "Adverse claim" includes a claim that a transfer is wrongful or that someone else owns the security (s. 44(2)(a)),

(e) he takes delivery. "Delivery" means "voluntary transfer of possession" (s. 44(2)(e)), and

(f) the security is in bearer form, or, if in registered form it is registered in the purchaser's name, or endorsed to him or in blank.

Through the use of this definition, s. 56(2) conforms to the standard tests for negotiability and, assuming that the policy decision in favour of negotiability is made, appears to be in order.

5. With regard to s. 56(4), again see the comment on the definition of "adverse claim" in s. 44(2)(a).

6. What is said in s. 56(4) is implicit in the definition in s. 44(2)(c) of "bona fide purchaser" as one to whom a security in registered form is "endorsed" and the statement made in s. 61(3) that an endorsement is made when, inter alia, an appropriate person signs. However, it is difficult for a reader to perceive that s. 44(2)(c) and s. 61(3) have that effect, and we have added s. 56(4) in the hope that it will make Part 6 easier to read.

57.(1) A purchaser of a security, or any broker for a seller or purchaser, is deemed to have notice of all adverse claims if

(a) the security, whether in bearer or registered form, has been endorsed "for collection" or "for surrender" or for some other purpose not involving transfer, or

(b) the security is in bearer form and has on it a statement that it is the property of a person other than the transferor, except that the mere writing of a name on a security is not such a statement.

(2) Notwithstanding that a purchaser or any broker for a seller or purchaser, has notice that a security is held for a third person or is registered in the name of or endorsed by a fiduciary, he has no duty to inquire into the rightfulness of the transfer and has no notice of an adverse claim, except that where a purchaser knows that the consideration is to be used for, or that the

transaction is for, the personal benefit of the fiduciary or is otherwise in breach of the fiduciary's duty, the purchaser is deemed to have notice of an adverse claim.

NOTE: Deemed notice of adverse claims. CBCA s. 57.

Comment

1. The circumstances set out in s. 57(1) justify depriving a purchaser of the advantages of negotiability.

2. CBCA s. 57(1) says that the purchaser of a security described in clause (a) or (b) is deemed to have notice of "an adverse claim." We think this term to be somewhat ambiguous. On the one hand, it might be interpreted to include only the "adverse claim" of the person who endorses the security restrictively or who is said on the security to be the owner. On the other hand, it might be interpreted to mean any "adverse claim" being asserted against the purchaser by any person who has such a claim. We do not think that negotiability should operate in favour of a purchaser who takes a security which on its face is not intended to be negotiable, and we note that the plural term "adverse claims" is used in s. 8-304 of the Uniform Commercial Code, which is the prototype of CBCA s. 57(1). We have therefore returned to the wording of the UCC and have substituted "all adverse claims" for "an adverse claim". See also the comment on s. 58.

3. S. 57(2) enhances negotiability. Its effect is that in the absence of anything to the contrary a purchaser is entitled to assume that a fiduciary can transfer. See also s. 61(10).

58. An event that creates a right to immediate performance of the principal obligation evidenced by a security or that sets a date on or after which the security is to be presented or surrendered for redemption or exchange is not of itself notice of an adverse claim, except in the case of a purchase

(a) after one year from any date set for such presentation or surrender for redemption or exchange, or

(b) after 6 months from any date set for payment of money against presentation or surrender of the security if funds are available for payment on that date.

NOTE: Staleness as notice of adverse claims. CBCA s. 58.

Comment

S. 58 would deprive a purchaser of defences against an adverse claimant in somewhat the same way as s. 52 would deprive him of defences against the issuer in connection with validity. The time periods are shorter in s. 58.

59.(1) A person who presents a security for registration of transfer or for payment or exchange warrants to the issuer that he is entitled to the registration, payment or exchange, except that a purchaser for value without notice of an adverse claim who receives a new, reissued or re-registered security on registration of transfer warrants only that he has no knowledge of any unauthorized signature in a necessary endorsement.

(2) A person by transferring a security to a purchaser for value warrants only that

(a) the transfer is effective and rightful,

(b) the security is genuine and has not been materially altered, and

(c) he knows of nothing that might impair the validity of the security.

(3) If a security is delivered by an intermediary known by the purchaser to be entrusted with delivery of the security on behalf of another or with collection of a draft or other claim to be collected against such delivery, the intermediary by such delivery warrants only his own good faith and authority even if he has purchased or made advances against the draft or other claim to be collected against the delivery.

(4) A pledgee or other holder for purposes of security who redelivers a security received, or after payment and on order of the debtor delivers that security to a third person, gives only the warranties of an intermediary under subsection (3).

(5) A broker gives

(a) to his customer and to a purchaser the warranties provided in subsection (2), and

(b) to the issuer, the warranties provided in subsection (1).

(6) A broker has the rights and privileges of a purchaser under this section.

(7) The warranties of and in favour of a broker acting as an agent are in addition to warranties given by his customer and warranties given in favour of his customer.

NOTE: Warranties to issuers and purchasers; warranties of and to intermediaries, pledgees and brokers. CBCA s. 59 except that subsection (5) is recast as 3 subsections.

Comment

1. One effect of s. 59(1) is somewhat curious. A purchaser for value without notice of an adverse claim is a person, and therefore, under the first part of the subsection, warrants that he is entitled to the registration of his transfer; once the issuer has acted upon that warranty by registering the transfer, however, the latter part of the subsection says that the purchaser warrants only that he does not know of any unauthorized signature in a necessary endorsement; and a warranty which is made only until it is acted upon and then disappears is somewhat anomalous. There does not appear to be any difficulty in practice, however, and the exception is an accordance with s. 64 which changes the law to protect the purchaser under the circumstances which the exception deals with.

2. Under s. 59(2), the transferor warrants, in effect, that the instrument and the transfer are genuine. He does not warrant that the instrument will be honoured. In the case of a transfer by endorsement, the legal situation of the transferor is different from the legal situation of the endorser of a bill, notice or cheque, as the latter undertakes that the instrument will be honoured upon the presentation. See comment 5 on s. 61.

3. The warranty imposed by s. 59(3) and s. 59(4) appears to be an appropriate one for an agent.

4. S. 59(5) renders the broker liable to his customer and to a purchaser as if he were a principal. He should not be able to foist upon his customer a defective security, either from his own stock or by purchase on the market, since he is employed to obtain a valid one; and the purchaser deals with the broker and must rely on him to deliver a security which is genuine and is properly transferred. It should be noted that the warranty to the customer applies only when the customer is a purchaser; there is no warranty by a broker to a vendor.

5. S. 59(5) renders the broker liable to the issuer as an intermediary, which, when he presents a transfer for registration, is what he is.

6. Under CBCA s. 59(5) "a broker gives to his customer, to the issuer and to a purchaser, as the case may be, the

warranties provided in" CBCA s. 59. In view of the different warranties provided in different subsections we think that this wording is rather opaque. We have tried to sort out the warranties given by the broker and state them in a way which appears to us to be clearer.

7. The re-drafting of s. 59(5) requires s. 59(6) and 59(7) to appear in separate subsections. That appears appropriate in view of the relationship of a broker to those with whom he deals.

60. If a security in registered form is delivered to a purchaser without a necessary endorsement, he may become a bona fide purchaser only as of the time the endorsement is supplied, but against the transferor the transfer is complete upon delivery and the purchaser has a specifically enforceable right to have any necessary endorsement supplied.

NOTE: Right to compel endorsement. CBCA s. 60.

Comment

1. A purchaser who has received a security in registered form without a necessary endorsement should certainly be able to compel the endorsement.

2. Note that the purchaser would be affected by notice of an adverse claim received after delivery and before endorsement. It seems reasonable enough that if he wishes to obtain the advantage of negotiability he should take care to receive the security in negotiable form.

3. A forged or unauthorized endorsement does not make the purchaser a "bona fide purchaser." See notes to the definition of "adverse claim" in s. 44(2)(a), and see the definition of "bona fide purchaser" in s. 44(2)(c).

61.(1) In this section, "appropriate person" means

(a) the person specified by the security or by special endorsement to be entitled to the security,

(b) if a person described in clause (a) is described as a fiduciary but is no longer serving in the described capacity, either that person or his successor,

(c) if the security or endorsement mentioned in clause (a) specifies more than one person as fiduciaries

and one or more are no longer serving in the described capacity, the remaining fiduciary or fiduciaries, whether or not a successor has been appointed or qualified,

(d) if a person described in clause (a) is an individual and is without capacity to act by reason of death, incompetence, minority, or otherwise, his fiduciary,

(e) if the security or endorsement mentioned in clause (a) specifies more than one person with right of survivorship and by reason of death all cannot sign, the survivor or survivors,

(f) a person having power to sign under applicable law or a power of attorney, or

(g) to the extent that a person described in clauses (a) to (f) may act through an agent, his authorized agent.

(2) Whether the person signing is an appropriate person is determined as of the time of signing and an endorsement by such a person does not become unauthorized for the purposes of this Part by reason of any subsequent change of circumstances.

(3) An endorsement of a security in registered form is made when an appropriate person signs, either on the security or on a separate document, an assignment or transfer of the security or a power to assign or transfer it, or when the signature of an appropriate person is written without more upon the back of the security.

(4) An endorsement may be special or in blank.

(5) An endorsement in blank includes an endorsement to bearer.

(6) A special endorsement specifies the person to whom the security is to be transferred, or who has power to transfer it.

(7) A holder may convert an endorsement in blank into a special endorsement.

(8) Unless otherwise agreed, the endorser by his endorsement assumes no

obligation that the security will be honoured by the issuer.

(9) An endorsement purporting to be only of part of a security representing units intended by the issuer to be separately transferable is effective to the extent of the endorsement.

(10) Failure of a fiduciary to comply with a controlling instrument or with the law of the jurisdiction governing the fiduciary relationship, including any law requiring the fiduciary to obtain court approval of a transfer, does not render his endorsement unauthorized for the purposes of this Part.

NOTE: Endorsement. CBCA s. 61.

Comment

1. S. 61(1) lists the persons authorized to endorse a security which is in registered form. S. 61(1)(b)is somewhat extreme in that it enables an ex-fiduciary to endorse, but it improves negotiability and may save time and unnecessary legal proceedings. Note that under s. 72(1)(b) the issuer may, but need not, require proof of incumbency.

2. S. 61(3) departs from what we understand business practise to be by suggesting that a mere endorsement on a share certificate is enough, with delivery, to constitute a valid transfer; it is usual to require either a form of transfer or a form of power of attorney. We propose however that the draft Act follow the CBCA provision for the sake of uniformity.

3. Note that the definition of endorsement in s. 61(3) is integral to the definition of bona fide purchaser in s. 44(2)(c) and to the exoneration under s. 73(3) and s. 74 of an issuer who registers a transfer and issues a new security.

4. A registered security endorsed in blank can pass freely from hand to hand by delivery. One endorsed by special endorsement requires endorsement and delivery to give the transferee the rights of a bona fide purchaser, although mere delivery may give him his transferor's rights plus the right to call for an endorsement.

5. Under s. 61(8), the endorser of a security is in a different position from the endorser of a bill, note or cheque, who in the absence of anything to the contrary undertakes that the instrument will be honoured (Bills of Exchange Act, s. 133). The difference is in accordance with business understanding.

6. Note that if the endorser is a transferor, he gives to his purchaser the warranties under s. 59(2).

7. S. 61(9) makes it possible to split up the security to the extent that it is in separate units, unlike a bill, note or cheque.

8. S. 61(10) re-emphasizes that a purchaser is not affected by adverse claims based on breaches of fiduciary relationships. See s. 57(2) and s. 56(2).

62. An endorsement of a security whether special or in blank does not constitute a transfer until delivery of the security on which it appears or, if the endorsement is on a separate document, until delivery of both the security and that document.

NOTE: Effect of endorsement without delivery. CBCA s. 62.

Comment

A mere endorsement is not a transfer until both the endorsement and the security are delivered.

63. An endorsement of a security in bearer form may give notice of an adverse claim under section 57 but does not otherwise affect any right to registration that the holder has.

NOTE: Endorsement in bearer form. CBCA s. 63.

Comment

1. Note that a debt security would be and remain in bearer form "if it is payable to bearer according to its terms and not by reason of any endorsement" (s. 44(6)). It would remain in bearer form even though specially endorsed, and would remain transferable by delivery so as to constitute the transferee a bona fide purchaser unless the endorsement gives notice of an adverse claim. S. 57 mentions endorsements which would deprive a purchaser of the special rights of a bona fide purchaser, but provides that the mere writing of a name on a security in bearer form would not.

2. S. 63 would not apply to share certificates as, under s. 24, these would have to be in registered, not bearer, form.

64. Unless the owner has ratified an unauthorized endorsement or is otherwise precluded from asserting its ineffectiveness, he may assert its ineffectiveness against the issuer or any purchaser other than a purchaser for value and without notice of

adverse claims who has in good faith received a new, reissued or re-registered security on registration of transfer.

NOTE: Effect of unauthorized endorsement. This section is derived from s. 8-311(a) of the American Uniform Commericial Code and is a substantial departure from CBCA s. 64(1).

Comment

1. S. 64 departs substantially from the general law relating to negotiable instruments by giving title to a purchaser on the basis of a forged or unauthorized endorsement followed by registration of the void transfer and the issue of a new security. This derogation from owner's security of title and the substitution under s. 73(5) (CBCA s. 64(2)) of a claim in his favour against the issuer are justified in view of the interest of issuers and investors in the efficient working of the markets. It applies only in favour of a purchaser for value without notice who obtains a certificate in his name. See the comment on the definition of "adverse claim" in s. 44(2)(a).

2. Note that a purchaser, even though he takes in good faith and for value without notice, is not protected until he obtains a certificate in his own name (see also s. 68(2)). This is one reason why it is prudent to register a transfer of a security.

3. CBCA s. 64(1) reads as follows:

> 64.(1) The owner of a security may assert the ineffectiveness of an endorsement against the issuer or any purchaser, other than 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, unless the owner
>
> (a) has ratified an unauthorized endorsement of the security, or
>
> (b) is otherwise precluded from impugning the effectiveness of an unauthorized endorsement.

We have substituted the wording of its prototype, UCC s. 8-311. Our reason is that the CBCA section deals with "ineffective endorsements," an undefined class which, unless the reader has a thorough and detailed understanding of Part 6, might well be thought to include an endorsement made by someone without capacity to endorse. UCC s. 8-311 clearly deals only with "unauthorized" endorsements (which are "ineffective"), and it is clearly the policy of Part 6 that it is only "unauthorized" endorsements to which s. 64 is intended to apply. See the comment on the definition of "adverse claim" in s. 44(2)(a).

4. CBCA s. 64(2) reads as follows:

> (2) An issuer who registers the transfer of a security upon an unauthorized endorsement is liable for improper registration.

In order to clarify Part 6, we have included this subsection as s. 73(5) for reasons gien in comment 4 on the definition of "adverse claim" in s. 44(2)(a).

> 65.(1) A person who guarantees a signature of an endorser of a security warrants that at the time of signing
>
> (a) the signature was genuine,
>
> (b) the signer was an appropriate person as defined in section 61 to endorse, and
>
> (c) the signer had legal capacity to sign.
>
> (2) A person who guarantees a signature of an endorser does not otherwise warrant the rightfulness of the particular transfer.
>
> (3) A person who guarantees an endorsement of a security warrants both the signature and the rightfulness of the transfer in all respects, but an issuer may not require a guarantee of endorsement as a condition to registration of transfer.
>
> (4) The warranties referred to in this section are made to any person taking or dealing with the security relying on the guarantee and the guarantor is liable to that person for any loss resulting from breach of warranty.

NOTE: Warranties of guarantees of signatures or endorsements. CBCA s. 65.

Comment

1. Under s. 65(1), the guarantor of a signature would not only guarantee that the signature is that of the person who signs; he goes on to guarantee that that person is the one named in the certificate or otherwise determined by law under s. 61; and he also guarantees the capacity of the person signing. These are onerous warranties. Requiring them is the issuer's means of protecting itself against a forgery or unathorized signature (though it is still vulnerable to a forgery of the guarantee, or a lack of authority on the part of the person signing the guarantee);

under s. 71(1)(b) the issuer is entitled to demand reasonable assurance that an endorsement is genuine and effective.

2. S. 65(2) would protect the guarantor of a signature against being held to have warranted the rightfulness of the transfer as well as its genuineness and effectiveness.

3. S. 65(3) would provide for a guarantee of endorsement which goes on to guarantee the rightfulness of the transfer, but the principal effect of the subsection is to prohibit an issuer from requiring such an endorsement.

4. S. 65(4) would prevent a guarantor from escaping liability on the grounds that there is no relationship between the guarantor and the person dealing with the security which is recognized by the law of contract or torts.

66.(1) Delivery to a purchaser occurs when

(a) he or a person designated by him acquires possession of a security,

(b) his broker acquires possession of a security specially endorsed to or issued in the name of the purchaser,

(c) his broker sends him confirmation of the purchase and the broker in his records identifies a specific security as belonging to the purchaser, or

(d) with respect to an identified security to be delivered while still in the possession of a third person, that person acknowledges that he holds it for the purchaser.

(2) A purchaser is the owner of a security held for him by his broker, but a purchaser is not a holder except in the cases referred to in subsection (1)(b) and (c).

(3) If a security is part of a fungible bulk a purchaser of the security is the owner of a proportionate interest in the fungible bulk.

(4) Notice of an adverse claim received by a broker or by a purchaser after the broker takes delivery as a holder for value is not effective against the broker or the purchaser, except that, as between the broker and the purchaser, the purchaser may demand delivery of an equivalent security as to which no notice of an adverse claim has been

received.

NOTE: Constructive delivery and constructive ownership of a security. CBCA s. 66.

Comment

S. 66 is primarily, though not exclusively, concerned with the position of one who purchases securities through a broker. The present law is not clear or satisfactory. The section is designed to remedy both conditions, and we think that the rules which it lays down should have some success in so doing.

67.(1) Unless otherwise agreed, if a sale of a security is made on an exchange or otherwise through brokers,

(a) the selling customer fulfils his duty to deliver when

(i) he delivers the security to the selling broker or to a person designated by the selling broker, or

(ii) causes an acknowledgement to be made to the selling broker that the security is held for him,

and

(b) the selling broker, including a correspondent broker, acting for a selling customer fulfils his duty to deliver

(i) by delivering the security or a like security to the buying broker or to a person designated by the buying broker, or

(ii) by effecting clearance of the sale in accordance with the rules of the exchange on which the transaction took place.

(2) Except as otherwise provided in this section and unless otherwise agreed, a transferor's duty to deliver a security under a contract of purchase is not fulfilled until he

(a) delivers the security in negotiable form to a purchaser or to a person

designated by the purchaser, or

(b) causes an acknowledgement to be made to the purchaser that the security is held for him.

(3) A sale to a broker purchasing for his own account is subject to subsection (2) and not subsection (1), unless the sale is made on a stock exchange.

NOTE: Delivery of security. CBCA s. 67.

Comment

1. Under s. 67(1), the selling customer is exonerated by delivering the security to his broker. If the selling broker does not deliver the security to the purchaser or the purchaser's broker, the purchaser has no recourse. So far as the price goes, he can protect himself by not paying until he receives the certificate, but he will not be able to protect himself against consequential damages if the selling broker is judgment proof. This is a case in which it is highly desirable to have uniformity with the CBCA, to say nothing of the UCC (see UCC s. 8-314(1)).

2. S. 67(2) would prescribe an appropriate rule for determining when a transferor's duty is discharged.

3. S. 67(3) is desirable to cover the special case of a broker purchasing on his own account in a way which is uniform with the CBCA and the UCC (see UCC s. 8-314(2)).

68.(1) A person against whom the transfer of a security is wrongful for any reason, including his incapacity but not including an unauthorized endorsement, may against anyone except a bona fide purchaser reclaim possession of the security or obtain possession of any new security evidencing all or part of the same rights or claim damages.

(2) If the transfer of a security is wrongful by reason of an unauthorized endorsement, the owner may reclaim possession of the security or obtain possession of a new security even from a purchaser for value and without notice of an adverse claim if the ineffectiveness of the purported endorsement may be asserted against such purchaser under section 64.

(3) The right to reclaim possession of a security may be specifically enforced, its transfer may be restrained and the security may be impounded pending litigation.

NOTE: Right to reclaim possession of security. CBCA s. 68 varied in subsection (1) to make it clear that the subsection does not extend to unauthorized endorsements, and in subsection (2) to refer to "a purchaser for value and without notice of an adverse claim" instead of a bona fide purchaser.

Comment

1. S. 68(1) would make it clear that a person with an interest in a security would be entitled to assert his interest, except in a case in which his right to do so would interfere with the rights of a bona fide purchaser and would therefore adversely affect negotiability. The subsection complements s. 56(2).

2. S. 68(1) would not cover a case of an unauthorized endorsement, which comes under s. 68(2). We have therefore added to s. 68(1) the words "but not including an unauthorized endorsement" to make the point clearer to the reader.

3. S. 68(2) would make it clear that if an unauthorized endorsement is made on a security the owner could recover the security until the transfer is registered and a new security issued in the name of a purchaser for value and without notice of an adverse claim. The subsection complements s. 64.

4. CBCA s. 68(2) uses the term "bona fide purchaser" and not "purchaser for value and without notice of an adverse claim." We have made the substitution because we do not think that one who takes a security in registered form under an unauthorized endorsement can be a "bona fide purchaser" as defined in s. 44(2) because the security is not "endorsed" within the meaning of the term under s. 61(3).

69.(1) Unless otherwise agreed, a transferor shall on demand supply a purchaser with proof of his authority to transfer or with any other requisite that is necessary to obtain registration of the transfer of a security, but if the transfer is not for value a transferor need not do so unless the purchaser pays the reasonable and necessary costs of the proof and transfer.

(2) If the transferor fails to comply with a demand under subsection (1) within a reasonable time, the purchaser may reject or rescind the transfer.

NOTE: Right to requisites of transfer. CBCA s. 69.

Comment

1. S. 69(1) sets out the obligation of a transferor for value to provide all necessary assurances.

2. If necessary assurances are not forthcoming within a reasonable time the purchaser should be able to reject the transfer or rescind it. S. 69(2) so provides.

> 70. No seizure of a security of a distributing corporation or other interest evidenced thereby is effective until the person making the seizure obtains possession of the security.

NOTE: Seizure of security. CBCA s. 70 varied to make it inapplicable to non-distributing corporations.

Comment

We have given thought to the rather unsatisfactory state of the law with regard to the seizure of shares in private companies. We have however reserved the subject for further consideration. S. 70 of the draft Act would follow CBCA s. 70, but only with regard to the seizure of shares of distributing corporations.

> 70.1 An agent or bailee who in good faith, including observance of reasonable commercial standards if he is in the business of buying, selling or otherwise dealing with securities, has received securities and sold, pledged or delivered them according to the instructions of his principal is not liable for conversion or for participation in breach of fiduciary duty although the principal has no right to dispose of them.

NOTE: No conversion if good faith delivery by agent. CBCA s. 70.1.

Comment

1. S. 70.1 is UCC s. 8-318. It was carried forward into the Ontario BCA as s. 89. It was carried forward into the CBCA by 1978-79 S.C. c. 9, s. 24.

2. Halsbury says (1 Halsbury (4th ed.) 519-20) that an agent who obtains possession of, sells and delivers goods under authority of a principal who is not the owner is guilty of conversion and liable in damages to the true owner. S. 70.1 would make it clear that that rule does not apply if an agent or bailee sells securities which he has received in good faith and in conformity with good commercial practice.

3. It may be thought that a broker should not be protected against the owner but should rather be left to rely on the warranty of his customer; that lack of protection would tend to cause him to exercise desirable care in the selection of his customers. We are inclined to the contrary view, that the unsuspecting broker is innocent and that freeing him from claims for conversion if his reliance on his customer is misplaced is desirable in the interests of facilitating the flow of capital in the money market.

71.(1) If a security in registered form is presented for registration of transfer, the issuer shall register the transfer if

(a) the security is endorsed by an appropriate person, as defined in section 61,

(b) reasonable assurance is given that that endorsement is genuine and effective,

(c) the issuer has no duty to inquire into adverse claims or has discharged any such duty,

(d) any applicable law relating to the collection of taxes has been complied with,

(e) the transfer is rightful or is to a bona fide purchaser, and

(f) any fee referred to in section 45(2) has been paid.

(2) If an issuer has a duty to register a transfer of a security, the issuer is liable to the person presenting it for registration for loss resulting from any unreasonable delay in registration or from failure or refusal to register the transfer.

NOTE: Duty to register transfer. CBCA s. 71.

Comment

1. S. 71(1) requires the issuer to register upon receipt of the limited materials listed in s. 71(1). S. 73(5) of the draft Act (s. 64(2) of the CBCA) imposes liability upon the issuer if it registers wrongfully. S. 71(2) imposes liability upon it for delay or for refusal to register. These apparently harsh provisions can, we think, be justified in two ways. The first is that it is the issuer and its shareholders who benefit from the efficient operation of the capital market

and should take the risk of loss arising from business practices which are necessary to that efficient operation. The second is that the issuer is given a means to protect itself against unauthorized endorsements; it can require guarantees of signatures; it can require the additional material listed in s. 72 relating to agents and fiduciaries; and it is given a simple and legally sufficient inquiry procedure to protect itself against adverse claims arising from other causes. It is also protected against adverse claims (other than those based on unauthorized endorsements) unless it has notice of the claim in writing or from excess documentation which it has demanded (s. 73(1)). See the discussion in our Report at p. 89-91 .

2. S. 71(1) uses the phrase "presented for registration of transfer". The CBCA counterpart says "presented for transfer". In s. 73(1) the CBCA uses the phrase "presented for registration". We propose to use the phrase "registration of transfer". This is consistent with s. 74(1) which refers to "the registration of a transfer of a security", and with a similar phrase in s. 75(1). We have thought it desirable that the same words should be used for the same process wherever it is dealt with. It may be that a more correct phraseology would be "transfer of registration", because the issuer is obliged to note in a register the name of the holder of a security but is not obliged to note in a register particulars of a transfer, and to change the registration from the name of an existing owner to that of a transferee is a process which might well be described as "transfer of registration"; however we propose to follow the usage first mentioned.

> 72.(1) An issuer may require an assurance that each necessary endorsement on a security is genuine and effective by requiring a guarantee of the signature of the person endorsing, and by requiring
>
> (a) if the endorsement is by an agent, reasonable assurance of the agent's authority to sign,
>
> (b) if the endorsement is by a fiduciary, evidence of his appointment or incumbency,
>
> (c) if there is more than one fiduciary, reasonable assurance that all who are required to sign have done so, and
>
> (d) in any other case, assurance that corresponds as closely as practicable to the foregoing.
>
> (2) For the purposes of subsection (1), a "guarantee of the signature" means a guarantee signed by or on behalf of a person reasonably believed by the issuer to be a

responsible person.

(3) An issuer may adopt reasonable standards to determine responsible persons for the purpose of subsection (2).

(4) In subsection (1)(b), "evidence of appointment or incumbency" means

(a) in the case of a fiduciary appointed by a court, a copy of the order certified in accordance with section 47(7), and dated not earlier than 60 days before the date a security is presented for transfer, or

(b) in any other case, a copy of a document showing the appointment or other evidence believed by the issuer to be appropriate.

(5) An issuer may adopt reasonable standards with respect to evidence for the purposes of subsection (4)(b).

(6) An issuer is not deemed to have notice of the contents of any document obtained pursuant to subsection (4) except to the extent that the contents relate directly to appointment or incumbency.

(7) If an issuer demands assurance additional to that specified in this section for a purpose other than that specified in subsection (4) and obtains a copy of a will, trust or partnership agreement, by-law or similar document, the issuer is deemed to have notice of all matters contained therein affecting the transfer.

NOTE: Assurance that endorsement is effective. CBCA s. 72.

Comment

S. 72 would amplify s. 71 as follows:

(a) S. 72(1) would provide that the issuer may obtain the reasonable assurance of the genuineness and effectiveness of an endorsement referred to in s. 71(1)(b) by requiring a guarantee of the signature, which, under s. 65(1) is a warranty of genuineness and capacity.

(b) S. 72(2) would provide that a guarantee under s. 72(1) means a guarantee of a person reasonably believed by the issuer to be responsible, and would thus allow the issuer to require that the guarantor be a responsible

person. S. 72(3) however would require that the issuer use reasonable standards in determining whether a proposed guarantor is a responsible person.

(c) S. 72(1)(a) would allow the issuer to require "reasonable assurance" of an agent's authority to sign, and s. 72(1)(b) and (c) and s. 72(4) and s. 72(5) would prescribe the evidence to be provided of the authority of court-appointed fiduciaries, leaving the evidence in other cases to the issuer's sense of appropriateness.

(d) Documents filed with the issuer might contain matters relating to the propriety of the transfer. S. 72(6) would protect the issuer against being fixed with notice by provisions in a court order appointing a fiduciary other than provisions relating to appointment or incumbency; e.g., the issuer need not read the copy of a will included in a probate. S. 72(7), however, would fix the issuer with notice of all matters dealt with in documents demanded by the issuer in addition to those provided for in s. 72; the subsection would thus provide an inducement to the issuer to refrain from asking for too much.

73.(1) An issuer to whom a security is presented for registration of transfer has a duty to inquire into adverse claims if

(a) written notice of an adverse claim is received at a time and in a manner that affords the issuer a reasonable opportunity to act on it before the issue of a new, reissued or re-registered security and the notice discloses the name and address of the claimant, the registered owner and the issue of which the security is a part, or

(b) the issuer is deemed to have notice of an adverse claim from a document that is obtained under section 72(7).

(2) An issuer may discharge a duty of inquiry by any reasonable means, including notifying an adverse claimant by registered mail sent to the address furnished by him or, if no such address has been furnished, to his residence or regular place of business, that a security has been presented for registraion of transfer by a named person, and that the transfer will be registered unless within 30 days from the date of mailing the notice either

(a) the issuer is served with a restraining order or other order of the Court, or

(b) the issuer is provided with an indemnity bond sufficient in the issuer's judgment to protect the issuer and any registrar, transfer agent or other agent of the issuer from any loss that may be incurred by any of them as a result of complying with the adverse claim.

(3) Unless an issuer is deemed to have notice of an adverse claim from a document that it obtained under section 72(7) or has received notice of an adverse claim under subsection (1), if a security presented for registration is endorsed by the appropriate person as defined in section 61 the issuer has no duty to inquire into adverse claims, and in particular,

(a) an issuer registering a security in the name of a person who is a fiduciary or who is described as a fiduciary is not bound to inquire into the existence, extent or correct description of the fiduciary relationship and thereafter the issuer may assume without inquiry that the fiduciary is no longer acting as such with respect to the particular security,

(b) an issuer registering a transfer on an endorsement by a fiduciary has no duty to inquire whether the transfer is made in compliance with the document or with the law of the jurisdiction governing the fiduciary relationship, and

(c) an issuer is not deemed to have notice of the contents of any court record or any registered document even if the record or document is in the issuer's possession and even if the transfer is made on the endorsement of a fiduciary to the fiduciary himself or to his nominee.

(4) A written notice of adverse claim received by an issuer is effective for 12 months from the date when it was received and thereupon ceases to be effective unless the notice is renewed in writing.

(5) An issuer who registers the transfer of a security upon an unauthorized endorsement is liable for improper registration.

NOTE: Limited duty of inquiry as to adverse claims. CBCA ss. 73 and 64(2).

Comment

1. S. 73 limits the issuer's duty of inquiry to claims of which it has notice, and gives him a reasonable way of discharging its duty. S. 74 then goes on to limit its liability where it has no duty or has discharged it.

2. S. 73 is difficult to read in one respect. It says that an issuer with notice of an adverse claim discharges its duty of inquiry by following the prescribed procedure and that an issuer without notice has no duty of inquiry. "Adverse claim" includes the claim of a registered owner that his apparent endorsement was forged or made without authority, and any but the closest reading might lead the reader to think that the issuer who has followed the procedure or has no notice is protected against that kind of adverse claim. That result is negatived by the words "if a security presented for registration is endorsed by the appropriate person as defined in section 61," but we have thought it desirable to give a clearer warning to the reader by including as s. 73(5) what appears in the CBCA as s. 64(2), which makes the blunt statement that the issuer who registers on the strength of an unauthorized endorsement is liable for improper registration. We think that it is also desirable to place that subsection closer to s. 74 (which defines the nature of the liability) and s. 75 (which provides an exception from it). (See also the notes to the definition of "adverse claim" in s. 44(2)(a)).

3. CBCA s. 73(4) does not include the words "and thereupon ceases to be effective." If read literally it would mean that if no renewal notice is given the notice is not effective from the beginning. While we do not think that such an absurd interpretation would be given to the subsection, we have added the extra words for clarification.

4. The reasons for the imposition of liability upon the issuer under s. 73(5) are discussed in the comment on s. 71. The reason for including the provision as s. 73(5) (instead of s. 64(2) as it appears in the CBCA) is given in the commentary on s. 73(1). Note that the issuer's liability would be to deliver a like security unless there would be an overissue, in which event s. 48 would apply (s. 74(2)).

> 74.(1) Except as otherwise provided in any applicable law relating to the collection of taxes, 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
>
> (a) the necessary endorsements were on or with the security, and

(b) the issuer had no duty to inquire into adverse claims or had discharged any such duty.

(2) If an issuer has registered a transfer of a security to a person not entitled to it, the issuer shall on demand deliver a like security to the owner unless

(a) subsection (1) applies,

(b) the owner is precluded by section 75(1) from asserting any claim, or

(c) the delivery would result in overissue, in which case the issuer's liability is governed by section 48.

NOTE: Limitation of issuer's liability. CBCA s. 74.

Comment

1. The issuer's position is somewhat like that of the drawee or maker of a bill, note or cheque who pays in due course: it is not protected against an unauthorized endorsement, but otherwise it is not affected by "adverse claims" unless it has notice, and written notice at that, or unless it has brought on its own misfortune by demanding excess documentation the contents of which disclose an adverse claim.

2. Essentially, the issuer's obligation under s. 74(2), when it wrongfully registers a transfer of a security, is to replace the security. If that would result in an overissue, s. 48 provides for the acquisition of a replacement, and, if no replacement is reasonably available, for payment of compensation.

3. Replacement of a substantial debt security might conceivably render the issuer insolvent; and replacement of a share certificate covering a substantial part of the issuer's issued shares would dilute the shareholdings of the wronged owner whose shares are replaced, the purchaser who obtained good title to the shares, and the other shareholders. The remedy therefore does not inevitably provide perfect satisfaction; it does, however, do so in some cases, and in others it shares the loss in an equitable manner.

75.(1) If

(a) a security has been lost, apparently destroyed or wrongfully taken, and the owner fails to notify the issuer of that fact by giving the issuer written notice of his adverse claim within a

reasonable time after he knows of the loss, destruction or taking, and

(b) the issuer has registered a transfer of the security before receiving such notice,

the owner is precluded from asserting against the issuer any claim to a new security.

(2) If the owner of a security claims that the security has been lost, destroyed or wrongfully taken, the issuer shall issue a new security in place of the original security if the owner

(a) so requests before the issuer has notice that the security has been acquired by a bona fide purchaser and before a purchaser described in section 64 has received a new, reissued or re-registered security,

(b) furnishes the issuer with a sufficient indemnity bond, and

(c) satisfies any other reasonable requirements imposed by the issuer.

(3) If, after the issue of a new security under subsection (2), a bona fide purchaser of the original security presents the original security for registration of transfer, the issuer shall register the transfer unless registration would result in overissue, in which case the issuer's liability is governed by section 48.

(4) In addition to any rights on an indemnity bond, the issuer may recover a new security issued under subsection (2) from the person to whom it was issued or any person taking under him other than a bona fide purchaser.

NOTE: Rights and obligations upon loss or theft of security. CBCA s. 75 except for additional reference in subsection (2)(a) to a purchaser described in s. 64.

Comment

1. Other provisions of the proposed Act would impose liability upon an issuer who wrongfully registers a transfer. The effect of s. 75(1) would be to make it incumbent upon the owner to notify the issuer if the security is lost or wrongfully taken, as the subsection would deprive him of his right to a new security or compensation if he were not to do

so.

2. S. 74(1) already would protect the issuer against adverse claims of which it has no notice, other than an adverse claim based upon an unauthorized endorsement: see the comments on s. 73 and s. 74. Since s. 75(1) also requires, and may be satisfied by, a written notice of what amounts to an adverse claim, its principal additional effect is likely to be upon claims arising from unauthorized endorsements. S. 64 has already made a substantial departure from common law principles by providing that a purchaser for value without notice can acquire title by receiving a new security following upon a transfer based upon a forged endorsement; and s. 75(1) goes on to extinguish the owner's remaining rights. However, we think it reasonable that the owner, who can prevent the loss by taking proper care of the security or by notifying the issuer if he has failed to do so, should bear the loss.

3. On the one hand, securities are sometimes lost or destroyed, and a mechanism must be provided for their replacement. On the other, there is always the possibility that someone has acquired an interest in a security which is, or which is alleged to be lost or destroyed; the interest may have been acquired from the owner who alleges the loss or destruction, or it may have been acquired from some other dishonest person who has come into possession of the security. Some mechanism must be provided to protect the issuer against such possibilities. S. 75(2) would provide such a mechanism and would place the responsibility for the bond upon the owner whose failure to take care has brought about the difficulty.

4. We have added to s. 75(2) the words "or before a purchaser described in s. 64 has received a new, re-issued or re-registered security" to cover the case in which the issuer has issued a new security upon an unauthorized endorsement and the purchaser is entitled to the new security under s. 64.

5. S. 75(3) would require the issuer to register a transfer to a bona fide purchaser even though it has already issued a substitute security under s. 75(2). That requirement flows from the fact that on the one hand, the bona fide purchaser is entitled to the security and the further fact that, on the other hand, a new security has already been issued in its place. The effect of s. 75(3) is that the bona fide purchaser is entitled to a security in accordance with his transfer unless there would be an overissue, in which case he is entitled to have the security replaced if a replacement is reasonably available or to be given compensation if it is not.

6. S. 75(4) contemplates a case in which the issuer has, under indemnity, issued a new security to the owner under s. 75(2), and a bona fide purchaser is entitled to receive a security or compensation under s. 75(3). The issuer can then recover the new security issued under s. 75(2) from the owner. It is also entitled to recover the security from anyone taking under the owner who is not a bona fide

purchaser; the bona fide purchaser must be protected in order to preserve negotiability, but there is no reason to protect anyone else.

76.(1) An authenticating trustee, registrar, transfer agent or other agent of an issuer has, in respect of the issue, registration of transfer and cancellation of a security of the issuer,

(a) a duty to the issuer to exercise good faith and reasonable diligence, and

(b) the same obligations to the holder or owner of a security and the same rights, privileges and immunities as the issuer.

(2) Notice to an authenticating trustee, registrar, transfer agent or other agent of an issuer is notice to the issuer with respect to the functions performed by the agent.

NOTE: Rights, duties, etc. of issuer's agent. CBCA s. 76.

Comment

1. S. 76(1) would define the duties and obligations of the registrar and transfer agent in an appropriate way.

2. In the absence of s. 76(2) there might be doubt whether notice to the agent is notice to the issuer. It is obvious that it should be.

PART 7

CORPORATE BORROWING

DIVISION 1

TRUST INDENTURES

77.(1) In this Division,

(a) "event of default" means an event specified in a trust indenture on the occurrence of which

(i) a security interest constituted by the trust indenture becomes enforceable, or

(ii) the principal, interest and other moneys payable under the trust indenture become or may be declared to be payable before maturity,

but the event is not an event of default until all conditions prescribed by the trust indenture in connection with that event for the giving of notice or the lapse of time or otherwise have been satisfied;

(b) "trustee" means any person appointed as trustee under the terms of a trust indenture to which a corporation is a party and includes any successor trustee;

(c) "trust indenture" means any deed, indenture or other instrument, including any supplement or amendment to it, made by a corporation after its incorporation or continuance under this Act, under which the corporation issues debt obligations and in which a person is appointed as trustee for the holders of the debt obligations issued under it.

(2) This Division applies to a trust indenture only if the debt obligations issued or to be issued under the trust indenture are part of a distribution to the public.

NOTE: Interpretation and application of Division 1, Part 7. CBCA s. 77 with the omission of subsection (3).

Comment

1. S. 77(2) would exempt from this Division trust deeds under which the debt obligations are not to be issued to the public. While the considerations in favour of these provisions also apply to private placements, they do not apply so strongly because the holders of privately placed debt obligations are likely to be well able to look after themselves. The exemption gives effect to the countervailing consideration that the holders may not want the expense of a registered trust company, or of an active as differentiated from a passive trust.

2. CBCA s. 77(3) empowers the Director under that Act to exempt a trust indenture from the provisions of CBCA Part 7, which is the CBCA counterpart of this Division, if the indenture, the debt obligations and the security interest effected thereby are subject to another jurisdiction's law which is substantially equivalent to Part 7. We have not included a similar provision. It appears to us appropriate that Alberta law should apply to Alberta corporations to the greatest extent that it can constitutionally do so; and we note that the counterpart provisions of the Manitoba and Saskatchewan Acts have no provision for exemption.

> 78.(1) No person shall be appointed as trustee if there is a material conflict of interest between his role as trustee and his role in any other capacity.
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> (2) A trustee shall, within 90 days after he becomes aware that a material conflict of interest exists
>
> (a) eliminate the conflict of interest, or
>
> (b) resign from office.
>
> (3) A trust indenture, any debt obligations issued under it and a security interest effected by it are valid notwithstanding a material conflict of interest of the trustee.
>
> (4) If a trustee contravenes subsection (1) or (2), any interested person may apply to the Court for an order that the trustee be replaced, and the Court may make an order on such terms as it thinks fit.

NOTE: Conflict of interest. CBCA s. 78.

Comment

1. S. 78(1) would make an important policy declaration against "material" conflicts of interest on the part of trustees

under trust indentures under which distributions of securities are made to the public. S. 78(2) would go on to require the trustee either to eliminate any conflict of interest which it later discovers, or to resign; and s. 78(4) would provide for the replacement by the court of a trustee which is in a position of material conflict.

2. The word "material" is not defined. S. 78(1) would recognize that there are situations of technical conflict which are not material, e.g., a situation in which the trustee is the executor of an estate which owns shares in the issuing corporation. On the other hand, the subsection would require the trustee to apply its mind to the question and to refrain from acting if the conflict is one which might reasonably be expected to influence its conduct.

3. Unless it can be shown that loss is suffered from the position of conflict, it appears that the principal sanctions would be the liability of the trustee to prosecution for an offence under the proposed Act and to replacement under s. 78(4). The validity of things done is protected by s. 78(3).

79. A trustee, or at least one of the trustees if more than one is appointed, shall be a trust company registered under The Trust Companies Act.

NOTE: Qualification of trustee. CBCA s. 79 varied to be applicable in Alberta.

Comment

We think that the protection of investors requires that trustees of publicly distributed securities be registered trust companies.

80.(1) A holder of debt obligations issued under a trust indenture may, upon payment to the trustee of a reasonable fee, require the trustee to furnish within 15 days after delivering to the trustee the statutory declaration referred to in subsection (4), a list setting out

(a) the names and addresses of the registered holders of the outstanding debt obligations,

(b) the principal amount of outstanding debt obligations owned by each of those holders, and

(c) the aggregate principal amount of debt obligations outstanding,

as shown on the records maintained by the trustee on the day that the statutory declaration is delivered to that trustee.

(2) Upon the demand of a trustee, the issuer of debt obligations shall furnish the trustee with the information required to enable the trustee to comply with subsection (1).

(3) If the person requiring the trustee to furnish a list under subsection (1) is a body corporate, the statutory declaration required under that subsection shall be made by a director or officer of the body corporate.

(4) The statutory declaration required under subsection (1) shall state

(a) the name and address of the person requiring the trustee to furnish the list and, if the person is a body corporate, the address for service of the body corporate, and

(b) that the list will not be used except as permitted under subsection (5).

(5) A list obtained under this section shall not be used by any person except in connection with

(a) an effort to influence the voting of the holders of debt obligations;

(b) an offer to acquire debt obligations, or

(c) any other matter relating to the debt obligations or the affairs of the issuer or guarantor of the debt obligations.

(6) A person who, without reasonable cause, contravenes subsection (5) is guilty of an offence and liable on summary conviction to a fine of not more than $5000 or to imprisonment for a term of not more than 6 months or to both.

NOTE: List of security holders. CBCA s. 80.

Comment

S. 80 is intended to enable a holder of a debt obligation which is part of a public issue under a trust indenture to

obtain the information necessary to communicate with the other holders in order to obtain their votes or raise with them matters of mutual interest; the information could also be used to facilitate the making of an offer to acquire the debt obligations, but that is not the essence of the proposal. Without the information a holder might well be unable to approach a sufficiently large proportion of holders to persuade them of the need to take some action which in his view is in their common interest. The provision is the counterpart for debt securities of s. 21(5) to (12) relating to lists of shareholders.

81.(1) An issuer or a guarantor of debt obligations issued or to be issued under a trust indenture shall before the doing of any act under clause (a), (b) or (c), furnish the trustee with evidence of compliance with the conditions in the trust indenture relating to

(a) the issue, certification and delivery of debt obligations under the trust indenture,

(b) the release or release and substitution of property subject to a security interest constituted by the trust indenture, or

(c) the satisfaction and discharge of the trust indenture.

(2) Upon the demand of a trustee, the issuer or guarantor of debt obligations issued or to be issued under a trust indenture shall furnish the trustee with evidence of compliance with the trust indenture by the issuer or guarantor in respect of any act to be done by the trustee at the request of the issuer or guarantor.

NOTE: Evidence of compliance. CBCA s. 81, varied slightly in subsection (1).

Comment

1. We have made minor changes in s. 81(1) to make it clear that it would apply whether or not it is the issuer or guarantor who is to perform an act referred to in clauses (a), (b) and (c).

2. S. 81(1) by implication would impose a mandatory duty upon the trustee under a trust indenture to obtain evidence of compliance before it does any of those acts.

3. S. 81(2) would not be mandatory. The trustee might, if it wishes, demand evidence of compliance with the provisions of the trust indenture before performing any act requested by

the issuer or guarantor.

82. Evidence of compliance as required by section 81 shall consist of

(a) a statutory declaration or certificate made by a director or an officer or guarantor stating that the conditions referred to in that section have been complied with, and

(b) if the trust indenture requires compliance with conditions that are subject to review

(i) by legal counsel, an opinion of legal counsel that those conditions have been complied with, or

(ii) by an auditor or accountant, an opinion or report of the auditor of the issuer or guarantor, or any other accountant the trustee may select, that those conditionss have been complied with.

NOTE: Contents of declaration. CBCA s. 82.

Comment

S. 82 would provide statutory guidance as to what would constitute sufficient evidence of compliance. We are somewhat troubled by its rigidity but think that uniformity is important in this area. It will be noted that the trustee would have an overriding right to choose the accountant under s. 82(b)(ii).

83. The evidence of compliance referred to in section 82 shall include a statement by the person giving the evidence

(a) declaring that he has read and understands the conditions of the trust indenture described in section 81,

(b) describing the nature and scope of the examination or investigation upon which he based the certificate, statement or opinion, and

(c) declaring that he has made such

examination or investigation as he believes necessary to enable him to make the statements or give the opinions contained or expressed therein.

NOTE: Further evidence of compliance. CBCA s. 83.

Comment

S. 83 would require anyone giving a statutory declaration, certificate or opinion under s. 82 to show that he understands and has complied with the relevant provisions of the trust indenture, and to say what he has done.

84.(1) Upon the demand of a trustee, the issuer or guarantor of debt obligations issued under a trust indenture shall furnish the trustee with evidence in such form as the trustee may require as to compliance with any condition of the trust indenture relating to any action required or permitted to be taken by the issuer or guarantor under the trust indenture.

(2) At least once in each 12 - month period beginning on the date of the trust indenture and at any other time upon the demand of a trustee, the issuer or guarantor of debt obligations issued under a trust indenture shall furnish the trustee with a certificate that the issuer or guarantor has complied with all requirements contained in the trust indenture that, if not complied with, would, with the giving of notice, lapse of time or otherwise, constitute an event of default, or, if there has been failure to so comply, giving particulars of the failure.

NOTE: Trustee may require evidence of compliance. CBCA s. 84.

Comment

S. 84(1) would confer a blanket power upon the trustee to demand evidence of compliance at any time about anything in relation to the trust indenture. S. 84(2) would require the issuer to provide a certificate of compliance once every year.

85. The trustee shall give to the holders of debt obligations issued under a trust indenture, within 30 days after the trustee becomes aware of its occurrence,

notice of every event of default arising under the trust indenture and continuing at the time the notice is given, unless the trustee reasonably believes that it is in the best interests of the holders of the debt obligations to withhold the notice and so informs the issuer or guarantor in writing.

NOTE: Notice of default. CBCA s. 85.

Comment

1. Since the trustee's obligation would be to give notice within 30 days after it becomes aware of the default, and since the obligation would be to give notice only of a default continuing at the time the notice is given, it appears that the trustee would be able to give the issuer 30 days to make good the default. In so doing, however, it would still be under its s. 86 obligation of care, diligence and skill.

2. The trustee would not have to give the notice if it "reasonably believes that it is in the best interests" of the holders of the debt obligations not to do so. That would not permit the trustee to consider the issuer's interests. Cases in which it is in the best interests of someone not to tell him something must be rather rare. The exception to s. 85 might apply, for example in an extreme case in which the debt obligations are not fully secured and publication of the default might be expected to cause the issuer's other creditors to close in and deprive the issuer of an opportunity of working out of its difficulties.

86. A trustee in exercising his powers and discharging his duties shall

(a) act honestly and in good faith with a view to the best interests of the holders of the debt obligations issued under the trust indenture, and

(b) exercise the care, diligence and skill of a reasonably prudent trustee.

NOTE: Trustee's duty of care. CBCA s. 86.

Comment

1. S. 86 tries to set out in short form and simple words the general duties of a trustee under a trust indenture under which debt obligations are issued to the public. It is the counterpart of s. 117(1) which would impose similar duties upon the directors of a corporation. Contracting out of the

duties imposed by s. 86 would be precluded by s. 88.

2. S. 86(b) would apply the standard of the "reasonably prudent trustee". That is a standard which leaves much to be worked out by the courts, but we think that it gives reasonable guidance to trustees and is satisfactory in principle.

87. Notwithstanding section 86, a trustee is not liable if he relies in good faith upon statements contained in a statutory declaration, certificate, opinion or report that complies with this Act or the trust indenture.

NOTE: Trustee's reliance on statements. CBCA s. 87.

88. No term of a trust indenture or of any agreement between a trustee and the holders of debt obligations issued under the trust indenture or between the trustee and the issuer or guarantor shall operate so as to relieve a trustee from the duties imposed upon him by section 86.

NOTE: No exculpation of trustee by agreement. CBCA s. 88.

Comment

S. 88 would be a substantial change from the present law.

DIVISION 2

REGISTRATION OF DEBT OBLIGATIONS

88.1 In this Division,

(a) "debentures" includes debenture stock and bonds;

(b) "mortgage" includes charge.

NOTE: Definitions for Division 2 of Part 7. ACA s. 2(1) 13; ACA s. 2(1) 24.

Comment

1. See the discussion of the registration of corporate mortgages and charges at p. 101 of our Report.

2. ACA s. 97 and 98 are brought forward as s. 88.2 and 88.3 of

the draft Act, subject to the important changes referred to in the comments on those sections. ACA s. 99 to 102, and 104(1), are brought forward as s. 88.4 to 88.8 of the draft Act.

3. The following sections of the ACA have been omitted:

(1) S. 103. This section is omitted because s. 45(1) of the draft Act, which would entitle the security holder to a security certificate, performs substantially the same function.

(2) S. 105. This section deals with preferences upon distribution of money by a receiver and, because it could only apply if the corporation is insolvent, does not appear to be either appropriate or constitutionally effective.

(3) S. 106. This section provides for the filing of accounts with the Registrar. Its subject matter is sufficiently covered by s. 96 of the draft Act.

(4) S. 107. This section deals with the liabilities of a receiver, which would be covered by Part 7 of the proposed Act.

4. It will of course be noted that the registration provisions do not apply to a mortgage of land duly registered under the Land Titles Act (s. 88.2(7)) or to an assignment of book debts required to be registered under the Assignment of Book Debts Act (s. 88.2(13)).

> 88.2 (1) Every mortgage of its property created by a corporation or an Alberta company and every mortgage of its property situated in Alberta created by an extra-provincial corporation
>
> (a) for the purpose of securing any debenture,
>
> (b) on uncalled or unpaid share capital,
>
> (c) as a floating charge on its undertaking or property, or
>
> (d) as a mortgage or charge on goodwill on any patent, licence under a patent, trade mark, copyright or licence under a copyright,
>
> unless the mortgage is registered under this section, is, so far as any security on the corporation's property or undertaking is thereby conferred, void against a liquidator, and any assignee, receiver, and creditor of the corporation, and any subsequent bona fide purchaser or mortgagee for valuable

consideration, but without prejudice to any contract or obligation for repayment of the money thereby secured.

(2) A mortgage shall be registered by filing the instrument, or a true copy of the instrument, by which the mortgage is created or evidenced, with the Registrar within 60 days after the date the instrument is fully executed.

(3) The mortgage takes effect against such liquidator, assignee, receiver, creditor, purchaser or mortgagee only from the registration of the mortgage.

(4) If a mortgage is not registered within the time referred to in subsection (2), the money secured by it becomes payable immediately upon expiration of the said time.

(5) In the case of a series of debentures containing any charge to the benefit of which the debenture holders of that series are entitled pari passu, and not covered by a deed creating or defining the security, it is sufficient if there is filed within 60 days after the execution of the first debenture of the series, a true copy of one of the debentures, with a statement setting forth

(a) the total amount secured by the whole series and the amount issued at the date of registration,

(b) the date or dates of the resolutions authorizing the issue,

(c) the property charged, and

(d) the names and addresses of the trustees, if any, for the debenture holders,

but if more than one issue is made of debentures in the series, there shall be filed with the Registrar within 60 days after each issue is made a statement setting forth the date and amount of each issue, but an omission to do so does not affect the validity of the debentures issued.

(6) Every corporation and every Alberta company shall keep at its records office a copy of every instrument creating any mortgage requiring registration under this section, but in the case of a series of uniform debentures not covered by a deed creating or defining the security, a copy of

one such debenture is sufficient.

(7) No mortgage of land duly registered under The Land Titles Act becomes void under subsection (1) by reason of the fact that the mortgage is not registered under this Act.

(8) Where the mortgage is created in Alberta but comprises property outside Alberta, the instrument creating or purporting to create the mortgage may be registered notwithstanding that further proceedings may be necessary to make the mortgage valid or effectual according to the law of the jurisdiction in which the property is situate.

(9) The Registrar shall endorse every mortgage registered pursuant to this section with a memorandum of the date of filing and that memorandum is conclusive proof that the requirements of this section as to registration have been complied with.

(10) The Registrar shall keep a register of all mortgages requiring registration under this section, and shall enter in the register the date of the mortgage, the name of the mortgagor, and the name of the mortgagee or other person entitled to the charge.

(11) Evidence in writing to the satisfaction of the Registrar that a mortgage registered under this Act or the Companies Act has been in whole or in part satisfied, discharged, or cancelled may be filed with him, and a memorandum thereof shall be entered on the register.

(12) If any change takes place in the title to the property comprised in a mortgage, or other property is substituted for the property mortgaged, or there is any other change in respect of the mortgage, a notice of the change may be filed with the Registrar.

(13) For the purpose of this section an assignment of book debts to which The Assignment of Book Debts Act applies, and that is required to be registered pursuant to the provisions of that Act, shall not be deemed to be a mortgage or a floating charge.

NOTE: Registration of mortgage by a corporation or by an extra-provincial corporation relating to property in Alberta. ACA s. 97, varied.

Comment

1. Under ACA s. 97, a mortgage or debenture executed on day 1 and registered on day 60 will take priority over a mortgage executed on day 2 and registered on day 3. That state of the law makes it difficult for a mortgagee to ensure his priority, and it therefore impedes legitimate business transactions. Upon strong representations being made by our lawyer consultants, we agreed to make a change in the draft Act which would remedy this defect.

2. S. 88.2(3) would accordingly provide that a mortgage takes effect against the protected classes only upon registration. We have based it on s. 3(2) of the Bills of Sale Act in order to stay with wording which is familiar to Alberta.

3. Otherwise, s. 88.2 follows ACA s. 97 subject only to the changes which appear to us to be necessary to retain some intelligibility after that important change is made in what is an already difficult section. We do, however, note parenthetically that ACA s. 97 does not make it entirely clear when the acceleration of repayment of money secured by an unregistered mortgage takes place, and it may therefore be that s. 88.2(4) of the draft Act would, by clarifying the point, change the law.

88.3 (1) Notwithstanding any other provision of this Act, a mortgage not registered within the time prescribed in this Act may be registered at a later date and such registration has the same effect as registration within the prescribed time except that it does not affect rights which have acccrued prior to the late registration.

(2) The Court, on being satisfied that any omission or mis-statement in a mortgage or particulars thereof, or in a memorandum of satisfaction, was accidental, or due to inadvertence or to some other sufficient cause, or is not of a nature to prejudice the position of creditors or shareholders of the corporation, Alberta company or extra-provincial corporation, or that on other grounds it is just and equitable to grant relief, may, on the application of the corporation, Alberta company, or extra-provincial corporation or any person interested, and on such terms and conditions as seem to the Court just and expedient, order that the omission or mis-statement be rectified.

NOTE: Extension of time for registration and rectification of register. ACA s. 98, varied.

Comment

1. ACA s. 98 requires an order of the court to permit late registration of a corporate mortgage or debenture. The requirement is pointless in view of the protection which the section gives to third parties in the event of late registration. In view of strong representations from our lawyer consultants, we agreed to make changes in the draft Act which would dispense with the need for the order.

2. S. 88.3(1) would accordingly provide for late registration subject to rights which accrue prior to registration. In order to use a familiar word pattern we have followed s. 24(1) of the Bills of Sale Act. We note in passing that in view of that provision there may be little point in having a prescribed registration period; but that is equally true of the Bills of Sale Act, and we have attempted to avoid extending into mortgage law our business corporations project.

3. S. 88.3(2) carries forward the existing ACA s. 98 provision for rectification of errors under court order.

> 88.4 (1) A corporation or extra-provincial corporation shall register every mortgage created by it and requiring registration under this Act, but registration of any such mortgage may be effected on the application of any interested person.
>
> (2) If the registration is effected on the application of some person other than the corporation or extra-provincial corporation, that person may recover from the corporation or extra-provincial corporation the amount of any fees properly paid by him to the Registrar on the registration and on an application to the Court under section 88.3.
>
> (3) Every corporation or extra-provincial corporation that makes default in the registration of any mortgage requiring registration under this Division is, without prejudice to any other liability, guilty of an offence.

NOTE: Duty to register. ACA s. 99.

> 88.5 (1) Every corporation and every Alberta company shall keep at its records office a register of mortgages in which shall be entered all mortgages specifically affecting property of the corporation, giving in each case a short description of the property mortgaged, the amount of the mortgage, and (except in the case of

securities to bearer) the names of the mortgagees or persons entitled thereto.

(2) Every corporation that makes default in complying with any requirement of this section is guilty of an offence.

NOTE: Corporation's register of mortgages. ACA s. 100.

88.6 (1) Copies of instruments creating any mortgage requiring registration or registered under this Act or The Companies Act, and the register of mortgages, shall during business hours (subject to such reasonable restrictions as the corporation in general meeting may impose, so that not less than 2 hours in each day be allowed for inspection) be open to the inspection of any creditor or security holder of the corporation without charge, and the register of mortgages shall also be open to the inspection of any other person on payment of a fee of $3, or any lesser fee as the corporation may prescribe, for each inspection.

(2) Every corporation that refuses any inspection required under this section is guilty of an offence and the Court may order that an inspection be allowed within such time as it thinks fit.

NOTE: Inspection of register of mortgages. ACA s. 101 varied so as not to refer to the register of holders of debentures (which is covered by s. 46 of the draft Act) and with an increase in the fee from 25 to $3.

88.7(1) Any security holder, creditor, or other person may require a copy of the register of mortgages or of any part of the register or of any instrument creating any mortgage registered or requiring registration under this Act or The Companies Act, on payment of,

(a) in the case of a printed statement, $1 or any lesser sum prescribed by the corporation, or

(b) in the case of a copy that is other than a printed statement, 10¢ for every 100 words required to be copied.

(2) A corporation that, without

reasonable cause, contravenes subsection (1) is guilty of an offence.

NOTE: Copies of register. ACA s. 102.

88.8 Upon receiving notice of the appointment of a receiver or receiver-manager under section 96(a), the Registrar shall enter a memorandum regarding the appointment in the register of mortgages.

NOTE: Notice of appointment of receiver or receiver-manager. ACA s. 104(1).

PART 8

RECEIVERS AND RECEIVER-MANAGERS

89. A receiver of any property of a corporation may, subject to the rights of secured creditors, receive the income from the property and pay the liabilities connected with the property and realize the security interest of those on behalf of whom he is appointed, but, except to the extent permitted by the Court, he may not carry on the business of the corporation.

NOTE: Functions of receiver. CBCA s. 89.

Comment

1. S. 89 would delimit the powers of a receiver (as distinguished from a receiver-manager). We believe that it is consistent with the present law. Note that the court would be able to confer power on the receiver to carry on the business of the corporation; we expect that the court would use the power sparingly and in cases in which its desirability is obvious.

2. S. 89 would be of general application, i.e., it would apply to receivers however and by what authority appointed. Note that the authority to make the appointment will have to be found elsewhere (e.g., the security instrument or s. 34(9) of the Judicature Act), and additional powers may be found elsewhere (e.g., s. 36 of the Judicature Act).

3. We gave consideration to including statutory qualifications for a receiver, but concluded that the power of the court to replace a receiver under s. 95(a) of the draft Act would be a sufficient protection against the rather unlikely evil of the appointment of a receiver lacking appropriate qualifications.

90. A receiver of a corporation may, if he is also appointed receiver-manager of the corporation, carry on any business of the corporation to protect the security interest of those on behalf of whom he is appointed.

NOTE: Functions of receiver-manager. CBCA s. 90.

Comment

S. 90 would recognize the existing distinction between a receiver and a receiver-manager, and would authorize the latter to carry on the corporation's business in order to protect the interests of those on whose behalf he is

appointed. In so doing he would be subject to the duties imposed by s. 94 of the draft Act. We have retained the CBCA wording for the sake of uniformity; we would not otherwise have used wording which might be taken to suggest the need for two separate appointments, but we do not think it will give rise to problems in practice.

> 91. If a receiver-manager is appointed, by the Court or under an instrument, the powers of the directors of the corporation that the receiver-manager is authorized to exercise may not be exercised by the directors until the receiver-manager is discharged.

NOTE: Directors' powers during receivership. CBCA s. 91.

Comment

1. S. 91 would displace the directors' powers to the extent provided by the security instrument or by the order appointing the receiver-manager.

2. We are satisfied that the wording of s. 91 would not exclude the rule that the appointment of a receiver or receiver-manager does not preclude the directors from instructing counsel to defend in the name of the company an action brought against the company by the debenture holder, or to commence an action against the debenture holder: see Toronto-Dominion v. Fortin (1978) 85 DLR (3d) 111; Newhard Developments Ltd. v. Cooperative Commercial Bank [1978] 2 All ER 896; and Wanapel Co-op Ltd. v. Alberta Agricultural Development Corporation and Coopers and Lybrand Ltd. (1978) 16 AR 26 (Alta. S.C.). It is true that Federal Business Development Bank v. Shearwater Marine Ltd. (1979) 102 D.L.R. (3d) 257 (BCCA) and Del Zotto v. International Chemalloy Corp. (1977) 14 O.R. (2d) 72 (Ont. H.C.) hold that the directors cannot bring an action against the receiver without leave of the court; such a requirement seems appropriate where (as the situation was in each of the latter two cases) the receiver was appointed by the court.

> 92. A receiver or receiver-manager appointed by the Court shall act in accordance with the directions of the Court.

NOTE: Duty of Court-appointed receiver or receiver-manager. CBCA s. 92.

Comment

S. 92 would make it clear that a receiver appointed by the court is subject to the supervision of the court.

93. A receiver or receiver-manager appointed under an instrument shall act in accordance with that instrument and any direction of the Court made under section 95.

NOTE: Duty under debt obligation. CBCA s. 93.

Comment

S. 93 and s. 95 would make it clear that a receiver or receiver-manager appointed by creditors is also subject to the supervision of the court.

94. A receiver or receiver-manager of a corporation appointed under an instrument shall

(a) act honestly and in good faith, and

(b) deal with any property of the corporation in his possession or control in a commercially reasonable manner.

NOTE: Duty of care. CBCA s. 94.

Comment

1. CBCA s. 94 as originally enacted imposed upon a receiver or receiver-manager the same fiduciary duty as CBCA s. 117(1) imposes upon the directors. Such a provision would, we think, place the receiver or receiver-manager in an intolerable position and defeat the purpose of receivership provisions in security instruments. We have therefore followed the amended CBCA s. 94 which was substituted by 1978-79 S.C. c. 9, s. 25. We are satisifed that some duty should be imposed upon the receiver to avoid unfairness to the corporation, and we think that the duties set out in s. 94 of the draft Act would protect the corporation without unduly hampering the receiver.

2. We are somewhat doubtful about the phrase "commercially reasonable manner". We felt however that we should follow that wording for the sake of uniformity with the CBCA (and also with Saskatchewan and Manitoba) on a point on which uniformity is important; and any different wording which we might devise would inevitably cause its own problems.

95. Upon an application by a receiver or receiver-manager, whether appointed by the Court or under an instrument, or upon an application by any interested person, the Court may make any order it thinks fit including, without limiting the generality of

the foregoing, any or all of the following:

(a) an order appointing, replacing or discharging a receiver or receiver-manager and approving his accounts;

(b) an order determining the notice to be given to any person or dispensing with notice to any person;

(c) an order fixing the remuneration of the receiver or receiver-manager;

(d) an order requiring the receiver or receiver-manager, or a person by or on behalf of whom he is appointed, to make good any default in connection with the receiver's or receiver-manager's custody or management of the property and business of the corporation, or to relieve any of those persons from any default on any terms the Court thinks fit, and to confirm any act of the receiver or receiver-manager;

(e) an order giving directions on any matter relating to the duties of the receiver or receiver-manager.

NOTE: Powers of the Court. CBCA s. 95.

Comment

1. S. 95 would spell out the power of the court to supervise the activities of a receiver even if he is appointed under a security instrument. The Court would have power under s. 95(a) to replace the receiver and approve his accounts; it would have power under s. 95(c) to fix his remuneration; and it would have power under s. 95(e) to give directions on any matter relating to his duties. Under the opening words of the section the court would also have power to "make any order it thinks fit".

2. S. 95(d) would enable the court to impose liability upon the receiver or receiver-manager, or upon the person appointing him, notwithstanding a provision in the security instrument which states that the receiver or receiver-manager is the agent of the corporation.

96. A receiver or receiver-manager shall

(a) immediately notify the Registrar of

his appointment or discharge,

(b) take into his custody and control the property of the corporation in accordance with the Court order or instrument under which he is appointed,

(c) open and maintain a bank account in his name as receiver or receiver-manager of the corporation for the money of the corporation coming under his control,

(d) keep detailed accounts of all transactions carried out by him as receiver or receiver-manager,

(e) keep accounts of his administration that shall be available during usual business hours for inspection by the directors of the corporation,

(f) prepare at least once in every 6-month period after the date of his appointment financial statements of his administration as far as is practicable in the form required by section 149, and, subject to any order of the Court, file a copy of them with the Registrar within 60 days after the end of each 6-month period, and

(g) upon completion of his duties,

(i) render a final account of his administration in the form adopted for interim accounts under clause (f),

(ii) send a copy of the final report to the Registrar who shall file it, and

(iii) send a copy of the final report to each director of the corporation.

NOTE: Duties of receiver and receiver-manager. CBCA s. 96, varied in clauses (f) and (g).

Comment

S. 96 would impose specific duties upon a receiver or receiver-manager to get in the property, keep accounts, and file with the Registrar his accounts and notices of his

appointment and discharge. S. 96(f) and (g) would go further than CBCA s. 96(f) and (g) by requiring the receiver to file his accounts with the Registrar and send his final report to the directors of the corporation.

PART 9

DIRECTORS AND OFFICERS

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

(2) A corporation shall have one or more directors but a distributing corporation shall have not fewer than 3 directors, at least 2 of whom are not officers or employees of the corporation or its affiliates.

NOTE: Directors' powers to manage; number of directors. CBCA s. 97.

Comment

1. S. 97(1) is CBCA s. 97(1). For all but closely held corporations, it would effectively cause the directors to be fixed with the sole power and duty to manage the business and affairs of the corporation. Variation would require a unanimous shareholder agreement. See the discussion at Report pp. 46-47.

2. S. 97(2) would require every corporation to have at least one director, and it would require every distributing corporation to have three or more, two of whom must be independent of the corporation. The independent directors would also be needed to provide a majority for the audit committee under s. 165. Their presence would be a useful check on the management of a distributing corporation.

98.(1) Unless the articles, by-laws or a unanimous shareholder agreement otherwise provide, the directors may, by resolution, make, amend or repeal any by-laws that regulate the business or affairs of the corporation.

(2) The directors shall submit a by-law, or an amendment or a repeal of a by-law, made under subsection (1) to the shareholders at the next meeting of shareholders, and the shareholders may, by ordinary resolution, confirm, reject or amend the by-law, amendment or repeal.

(3) A by-law or an amendment or a repeal of a by-law, is effective from the date of the resolution of the directors under subsection (1) until it is confirmed, confirmed as amended or rejected by the shareholders under subsection (2) or until it

ceases to be effective under subsection (4) and, if the by-law is confirmed or confirmed as amended, it continues in effect in the form in which it was so confirmed.

(4) If a by-law, an amendment or a repeal is rejected by the shareholders, or if the directors do not submit a by-law, an amendment or a repeal to the shareholders as required under subsection (2), the by-law, amendment or repeal ceases to be effective and no subsequent resolution of the directors to make, amend or repeal a by-law having substantially the same purpose or effect is effective until it is confirmed or confirmed as amended by the shareholders.

(5) A shareholder entitled to vote at an annual meeting of shareholders may in accordance with section 131 make a proposal to make, amend or repeal a by-law.

NOTE: By-laws. CBCA s. 98.

Comment

1. See the discussion in our Report, p. 56-57.

2. The effect of s. 98 would be

   (a) to empower the directors to make, amend or repeal by-laws with immediate effect continuing until the next shareholders' meeting.

   (b) to allow the shareholders by ordinary resolution to confirm, reject or amend what the directors have done.

   (c) to preclude the directors, without the approval of the shareholders, from re-enacting a by-law which has not been submitted to the shareholders or which has been rejected by them.

3. S. 98(1), would allow the corporation, by its articles, by unanimous shareholder agreement, or by the by-laws themselves, to reserve to the shareholders, the power to make and change by-laws.

4. We have concluded that s. 98(5) would allow the shareholders, upon the proposal of one of them, to make, amend or repeal a by-law. See the discussion in our Report at p. 57.

98.1(1) Unless the articles or by-laws of or a unanimous shareholder agreement relating to a corporation otherwise provide the directors of a corporation may, without authorization of the shareholders,

(a) borrow money upon the credit of the corporation,

(b) issue, reissue, sell or pledge debt obligations of the corporation,

(c) subject to section 42, give a guarantee on behalf of the corporation to secure performance of an obligation of any person, and

(d) mortgage, hypothecate, pledge or otherwise create a security interest in all or any property of the corporation, owned or subsequently acquired, to secure any obligation of the corporation.

(2) Notwithstanding sections 110(3) and 116(a), unless the articles or by-laws of or a unanimous shareholder agreement relating to a corporation otherise provide, the directors may, by resolution, delegate the powers referred to in subsection (1) to a director, a committee of directors or an officer.

NOTE: General borrowing powers. CBCA s. 183(1) and (1.1).

Comment

CBCA s. 183(1) and (1.1) are relocated here for the reasons given in our comment following s. 183 of the draft Act.

99.(1) After issue of the certificate of incorporation, a meeting of the directors of the corporation shall be held at which the directors may

(a) make by-laws,

(b) adopt forms of security certificates and corporate records,

(c) authorize the issue of securities,

(d) appoint officers,

(e) appoint an auditor to hold office until the first annual meeting of shareholders,

(f) make banking arrangements, and

(g) transact any other business.

(2) Subsection (1) does not apply to a body corporate to which a certificate of

amalgamation has been issued under section 179, 180.1 or to which a certificate of continuance has been issued under section 181.

(3) An incorporator or a director may call the meeting of directors referred to in subsection (1) by giving not less than 5 days notice of the meeting to each director, stating the time and the place of the meeting.

(4) A director may waive notice under section 99(3).

NOTE: Organization meeting. CBCA s. 99.

Comment

1. S. 99(1) would require that a directors' meeting be held after incorporation; and it would confirm the powers of the first directors to take a number of steps which are necessary or desirable in the process of organizing the corporation's affairs. S. 99(3) would allow an incorporator or director to call the meeting. The provision is borrowed from American precedents.

2. S. 99(2) was added to the CBCA as s. 99(1.1) by 1978-79 S.C. c. 9 s. 28 to make it clear that the section would not apply to a corporation resulting from an amalgamation or one brought under the CBCA by "continuance." It serves the same purpose in the draft Act.

100.(1) The following persons are disqualified from being a director of a corporation:

(a) anyone who is less than 18 years of age,

(b) anyone who

(i) is a dependent adult as defined in The Dependent Adults Act or is the subject of a certificate of incapacity under that Act,

(ii) is a formal patient as defined in The Mental Health Act, 1972,

(iii) is the subject of an order under The Mentally Incapacitated Persons Act appointing a committee of his person or estate or both, or

(iv) has been found to be a person of unsound mind by a court elsewhere than in Alberta.

(c) a person who is not an individual, or

(d) a person who has the status of bankrupt.

(2) Unless the articles otherwise provide, a director of a corporation is not required to hold shares issued by the corporation.

(3) A majority of directors of a corporation must be resident Canadians.

(4) Notwithstanding subsection (3), not more than one-third of the directors of a holding corporation need be resident Canadians if the holding corporation earns in Canada directly or through its subsidiaries less than 5% of the gross revenues of the holding corporation and all of its subsidiary bodies corporate together as shown in

(a) the most recent consolidated financial statements of the holding corporation referred to in section 151, or

(b) the most recent financial statements of the holding corporation and its subsidiary bodies corporate as at the end of the last completed financial period of the holding corporation.

(5) A person who is elected or appointed a director is not a director unless

(a) he was present at the meeting when he was elected or appointed and did not refuse to act as a director, or

(b) if he was not present at the meeting when he was elected or appointed,

(i) he consented to act as a director in writing before his election or appointment or within 10 days thereafter, or

(ii) he has acted as a director pursuant to the election or appointment.

(6) For the purpose of subsection (5),

a person who is elected or appointed as a director and refuses under subsection (5)(a) or fails to consent or act under subsection (5)(b) shall be deemed not to have been elected or appointed as a director.

NOTE: Qualifications of directors. CBCA s. 100 with the addition of subsections (5) & (6).

Comment

1. For a discussion of qualification of directors, see our Report, p. 57-59. S. 100(1) would disqualify corporations and persons under legal disabilities.

2. Our Report at p. 59 recommends that the proposed ABCA impose a requirement that a corporation have a majority of resident Canadian directors, as the CBCA does, rather than a requirement that half its directors be resident Albertans, as the ACA does, and s. 100(3) would give effect to that proposal. S. 100(4) would exempt a holding corporation from the requirement that a majority of its directors be resident Canadians if the corporation meets the revenue test set out in the subsection.

3. We do not think that a person should, without his consent, be placed in a position in which he may be subjected to the liabilities of a director or compelled to take proceedings to demonstrate that he is not. S. 100(5) would at least put on the corporation the burden of proof of an allegation that a person has consented to be a director and, by so doing, might prevent the allegation being made. There is no similar provision in the CBCA.

4. S. 100(6) flows from s. 100(5).

101.(1) At the time of sending articles of incorporation, the incorporators shall send to the Registrar a notice of directors in prescribed form and the Registrar shall file the notice.

(2) Each director named in the notice referred to in subsection (1) holds office from the issue of the certificate of incorporation until the first meeting of shareholders.

(3) Subject to section 102, shareholders of a corporation shall, by ordinary resolution at the first meeting of shareholders and at each succeeding annual meeting at which an election of directors is required, elect directors to hold office for a term expiring not later than the close of the third annual meeting of shareholders following the election.

(4) Where the articles so provide, the directors may, between annual general meetings, appoint one or more additional directors of the corporation to serve until the next annual general meeting; but the number of additional directors shall not at any time exceed one-third of the number of directors who held office at the expiration of the last annual meeting of the corporation.

(5) It is not necessary that all directors elected at a meeting of shareholders hold office for the same term.

(6) A director not elected for an expressly stated term ceases to hold office at the close of the first annual meeting of shareholders following his election.

(7) Notwithstanding subsections (2), (3) and (6), if directors are not elected at a meeting of shareholders, the incumbent directors continue in office until their successors are elected.

(8) If a meeting of shareholders fails to elect the number or the minimum number of directors required by the articles by reason of the disqualification or death of any candidate, the directors elected at that meeting may exercise all the powers of the directors if the number of directors so elected constitutes a quorum.

(9) The articles or a unanimous shareholder agreement may provide for the election or appointment of a director or directors for terms expiring not later than the close of the third annual meeting of shareholders following the election, or by creditors or employees of the corporation or by a class or classes of those creditors or employees.

NOTE: Election and appointment of directors. CBCA s. 101 with the addition of subsections (4) and (9). BCCA s. 134(3).

Comment

1. It is important for many reasons that an outsider be able to ascertain who are the directors of a corporation. S. 108 would complement s. 101(1) by requiring that notices of changes of directors also be filed.

2. S. 101(2) would give effect to the incorporators' nominations until the first meeting of shareholders. S.

101(3) would require an election at that meeting.

3. Under s. 101(3), at least one director would have to be elected at each annual meeting, and a director could be elected only for a term which does not extend beyond the third annual meeting following his election. The shareholders would therefore be guaranteed periodic opportunities to elect directors.

4. S. 101(4) would allow the articles to give the directors power to appoint additional directors up to one-third of their number. It comes from BCCA s. 134(3). See our Report p. 62 for a discussion of the reasons for the subsection.

5. S. 101(5) would allow elections for staggered terms in case it is desired to use this device to ensure continuity of the board.

6. S. 101(6) would make provision for the case in which the length of the term is not stated. Since annual elections are customary, a corporation might not bother to specify the directors' terms at the time of their election.

7. S. 101(7) would provide for cases in which, for some reason, no election is held. Any shareholder, however, would be entitled to insist upon an election, so that the subsection should not lead to abuse.

8. S. 101(7) would deal with a case in which there is no election. S. 101(8) is needed to cover a case in which there is an election, but for some reason there is a failure, by reason of the disqualification, incapacity or death of candidates, to elect the minimum number required. In that case, if enough directors have been elected to constitute a quorum, they would be able to act. The final possibility, that, for other reasons than those listed, less than a quorum is elected or that less than the minimum number is elected, is covered by s. 106(2) under which those elected, or failing them a shareholder, would be able to call a special meeting of shareholders to fill the vacancies.

9. S. 101(9) would allow the articles or a unanimous shareholder agreement to allow for the election of directors by creditors or employees. We think that there may be cases in which such a power would be useful. The subsection does not appear in the CBCA, under which all directors must be elected by meetings of shareholders. See s. 104(4) (removal of such directors) and s. 117(4) (duties of such directors).

102. If the articles provide for cumulative voting,

(a) the articles shall require a fixed number and not a minimum and maximum number of directors,

(b) each shareholder entitled to vote at an election of directors has the

right to cast a number of votes equal to the number of votes attached to the shares held by him multiplied by the number of directors to be elected, and he may cast all those votes in favour of one candidate or distribute them among the candidates in any manner,

(c) a separate vote of shareholders shall be taken with respect to each candidate nominated for director unless a resolution is passed unanimously permitting 2 or more candidates to be elected by a single resolution,

(d) if a shareholder has voted for more than one candidate without specifying the distribution of his votes among the candidates, he is deemed to have distributed his votes equally among the candidates for whom he voted,

(e) if the number of candidates nominated for director exceeds the number of positions to be filled, the candidates who receive the least number of votes shall be eliminated until the number of candidates remaining equals the number of positions to be filled,

(f) each director ceases to hold office at the close of the first annual meeting of shareholders following his election,

(g) a director may not be removed from office if the votes cast against his removal would be sufficient to elect him and those votes could be voted cumulatively at an election at which the same total number of votes were cast and the number of directors required by the articles were then being elected, and

(h) the number of directors required by the articles may not be decreased if the votes cast against the motion to decrease would be sufficient to elect a director, and those votes could be voted cumulatively, at an election at which the same total number of votes were cast and the number of directors required by the articles were then being elected.

NOTE: Cumulative voting. CBCA s. 102.

Comment

1. As the articles of incorporation are under the control of the corporation, the adoption of cumulative voting under s. 102 would be optional. If cumulative voting should be adopted, however, the provisions of s. 102 would be mandatory. See the discussion at p. 59-61 of our Report.

2. S. 102(b) and s. 102(c) are the basic requirements for a system of cumulative voting. Each shareholder must be able to cast his usual number of votes multiplied by the number of directors to be elected and he must be able to allocate his votes as he wishes; it is only under those conditions that a sufficient minority can concentrate their votes so as to procure the election of the director or directors of their choice.

3. S. 102(a) and s. 102(h) are necessary to ensure that the majority cannot reduce the number of directors below that which will give the minority the power to elect a director. In the absence of s. 102(a) those with the majority of votes at a meeting could choose to elect the minimum number of directors if that would defeat the minority, and, if they had enough votes, they could in the absence of s. 102(h) reduce the number fixed by the articles to better achieve that purpose.

4. Those in control of the corporation might use the device of staggered terms for directors as another means of keeping the number of directors voted on at any one meeting below the number at which cumulation of the minority votes would take effect. It is therefore necessary to prevent the use of staggered terms if cumulative voting is adopted, and s. 102(f) would do so.

5. A minority s power to elect a director by cumulative voting would be rendered nugatory if the majority could then remove him. S. 100(g) would accordingly protect against removal a director who is supported by enough votes to elect him if an election were held.

103.(1) A director of a corporation ceases to hold office when

(a) he dies or resigns,

(b) he is removed in accordance with section 104, or

(c) he becomes disqualified under section 100(1).

(2) A resignation of a director becomes effective at the time a written resignation is sent to the corporation, or at the time specified in the resignation, whichever is

later.

NOTE: Ceasing to hold office. CBCA s. 103.

Comment

It is obviously useful to provide for the death, resignation, and disqualification of directors. With regard to removal, see the comment on s. 104.

104.(1) Subject to section 102(g), the shareholders of a corporation may by ordinary resolution at a special meeting remove any director or directors from office.

(2) If the holders of any class or series of shares of a corporation have an exclusive right to elect one or more directors, a director so elected may only be removed by an ordinary resolution at a meeting of the shareholders of that class or series.

(3) Subject to section 102(b) to (e), a vacancy created by the removal of a director may be filled at the meeting of the shareholders at which the director is removed or, if not so filled, may be filled under section 106.

(4) A director elected or appointed under section 101(9) may be removed only by those persons having the power to elect or appoint that director.

NOTE: Removal of directors. CBCA s. 104 with the addition of subsection (4).

Comment

1. S. 104 would confer an important power on the shareholders, the power to remove at any time the directors elected by them. In the absence of a specific provision, the shareholders cannot remove directors, and the ACA leaves the matter to be determined by the articles of association. As the drafters of the CBCA said: "In the conditions of modern business, however, and especially in large publicly-held corporations, the right of removal seems elementary and necessary, and should not depend on fortuitous provision for removal in the corporate constitution." We think it of great importance in smaller corporations as well.

2. S. 6(4) would prevent the articles of incorporation from requiring more than a majority of votes for the removal of directors, though a unanimous shareholder agreement could do

so.

3. S. 104(1) is subject to s. 102(g) so that the power to remove could not be used to defeat a scheme of cumulative voting if one is adopted.

4. S. 104(2) and s. 104(4) would reserve to other classes the right to remove directors appointed by them.

105.(1) A director of a corporation is entitled to receive notice of and to attend and be heard at every meeting of shareholders.

(2) A director who

(a) resigns,

(b) receives a notice or otherwise learns of a meeting of shareholders called for the purpose of removing him from office, or

(c) receives a notice or otherwise learns of a meeting of directors or shareholders at which another person is to be appointed or elected to fill the office of director, whether because of his resignation or removal or because his term of office has expired or is about to expire,

is entitled to submit to the corporation a written statement giving the reasons for his resignation or the reasons why he opposes any proposed action or resolution.

(3) A corporation shall forthwith send a copy of the statement referred to in subsection (2) to every shareholder entitled to receive notice of any meeting referred to in subsection (1) and, if the corportion is a distributing corporation, to the Director unless the statement is included in or attached to a management proxy circular required by section 144.

(4) No corporation or person acting on its behalf incurs any liability by reason only of circulating a director's statement in compliance with subsection (3).

NOTE: Attendance at meetings; statement of director. CBCA s. 105.

Comment

1. S. 105(1) would state an elementary rule of procedure in statutory form.

2. S. 105(2) would, together with s. 105(3), give a director who is about to be replaced a means of putting his case before the shareholders. As it is desirable in the interests of the shareholders that they hear both sides, the use of the corporation's machinery is justified.

3. As the corporation would be required by law to circulate the statement, s. 105(4) would give it immunity from liability for doing so. A director who submits a statement would remain liable for anything said in it unless some other rule of law would protect him.

106.(1) Notwithstanding section 109(3), but subject to subsections (3) and (4), a quorum of directors may fill a vacancy among the directors, except a vacancy resulting from an increase in the number or minimum number of directors or from a failure to elect the number or minimum number of directors required by the articles.

(2) If there is not a quorum of directors, or if there has been a failure to elect the number or minimum number of directors required by the articles, the directors then in office shall forthwith call a special meeting of shareholders to fill the vacancy and, if they fail to call a meeting or if there are no directors then in office, the meeting may be called by any shareholder.

(3) If the holders of any class or series of shares of a corporation or any other class of persons have an exclusive right to elect one or more directors and a vacancy occurs among those directors,

(a) subject to subsection (4), the remaining directors elected by that class or series may fill the vacancy except a vacancy resulting from an increase in the number or minimum number of directors for that class or series or from a failure to elect the number or minimum number of directors for that class or series, or

(b) if there are no such remaining directors, any holder of shares of that class or series or any member of that other class of persons, as the case may be, may call a meeting of those shareholders or those

persons for the purpose of filling the vacancy.

(4) The articles or a unanimous shareholder agreement may provide that a vacancy among the directors shall only be filled by

(a) a vote of the shareholders,

(b) a vote of the holders of any class or series of shares having an exclusive right to elect one or more directors if the vacancy occurs among the directors elected by that class or series, or

(c) the vote of any class of persons having an exclusive right to elect one or more directors if the vacancy occurs among the directors elected by that class of persons.

(5) A director appointed or elected to fill a vacancy holds office for the unexpired term of his predecessor.

NOTE: Filling vacancies. CBCA s. 106 with the addition in subsection (4) of a reference to a unanimous shareholder agreement, and with the addition of paragraph (c).

Comment

1. S. 106 would deal with the problem of vacancies in the board of directors as follows:

   (a) so long as they constitute a quorum, the directors might fill a casual vacancy for the unexpired term of the former incumbent (s. 106(1)).

   (b) in three cases, the only power the directors would have would be to call a meeting of shareholders to fill a vacancy; the three cases are:

      (i) if there is no quorum of directors;

      (ii) if the vacancy arises from a failure to elect the minumum number of directors required by the articles;

      (iii) if the vacancy is caused by an increase in the minimum number of directors required by the articles.

2. S. 106(4) would allow the articles or a unanimous shareholder agreement to require the filling of vacancies by the shareholders or by the electing class. CBCA s. 106(4) does not refer to a unanimous shareholder agreement, but we

think it appropriate that the draft Act do so.

3. Note that under s. 101(7) the directors, if a quorum, would have the power to carry on without filling a vacancy if the vacancy was caused by a failure to elect enough directors by reason of the disqualification, incapacity or death of a candidate.

> 107.(1) The shareholders of a corporation may amend the articles to increase or, subject to section 102(h), to decrease the number of directors, or the minimum or maximum number of directors, but no decrease shall shorten the term of an incumbent director.
>
> (2) If the shareholders adopt an amendment to the articles of a corporation to increase the number or minimum number of directors, the shareholders may, at the meeting at which they adopt the amendment, elect an additional number of directors authorized by the amendment, and for that purpose, notwithstanding sections 173(1) and 255(3), on the issue of a certificate of amendment the articles are deemed to be amended as of the date the shareholders adopt the amendment to the articles.

NOTE: Change in number of directors. CBCA s. 107.

Comment

1. S. 107 would confer upon the shareholders power to change the number of directors, and is obviously necessary. As an amendment to the articles of incorporation is involved, a special resolution would be needed.

2. The reference to s. 102(h) ensures that the power to decrease the number could not be used to defeat a minority's right to elect a director if a system of cumulative voting is adopted.

3. The provision against the shortening of a director's term by decreasing the number would not derogate from the shareholders' powers, as they could under s. 104 remove a director by ordinary resolution at the same time. It would however avoid the confusion which would follow if the standing of existing directors were to be overlooked.

> 108.(1) Within 15 days after a change is made among the directors, a corporation shall send to the Registrar a notice in prescribed form setting out the change and the Registrar shall file the notice.

(2) Any interested person, or the Registrar, may apply to the Court for an order to require a corporation to comply with subsection (1), and the Court may so order and make any further order it thinks fit.

NOTE: Notice of change of directors. CBCA s. 108.

Comment

See s. 101 of the draft Act and Comment No. 1 thereon. S. 101 and s. 108 are complementary.

109.(1) Unless the articles or by-laws otherwise provide, the directors may meet at any place, and upon such notice as the by-laws require.

(2) Subject to the articles or by-laws, a majority of the number of directors or minimum number of directors required by the articles constitutes a quorum at any meeting of directors, and, notwithstanding any vacancy among the directors, a quorum of directors may exercise all the powers of the directors.

(3) Directors, other than directors of a corporation referred to in section 100(4), shall not transact business at a meeting of directors unless a majority of directors present are resident Canadians.

(4) Notwithstanding subsection (3), directors may transact business at a meeting of directors where a majority of resident Canadian directors is not present if

(a) a resident Canadian director who is unable to be present approves in writing or by telephone or other communications facilities the business transacted at the meeting, and

(b) a majority of resident Canadian directors would have been present had each director who approves under sub-paragraph (a) been present at the meeting.

(5) A notice of a meeting of directors shall specify any matter referred to in section 110(3) that is to be dealt with at the meeting but, unless the by-laws otherwise provide, need not specify the purpose or the business to be transacted at the meeting.

(6) A director may in any manner waive a notice of a meeting of directors, and attendance of a director at a meeting of directors is a waiver of notice of the meeting, except where a director attends a meeting for the express purpose of objecting to the transaction of any business on the grounds that the meeting is not lawfully called.

(7) Notice of an adjourned meeting of directors is not required to be given if the time and place of the adjourned meeting is announced at the original meeting.

(8) If a corporation has only one director, that director may constitute a meeting.

(9) A director may participate in a meeting of directors or of a committee of directors by means of telephone or other communication facilities that permit all persons participating in the meeting to hear each other if

(a) the by-laws so provide, or

(b) subject to the by-laws, all the directors of the corporation consent,

and a director participating in a meeting by those means is deemed for the purposes of this Act to be present at that meeting.

NOTE: Meeting of directors. CBCA s. 109 with the addition of clause (a) in subsection (9).

Comment

1. S. 109 (leaving aside s. 109(3) and s. 109(4) which will be discussed separately) would provide for meetings of directors, as follows:

(a) the articles or by-laws may provide for the place of meetings, but unless they do so the directors may meet where they wish.(s. 109(1).

(b) the by-laws are to provide for notice of directors' meetings (s. 109(1)), but notice of an adjourned meeting need not be given if the time and place are announced at the adjourned meeting.

(c) the content of the notice must conform to the by-laws, and must in any event specify any of the matters reserved to the directors by s. 110(3), but otherwise it need not say anything about the purpose of the

meeting (s. 109(5)).

(d) a director may in any manner, including attendance at the meeting, waive notice of a meeting (s. 109(6)).

(e) the articles or by-laws may establish the quorum, but if they do not, a majority of the number or minimum number required by the articles is a quorum (s. 109(2)); if there is only one director, he constitutes a meeting (s. 109(8)).

(f) the directors, if a quorum, may carry on despite a vacancy (s. 109(2)).

(g) directors may attend a meeting by telephone if the by-laws so provide or if all the directors consent (s. 109(9)). The correspondending CBCA provision requires the consent of all the directors and does not make it entirely clear whether the consent must be given for each meeting. We think that it would remove uncertainty and ensure flexibility if the procedure were to be governed by the by-laws.

2. S. 109(3) would require that a majority of the directors at a meeting be resident Canadians. See p. 58-59 of our Report; and see s. 100(3) of the draft Act and the comment thereon. S. 109(4) would, in effect, allow absent resident Canadians to join the majority by later approving the business done at a meeting which does not conform to s.109(3); the draft goes further than the CBCA (see CBCA s. 109(4)(b)) by making it clear that more than one director can give such approval. (Note that s. 111(2) of the draft Act provides that the acts of the directors will be valid anyway; the effect of s. 109(3) would be that directors who contravene it are liable to injunction and prosecution.)

3. See also s. 110(1) which would require a managing director to be a resident Canadian and s. 110(2) which would require a Canadian majority on committees; and also see s. 111(2).

> 110.(1) Directors of a corporation may appoint from their number a managing director who is a resident Canadian or a committee of directors and delegate to the managing director or committee any of the powers of the directors.
>
> (2) If the directors of a corporation, other than a corporation referred to in section 100(4), appoint a committee of directors, a majority of the members of the committee must be resident Canadians.
>
> (3) Notwithstanding subsection (1), no managing director and no committee of directors has authority to
>
> (a) submit to the shareholders any question or matter requiring the

approval of the shareholders,

(b) fill a vacancy among the directors or in the office of auditor,

(c) issue securities except in the manner and on the terms authorized by the directors,

(d) declare dividends,

(e) purchase, redeem or otherwise acquire shares issued by the corporation, except in the manner and on the terms authorized by the directors,

(f) pay a commission referred to in section 39,

(g) approve a management proxy circular referred to in Part 12,

(h) approve any financial statements referred to in section 149, or

(i) adopt, amend or repeal by-laws.

NOTE: Delegation to managing director or committee. CBCA s. 110.

Comment

1. In the absence of special authority, the directors cannot delegate their powers. Under Article 73 of Table A to the ACA, the directors may delegate any of their powers to committees. S. 110(1) and s. 110(3) would strike a balance by conferring a general power of delegation, but carving out of it certain powers fundamental to the directors' function which they must themselves exercise.

2. The requirement that a managing director be a resident Canadian would avoid the use of the power of delegation to evade the effect of s. 109(3) which would require that the directors who do business include a majority of resident Canadians.

3. With regard to the effect of failure to conform to the rules regarding resident Canadians, see s. 111(2).

111.(1) An act of a director or officer is valid notwithstanding an irregularity in his election or appointment or a defect in his qualification.

(2) An act of the directors or a committee of directors is valid

notwithstanding non-compliance with section 100(3) or (4), 109(3) or 110(2).

NOTE: Validity of acts of directors, officers and committees. CBCA s. 111 with the addition of subsection (2). See s. 76.1(5) of the ACA

Comment

1. S. 111(1), which follows CBCA s. 111(1), differs from the Ontario, British Columbia and United Kingdom Acts and from Article 76 of Table A of the ACA in that those other Acts validate only those acts which are performed before the defect is discovered. As Iacobucci states at page 279 of Canadian Company Law Reform, there are potential problems of interpretation in what constitutes discovery, whose discovery is relevant, and when the discovery must take place. It would protect outsiders even if they know or should know of the irregularity in the director's appointment or election or of the defect in his qualification.

2. In the absence of provision to the contrary, inadvertent failure to comply with the rules relating to resident Canadian directors could invalidate important business, and those who deal with corporations on a formal basis might well ask on a routine basis for evidence that those rules have been complied with. Business efficiency would accordingly be advanced by s. 111(2), which is similar to ACA s. 76.1(5).

112.(1) Subject to the articles, the by-laws or a unanimous shareholder agreement, a resolution in writing, signed by all the directors entitled to vote on that resolution at a meeting of directors or committee of directors, is as valid as if it had been passed at a meeting of directors or committee of directors.

(2) A copy of every resolution referred to in subsection (1) shall be kept with the minutes of the proceedings of the directors or committee of directors.

NOTE: Resolution in lieu of meeting. CBCA s. 112 varied in subsection (1) to allow for restrictions on the rule in the articles, by-laws or unanimous shareholder agreement.

Comment

1. In the absence of provision to the contrary, company business can only be transacted at properly constituted meetings, and as the Lawrence Committee said (p. 84): "directors of publicly-held companies should normally, if

not invariably, carry out their duties and obligations by means of actions taken at duly constituted meetings. The collective consideration and interchange of ideas among directors of publicly-held companies is conducive to good management".

2. However, convenience sometimes requires an alternative. A formal act which does not need debate may be required at a time when no meeting is scheduled; or a decision may be required which does not need debate. To deny the use of written resolutions would lead to unnecessary cost, delay and non-compliance. S. 112(1) would provide the alternative of a unanimous signed resolution.

3. We have, however, changed the CBCA provision to ensure that a corporation which wishes to do so would be able to restrict the use of written resolutions through its articles, by-laws or a unanimous shareholder agreement.

4. Written resolutions have the same effect as resolutions adopted at meetings, and it is appropriate to require that records of them be kept in the same way as minutes. S. 112(2) would make such a provision.

113.(1) Directors of a corporation who vote for or consent to a resolution authorizing the issue of a share under section 25 for a consideration other than money are jointly and severally liable to the corporation to make good any amount by which the consideration received is less than the fair equivalent of the money that the corporation would have received if the share had been issued for money on the date of the resolution.

(2) Subsection (1) does not apply if the shares, upon allotment, are held in escrow pursuant to an escrow agreement required by the Commission and are surrendered for cancellation pursuant to that agreement.

(3) Directors of a corporation who vote for or consent to a resolution authorizing

(a) a purchase, redemption or other acquisition of shares contrary to section 32, 33 or 34,

(b) a commission on a sale of shares not provided for in section 39,

(c) a payment of a dividend contrary to section 40,

(d) financial assistance contrary to section 42,

(e) a payment of an indemnity contrary to section 119, or

(f) a payment to a shareholder contrary to section 184 or 234,

are jointly and severally liable to restore to the corporation any amounts so paid and the value of any property so distributed, and not otherwise recovered by the corporation.

(4) A director who has satisfied a judgment rendered under this section is entitled to contribution from the other directors who voted for or consented to the unlawful act upon which the judgment was founded.

(5) If money or property of a corporation was paid or distributed to a shareholder or other recipient contrary to section 32, 33, 34, 39, 40, 42, 119, 184 or 234, the corporation, any director or shareholder of the corporation, or any person who was a creditor of the corporation at the time of the payment or distribution, is entitled to apply to a Court for an order under subsection (6).

(6) Upon an application under subsection (5), the Court may, if it is satisfied that it is equitable to do so, do any or all of the following:

(a) order a shareholder or other recipient to restore to the corporation any money or property that was paid or distributed to him contrary to section 32, 33, 34, 39, 40, 42, 119, 184 or 234;

(b) order the corporation to return or issue shares to a person from whom the corporation has purchased, redeemed or otherwise acquired shares;

(c) make any further order it thinks fit.

(7) A director is not liable under subsection (1) if he proves that he did not know and could not reasonably have known that the share was issued for a consideration less than the fair equivalent of the money that the corporation would have received if the share had been issued for money.

(8) A director is not liable under subsection (3)(d) if he proves that he did

not know and could not reasonably have known that the financial assistance was given contrary to section 42.

(9) An action to enforce a liability imposed by this section may not be commenced after 2 years from the date of the resolution authorizing the action complained of.

NOTE: Liability of directors and others. CBCA s. 113, varied in subsections (4) and (5). Subsections (2) and (8) are new.

Comment

1. S. 113(1) and s. 113(3) would impose what amounts to absolute liability upon directors who take part in specified acts which are contrary to the statute, though s. 118(3) would relieve from liability a director who acts upon properly presented financial statements, or the report of a member of a Profession. See the discussion at pp. 69-70 of our Report.

2. Fairness requires that all those who took part in the wrongful act share the liablity for it as provided in s. 113(4).

3. We have added s. 113(2) for reasons which appear in our Report p. 70.

4. Fairness also requires that the beneficiaries of a wrongful act be required to refund the money paid to them as provided in s. 113(6).

5. CBCA s. 113(4) allows a director to apply for an order that the recipient pay or deliver to the director the money property wrongfully received. CBCA s. 113(5) then empowers the court to make the order if it is equitable to do so. S. 113(6) of the draft Act would instead empower the court to make a declaration of liability and order payment or delivery to the corporation. The intention is to give the corporation a direct remedy against the recipient.

6. S. 113(6)(b) and s. 113(6)(c) of the draft would confer additional powers upon the court so that it could make any necessary adjustments in the rights of the parties. They follow the similar provisions in the CBCA but s. 113(5)(a) would apply in favour of the corporation rather than the director.

7. S. 113(7) and (8) would exonerate a participating but unknowing director in the case of a share issued for insufficient non-cash consideration or in the case of financial assistance in contravention of s. 42.

8. S. 113(9) would impose a relatively short limitation period in the interests of setting matters to rest.

114.(1) Directors of a corporation are jointly and severally liable to employees of the corporation for all debts not exceeding 6 months wages payable to each employee for services performed for the corporation while they are directors respectively.

(2) Subsection (1) does not render a director liable for debts for wages

(a) if he believes on reasonable grounds that the corporation can pay the debts as they become due, or

(b) if the debts are payable to employees for services performed while the property of the corporation is under the control of a receiver, receiver-manager or liquidator.

(3) A director is not liable under subsection (1) unless

(a) the corporation has been sued for the debt within 6 months after it has become due and execution has been returned unsatisfied in whole or in part,

(b) the corporation has commenced liquidation and dissolution proceedings or has been dissolved and a claim for the debt has been proved within 6 months after the earlier of the date of commencement of the liquidation and dissolution proceedings and the date of dissolution, or

(c) the corporation has made an assignment or a receiving order has been made against it under the Bankruptcy Act (Canada) and a claim for the debt has been proved within 6 months after the date of the assignment or receiving order.

(4) No action may be brought against a director under this section more than 2 years after the date he ceased to be a director.

(5) If execution referred to in subsection (3)(a) has issued, the amount recoverable from a director is the amount remaining unsatisfied after execution.

(6) If a director pays a debt referred to in subsection (1) that is proved in

liquidation and dissolution or bankruptcy proceedings, he is entitled to any preference that the employee would have been entitled to, and if a judgment has been obtained, he is entitled to an assignment of the judgment.

(7) A director who has satisfied a claim under this section is entitled to contribution from the other directors who were liable for the claim.

NOTE: Directors' liability for wages. CBCA s. 114 with the addition of subsection (2).

Comment

1. For a general discussion of the imposition upon directors of liability for wages see p. 70 of our Report.

2. ACA s. 77 is as follows:

> 77. The directors of a company are jointly and severally liable to the clerks, labourers, servants and apprentices thereof for all debts, not exceeding six months' wages, due for services performed for the company during the period while the said directors were acting as such, but no director is liable to an action therefor unless
>
> (a) the company is sued therefor or a judgment is obtained against the company within one year after the debt becomes due,
>
> (b) an execution against the company is returned unsatisfied in whole or in part, and
>
> (c) the director is sued therefor within one year from the time he ceased to be such director, and the amount unsatisfied on such execution is the amount that may be recovered with costs from the directors.

CBCA s. 114 is more modern in wording and more comprehensive in that it covers subrogation of the employee's claim and contribution of other directors, and the draft Act generally follows it. It was suggested to us that s. 114 should protect only the classes referred to in ACA s. 77, which appear narrower than the "employees" who would be protected by s. 114, and that it should not, e.g., allow the principal director and officer of a corporation to claim back wages from the others. We have however carried forward the CBCA language for the sake of uniformity and because we think

that s. 114(2) will protect directors from claims such as those mentioned.

3. CBCA s. 118(4) provides that a director is not liable under s. 114 if he relies in good faith upon financial statements which an officer or auditor says are correct. One of our consultants had difficulty in interpreting that provision, and we think his point is well taken: must the statements show that the wages have been paid? or is it enough that they indicate that the corporation is solvent? and what if the statements are some months old? Upon reflection, we think that the proper balance would be struck by a provision exonerating a director who believes on reasonable grounds that the corporation can pay the wages as they fall due, and s. 114(2)(a) would so provide. A director who connives at keeping employees working when their wages are in jeopardy or who is not vigilant for their protection would be liable, but an innocent director who relies on information that directors normally rely on would not.

4. It does not seem fair to hold the directors responsible if the management of the corporation's business is taken out of their hands. S. 114(2)(b) would accordingly relieve them from liability in such a case.

115.(1) A director or officer of a corporation who

(a) is a party to a material contract or proposed material contract with the corporation, or

(b) is a director or an officer of or has a material interest in any person who is a party to a material contract or proposed material contract with the corporation,

shall disclose in writing to the corporation or request to have entered in the minutes of meetings of directors the nature and extent of his interest.

(2) The disclosure required by subsection (1) shall be made, in the case of a director,

(a) at the meeting at which a proposed contract is first considered,

(b) if the director was not interested in a proposed contract at the time of the meeting referred to in clause (a), at the first meeting after he becomes so interested,

(c) if the director becomes interested after a contract is made, at the

first meeting after he becomes so interested, or

(d) if a person who is interested in a contract later becomes a director, at the first meeting after he becomes a director.

(3) The disclosure required by subsection (1) shall be made, in the case of an officer who is not a director,

(a) forthwith after he becomes aware that the contract or proposed contract is to be considered or has been considered at a meeting of directors,

(b) if the officer becomes interested after a contract is made, forthwith after he becomes so interested, or

(c) if a person who is interested in a contract later becomes an officer, forthwith after he becomes an officer.

(4) If a material contract or proposed material contract is one that, in the ordinary course of the corporation's business, would not require approval by the directors or shareholders, a director or officer shall disclose in writing to the corporation or request to have entered in the minutes of meetings of directors the nature and extent of his interest forthwith after the director or officer becomes aware of the contract or proposed contract.

(5) A director referred to in subsection (1) shall not vote on any resolution to approve the contract unless the contract is

(a) an arrangement by way of security for money lent to or obligations undertaken by him or by a body corporate in which he has an interest for the benefit of the corporation or an affiliate,

(b) one relating primarily to his remuneration as a director, officer, employee or agent of the corporation or an affiliate,

(c) one for indemnity or insurance under section 119, or

(d) one with an affiliate.

(6) For the purpose of this section, a general notice to the directors by a director or officer is a sufficient disclosure of interest in relation to any contract made between the corporation and a person in which the director has a material interest or of which he is a director of officer if

(a) the notice declares he is a director or officer of or has a material interest in a person and is to be regarded as interested in any contract made or to be made by the corporation with that person, and states the nature and extent of his interest,

(b) at the time disclosure would otherwise be required under subsection (2), (3) or (4), as the case may be, the extent of his interest in that person is not greater than that stated in the notice, and

(c) the notice has been given within the 12 - month period immediately preceding the time at which disclosure would otherwise be required under subsection (2), (3) or (4), as the case may be.

(7) If a material contract is made between a corporation and one or more of its directors or officers, or between a corporation and another person of which a director or officer of the corporation is a director or officer or in which he has a material interest,

(a) the contract is neither void nor voidable by reason only of that relationship, or by reason only that a director with an interest in the contract is present at or is counted to determine the presence of a quorum at a meeting of directors or committee of directors that authorized the contract, and

(b) a director or officer or former director or officer of the corporation to whom a profit accrues as a result of the making of the contract is not liable to account to the corporation for that profit by reason only of holding office as a director or officer,

if the director or officer disclosed his

interest in accordance with subsection (2), (3), (4) or (6), as the case may be, and the contract was approved by the directors or the shareholders and it was reasonable and fair to the corporation at the time it was approved.

(8) If a director or officer of a corporation fails to disclose his interest in a material contract in accordance with this section, the Court may, upon the application of the corporation or a shareholder of the corporation, set aside the contract on such terms as it thinks fit.

(9) This section is subject to any unanimous shareholder agreement.

NOTE: Disclosure by directors and officers in relation to contracts. CBCA s. 115 with the addition of subsection (9) and with variations in subsections (6) and (7).

Comment

1. The courts have held that "the trustee-like position of directors vitiated any contract which the board entered into on behalf of the company with one of their number," and extended the principle to contracts in which directors "are in any way interested, whether because they benefit personally however indirectly, or because they are subject to a conflicting duty." "In general the contract will be voidable at the instance of the company, and any profits made by the directors personally will be recoverable by the company." (Gower, p. 526, 527).

2. S. 115 is intended to avoid the rigours of the principle, but only on condition that the interested director makes appropriate disclosure and takes no part in the corporation's decision to enter into it. The following conditions would have to be satisfied:

   (a) disclosure must be made if the contract is "material." (s. 115(1)(a)).

   (b) disclosure must be made if the director is a party or has a "material" interest in the party (s. 115(1)(a) and 115(1)(b)).

   (c) the disclosure must be in writing or requested to be put in the minutes (s. 115(1)).

   (d) the nature and extent of the interest must be disclosed (s. 115(1)).

   (e) the disclosure must be made at the meeting of directors at which a proposed contract is considered or at the first meeting after he becomes interested or becomes a director; or if the contract does not require approval

the disclosure must be made forthwith after the director becomes aware of the contract or proposed contract (s. 115(2) and (4)).

(f) except in the limited cases mentioned in s. 115(5) the director must not vote on the contract.

3. One of our lawyer consultants suggested that CBCA s. 115(5)(a) is unduly restrictive in that it permits a director to vote upon a resolution giving security for obligations undertaken by him on behalf of the corporation, but not for an obligation undertaken by a body corporate in which he has an interest. Seeing no reason in policy for the distinction, we have expanded section 115(5)(a) of the draft Act to include the case in which money is lent to or an obligation undertaken by a body corporate in which the director has an interest.

4. The effect of s. 115(7) and 115(8) would be to ensure that a contract would be valid if disclosure is properly made and if it was reasonable and fair to the corporation at the time it was made, but that the court could otherwise set it aside. The section does not deal directly with the director's liability to account for profits but must have the effect of extinguishing it.

5. CBCA s. 115(6) permits a general notice that the director "is a director or officer of or has a material interest in a person and is to be regarded as interested in any contract made with that person." (We note parenthetically that s. 115(6) of the draft Act says ". . . contract made or to be made . . ."). S. 115(6) of the draft Act would go further by requiring the same degree of specificity about the interest as is required by s. 115(1), and by giving the notice currency for only 12 months. The intention is to ensure that a director who wishes to take advantage of the general notice provision must give sufficient information and cannot rely upon it after it is likely to have been forgotten. We do not think that the additional requirements are onerous.

6. Allowing the director to be included in the quorum under s. 115(7) is a policy decision, and the subsection follows the CBCA provision for the sake of uniformity.

7. The requirements for disclosure by officers under s. 115 are much the same as the requirements for disclosure by directors, with necessary changes.

8. S. 115(9) would allow a closely held corporation to relax the disclosure requirements by unanimous shareholder agreement. It has no counterpart in the CBCA.

116. Subject to the articles, the by-laws or any unanimous shareholder agreement,

(a) the directors may designate the offices of the corporation, appoint

as officers individuals of full capacity, specify their duties and delegate to them powers to manage the business and affairs of the corporation, except powers to do anything referred to in section 110(3),

(b) a director may be appointed to any office of the corporation, and

(c) 2 or more offices of the corporation may be held by the same person.

NOTE: Officers. CBCA s. 116.

Comment

1. The provisions of the Alberta Companies Act have been described (Selected topics in Canadian Company Law Reform, Iaccobucci, et al. p. 313) as follows:

> The Alberta Companies Act does not require the appointment of officers nor does it define the word "officer". There are, however, references to officers throughout the Act. A company may provide in its articles for the appointment of officers, and in the absence of any other provision, article 56 of Table A will apply to authorize the directors to appoint one or more of their body to the office of managing director or manager or any other office for such term and at such remuneration as they may think fit. Article 56 further provides that the appointment of such an officer is subject to determination at the pleasure of the directors. The duties and salaries of officers could also be set out in the articles, but the articles in Table A do not expressly govern these matters. Article 72 provides that the president of the company serves as chairman of the board of directors and article 60 refers to the president, the chairman of the board of directors, the secretary and the treasurer, but the duties of such officers are not specified.

2. The CBCA provision is recommended as it gives the directors flexibility to determine the business organization of the corporation while restricting them only from delegating matters to officers which they cannot delegate to a managing director or committee of directors. The provisions of CBCA s. 116 are also subject to the articles, by-laws or any unanimous shareholder agreement, so in effect the section would do no more than put into the Act what under present Alberta law would be in the articles. It does, however, make it clear that a director can be an officer -- this seems to be the case now under article 56 of Table A -- and that two or more offices may be held by the same person. The latter is not dealt with in the Alberta Companies Act or Table A. Other jurisdictions have prohibited holding of the offices of president and secretary by the same person.

According to the Commentary to the Draft Canada Act:

> "This provision appears originally to have been designed to ensure that where, for example, the by-laws required some act to be done on behalf of the corporation by the president and secretary, it should not, as a precaution, be done by the same person acting in both capacities. There is no reason why, if shareholders choose to simplify their operations, they should not be free to minimize formalities, and paragraph (c) permits this."

3. See the discussion at p. 71 of our Report.

> 117.(1) Every director and officer of a corporation in exercising his powers and discharging his duties shall
>
> (a) act honestly and in good faith with a view to the best interests of the corporation, and
>
> (b) exercise the care, diligence and skill that a reasonably prudent person would exercise in comparable circumstances.
>
> (2) Every director and officer of a corporation shall comply with this Act, the regulations, articles, by-laws and any unanimous shareholder agreement.
>
> (3) Subject to section 140(7), no provision in a contract, the articles, the by-laws or a resolution relieves a director or officer from the duty to act in accordance with this Act or the regulations or relieves him from liability for a breach of that duty.
>
> (4) In determining whether a particular transaction or course of action is in the best interests of the corporation, a director, if he is elected or appointed by the holders of a class or series of shares or by employees or creditors or a class of employees or creditors, may give special, but not exclusive, consideration to the interests of those who elected or appointed him.

NOTE: Duty of care of directors and officers. CBCA s. 117 with the addition of subsection (4).

Comment

1. See the discussion at pp. 65-67 of our Report.

2. S. 117(1)(a) is an attempt to set out the existing common law relating to a director's duty of honesty and good faith.

3. S. 117(1)(b) would raise the common law standard of care, diligence and skill, which we think is too low. Much of its effect (like the effect of the common law rule) will depend upon its application by the courts, case by case.

4. In the absence of s. 117(4), a director elected by a special class would be under precisely the same obligations to the corporation as a director elected by the voting shareholders, and the purpose of allowing the special election would be defeated. The subsection would leave the director under an obligation to the corporation but would allow him to take into consideration the interests of the class which elected him. The wording is based upon a proposed provision in Gower's draft Ghana Code, though the application is different.

118.(1) A director who is present at a meeting of directors or committee of directors is deemed to have consented to any resolution passed or action taken at the meeting unless

(a) he requests that his abstension or dissent be or his abstension or dissent is entered in the minutes of the meeting,

(b) he sends his written dissent to the secretary of the meeting before the meeting is adjourned,

(c) he sends his dissent by registered mail or delivers it to the registered office of the corporation immediately after the meeting is adjourned, or

(d) he otherwise proves that he did not consent to the resolution or action.

(2) A director who votes for or consents to a resolution or action is not entitled to dissent under subsection (1).

(3) A director is not liable under section 113, or 117 if he relies in good faith upon

(a) financial statements of the corporation represented to him by an officer of the corporation or in

a written report of the auditor of the corporation fairly to reflect the financial condition of the corporation, or

(b) an opinion or report of a lawyer, accountant, engineer, appraiser or other person whose profession lends credibility to a statement made by him.

NOTE: Dissent by director. CBCA s. 118, with the omission of subsection (3) and omission of reference in subsection (3) to section 114.

Comment

1. If a director attends a meeting, the burden should be upon him to demonstrate that he did not take an affirmative part in the vote. This he could do by the specific means set out in s. 118(1)(a), (b) and (c). We have inserted s. 118(1)(d) to ensure that he could also do so by other evidence.

2. We have omitted CBCA s. 118(3) under which a director who is not present at a meeting of directors and does not object within 7 days is deemed to have consented to resolutions passed at the meeting. Our reasons for the omission are set out in our Report at p. 67, but may be summarized by saying that it appears to impose upon directors a duty to decide without benefit of the meeting whether the business was rightly done; that it imposes liability without fault and to no purpose; and that a director could, and might, avoid the liability by the filing of blanket objections.

3. It is necessary that a director be able to rely upon reports presented to him. S. 118(3) would exonerate him from the apparently absolute obligations imposed by s. 113, if he relies in good faith upon financial statements and reports.

119.(1) Except in respect of an action by or on behalf of the corporation or body corporate to procure a judgment in its favour, a corporation may indemnify a director or officer of the corporation, a former director or officer of the corporation or a person who acts or acted at the corporation's request as a director or officer of a body corporate of which the corporation is or was a shareholder or creditor, and his heirs and legal representatives, against all costs, charges and expenses, including an amount paid to settle an action or satisfy a judgment, reasonably incurred by him in respect of any civil, criminal or administrative action or proceeding to which he is made a party by reason of being or having been a director or

officer of that corporation or body corporate, if

(a) he acted honestly and in good faith with a view to the best interests of the corporation, and

(b) in the case of a criminal or administrative action or proceeding that is enforced by a monetary penalty, he had reasonable grounds for believing that his conduct was lawful.

(2) A corporation may with the approval of the Court indemnify a person referred to in subsection (1) in respect of an action by or on behalf of the corporation or body corporate to procure a judgment in its favour, to which he is made a party by reason of being or having been a director or an officer of the corporation or body corporate, against all costs, charges and expenses reasonably incurred by him in connection with the action if he fulfils the conditions set out in subsections (1)(a) and (b).

(3) Notwithstanding anything in this section, a person referred to in subsection (1) is entitled to indemnity from the corporation in respect of all costs, charges and expenses reasonably incurred by him in connection with the defence of any civil, criminal or administrative action or proceeding to which he is made a party by reason of being or having been a director or officer of the corporation or body corporate, if the person seeking indemnity

(a) was substantially successful on the merits in his defence of the action or proceeding,

(b) fulfills the conditions set out in subsection (1)(a) and (b), and

(c) is fairly and reasonably entitled to indemnity.

(4) A corporation may purchase and maintain insurance for the benefit of any person referred to in subsection (1) against any liability incurred by him

(a) in his capacity as a director or officer of the corporation, except where the liability relates to his failure to act honestly and in good faith with a view to the best interests of the corporation, or

(b) in his capacity as a director or officer of another body corporate if he acts or acted in that capacity at the corporation's request, except where the liability relates to his failure to act honestly and in good faith with a view to the best interests of the body corporate.

(5) A corporation or a person referred to in subsection (1) may apply to the Court for an order approving an indemnity under this section and the Court may so order and make any further order it thinks fit.

(6) An applicant under subsection (5) shall, in a case involving a distributing corporation give the Director notice of the application and the Director is entitled to appear and be heard in person or by counsel.

(7) Upon an application under subsection (5), the Court may order notice to be given to any interested person and that person is entitled to appear and be heard in person or by counsel.

NOTE: Indemnification by corporation. CBCA s. 119 with the addition of clause (c) in subsection (3) and with variations in subsection (6).

Comment

1. See the summary of s. 119 at pp. 70-71 of our Report.

2. The subject of indemnification is a difficult and intricate one. The CBCA provisions appear to provide a reasonable solution and have been generally followed by the Saskatchewan and Manitoba legislation. We have, however, varied s. 119(3) so that it would allow a court to refuse indemnity if the claimant is not fairly and reasonably entitled to it.

120.(1) Subject to the articles, the by-laws or any unanimous shareholder agreement, the directors of a corporation may fix the remuneration of the directors, officers and employees of the corporation.

(2) Disclosure of the aggregate remuneration of directors, the aggregate remuneration of officers, and the aggregate remuneration of employees shall be made as prescribed.

NOTE: Remuneration. CBCA s. 120, with the addition of subsection (2).

Comment

1. The reasons for allowing the directors to fix their own renumeration and for the addition of s. 120(2) appear at pp. 68-69 of our Report.

2. The regulations should provide for disclosure of the aggregate remuneration of directors as directors, the aggregate remuneration of senior officers, and the aggregate remuneration of a certain number, (5 has been suggested), of the most highly paid employees of the corporation. The disclosure might be made in the financial statements or otherwise.

PART 10

INSIDER TRADING

121. In this Part,

(a) "corporation" does not include a distributing corporation;

(b) "insider" means, with respect to a corporation,

(i) the corporation in respect of the purchase or other acquisition by it of shares issued by it or any of its affiliates,

(ii) a director or officer of the corporation,

(iii) a person who, with respect to at least 10% of the voting rights attached to the voting shares of the corporation,

(A) beneficially owns, directly or indirectly, voting shares carrying those voting rights,

(B) exercises control or direction over those voting rights, or

(C) beneficially owns, directly or indirectly, voting shares carrying some of those voting rights and exercises control or direction over the remainder of those voting rights,

(iv) a person employed by the corporation or retained by it on a professional or consulting basis,

(v) an affiliate of the corporation, or

(vi) a person who receives specific confidential information from a person described in this clause or in section 123, including a person described in this subclause, and who has knowledge that the person

giving the information is a person described in this clause or in section 123, including a person described in this subclause.

(c) "voting share" means an issued and outstanding share carrying voting rights under all circumstances or under any circumstances that have occurred and are continuing.

NOTE: Definitions for Part. CBCA s. 121(1), 125(1).

122. For the purposes of this Part,

(a) a director or an officer of a body corporate that is an insider of a corporation is deemed to be an insider of the corporation,

(b) a director or an officer of a body corporate that is a subsidiary is deemed to be an insider of its holding corporation,

(c) a person is deemed to own beneficially shares beneficially owned by a body corporate controlled by him directly or indirectly, and

(d) a body corporate is deemed to own beneficially shares beneficially owned by its affiliates.

NOTE: Deemed insiders. CBCA s. 121(2)(a) to (d).

123. For the purposes of this Part,

(a) if a body corporate becomes an insider of a corporation, or enters into a business combination with a corporation, a director or officer of the body corporate is deemed to have been an insider of the corporation for the previous 6 months or for any shorter period during which he was a director or officer of the body corporate, and

(b) if a corporation becomes an insider of a body corporate, or enters into a business combination with a body corporate, a director or an officer of the body corporate is deemed to

have been an insider of the corporation for the previous 6 months or for any shorter period during which he was a director or officer of the body corporate.

NOTE: Deemed insiders. CBCA s. 121(3).

124. In section 123, "business combination" means an acquisition of all or substantially all the property of one body corporate by another or an amalgamation of two or more bodies corporate.

NOTE: "Business combination" defined. CBCA s. 121(4).

125.(1) An insider who sells to or buys from a shareholder of the corporation or any of its affiliates a security of the corporation or any of its affiliates and in connection with such sale or purchase makes use of any specific confidential information for his own benefit or advantage that, if generally known, might reasonably be expected to affect materially the value of the security

(a) is liable to compensate any person for any direct loss suffered by that person as a result of the transaction, unless the information was known or in the exercise of reasonable diligence should have been known to that person at the time of the transaction, and

(b) is accountable to the corporation for any direct benefit or advantage received or receivable by the insider as a result of the transaction.

(2) An action to enforce a right created by this section may be commenced only within 2 years after the date of completion of the transaction that gave rise to the cause of action.

NOTE: Civil liability of insiders. CBCA ss. 121(2) and 125 varied.

Comment

1. See the discussion under the heading of Civil Liability for

Insider Information at p. 117 of our Report.

2. S. 125 does not deal with the reporting requirements of insiders of distributing corporations. That is a subject which should be left to the Securities Act.

3. S. 121(b) would define "insider". The definition is less elaborate than the definition of an insider for reporting purposes in CBCA s. 121, but it is only varied slightly from CBCA s. 125. It would include the corporation itself (which might withhold confidential information from a shareholder when buying out his interest), directors, officers, substantial shareholders, employees and professional advisors and affiliates. We think that s. 121(b)(vi), which would cover a person who knowingly receives specific confidential information from an insider, would give the section a scope which is wide enough to catch any abuse of confidential information arising from control or management in a non-distributing corporation.

4. We have adopted s. 123 from CBCA s. 125. Under s. 123(a), if a body corporate becomes an insider of a corporation or enters into a business combination with a corporation, a director or officer of the body corporate would be deemed to have been an insider of the corporation for the previous six months or such shorter period as he was a director of officer of the body corporate. S. 123(b) would apply the same rule if a corporation becomes an insider of a body corporate. S. 124 would define a business combination as meaning an acquisition of all or substantially all of the property of one body corporate by another or an amalgamation of two or more bodies corporate. The definition is the same as that in CBCA s. 125(4).

5. S. 125(1) is the substantive provision which would impose liabiity upon an insider of non-distributing corporations. Note that the liability would apply only if the transaction involves a shareholder of the corporation or of an affiliate. S. 125(1) diverges in that respect from the CBCA and the other provincial Acts.

6. S. 125(1) would not impose liability on the insider if the other party knew or in the exercise of reasonable diligence should have known the information.

7. Under s. 125(2), the 2-year limitation period would run from the completion of the transaction. That is a departure from CBCA s. 125(6)(a), under which the period would run only from discovery of the facts, but conforms to the Securities Act, and the SBCA, though not the proposed Ontario BCA. Bill 76 of 1978, the proposed Securities Act, would allow 180 days from discovery, with a cut-off period of 3 years from the completion of the transaction.

PART 11

SHAREHOLDERS

126.(1) Meetings of shareholders of a corporation shall be held at the place within Alberta provided in the by-laws or, in the absence of such provision, at the place within Alberta that the directors determine.

(2) Notwithstanding subsection (1), a meeting of shareholders of a corporation may be held outside Alberta if all the shareholders entitled to vote at that meeting so agree, and a shareholder who attends a meeting of shareholders held outside Alberta is deemed to have so agreed except when he attends the meeting for the express purpose of objecting to the transaction of any business on the grounds that the meeting is not lawfully held.

(3) A shareholder or any other person entitled to attend a meeting of shareholders may participate in the meeting by means of telephone or other communication facilities that permit all persons participating in the meeting to hear each other if

(a) the by-laws so provide, or

(b) subject to the by-laws, all the shareholders entitled to vote at the meeting consent,

and a person participating in such a meeting by those means is deemed for the purposes of this Act to be present at the meeting.

(4) Notwithstanding subsections (1) and (2), if the articles so provide, meetings of shareholders may be held outside Alberta at one or more places specified in the articles.

NOTE: Place of shareholders meetings. CBCA s. 126. Subsection (3) is new. Subsection (4) is derived from the Saskatchewan BCA s. 126(3).

Comment

1. The general requirement would be that the shareholders of Alberta corporations meet in Alberta. (s. 126(1)).

2. S. 126(2) would relax the requirement if all the shareholders so agree. The subsection would allow some flexibility and, because of the requirement of unanimity, is not capable of being abused. S. 126(4), which does not

appear in the CBCA, would go on to allow the articles of incorporation to provide for meetings outside Alberta. If the provision is included in the ground rules set out in the articles, shareholders will have warning of it, and it seems unlikely that the power will be abused; we are not aware of any abuse under the ACA, which imposes no restriction.

3. S. 109(9) of the CBCA provides that a director can attend a meeting of directors by telephone or other suitable electronic means. Similar considerations suggest that shareholders should be able to do the same, as the great majority of companies incorporated in Alberta are small enough to make it possible to hold a meeting by telephone. S. 126(3) of the draft Act would so provide.

127.(1) The directors of a corporation

(a) shall call an annual meeting of shareholders to be held not later than 18 months after

(i) the date of its incorporation, or

(ii) the date of its certificate of amalgamation, in the case of an amalgamated corporation,

and subsequently not later than 15 months after holding the last preceding annual meeting, and

(b) may at any time call a special meeting of shareholders.

(2) Notwithstanding subsection (1), the corporation may apply to the Court for an order extending the time in which the first or the next annual meeting of the company shall be held.

(3) Notice of any application under subsection (2) by a distributing corporation shall be served upon the Director who has the right to appear and be heard in person or by counsel.

(4) If, upon an application under subsection (2), the Court is satisfied that it is in the best interests of the corporation, the Court may extend the time in which the first or the next annual meeting of the corporation shall be held, in such manner and upon such terms as it thinks fit.

NOTE: Calling meetings. CBCA s. 127; ACA s. 133(3). Subsection (3) is new.

Comment

1. In the absence of unanimity, the shareholders of a company can exercise their powers only by a resolution passed at a meeting. The requirement of an annual meeting is therefore fundamental to their protection. (Note that s. 136 would permit a unanimous written resolution to take the place of the annual meeting.)

2. S. 127(1)(a) differs slightly from CBCA s. 127(1)(a) in that it would require an annual meeting to be held within 18 months of incorporation or an amalgamation and within 15 months of the last annual meeting. CBCA s. 127(1)(a) merely requires that the meeting be called within those periods. S. 127(1)(a) differs from the ACA in two ways. Firstly, the time for the holding of the first meeting would run from the date of incorporation rather than from the date of commencement of business. Secondly, the subsection would not require that an annual meeting be held in a calendar year (so long as each annual meeting is held within 15 months of the previous annual meeting).

3. S. 127(2) and (4) do not appear in the CBCA. They are a modification of Section 133(3) of the ACA. They have been modified to conform with the style and the procedure under the CBCA, and in particular, CBCA s. 241, which deals with applications to the court generally.

4. S. 127(3) does not appear in either the CBCA or the ACA. It would provide an extra protection for the shareholders of a distributing corporation.

128.(1) For the purpose of determining shareholders

(a) entitled to receive payment of a dividend,

(b) entitled to participate in a liquidation distribution, or

(c) for any other purpose except the right to receive notice of or to vote at a meeting,

the directors may fix in advance a date as the record date for that determination of shareholders, but the record date shall not precede by more than 50 days the particular action to be taken.

(2) For the purpose of determining shareholders entitled to receive notice of a meeting of shareholders, the directors may fix in advance a date as the record date for that determination of shareholders, but that record date shall not precede by more than 50 days or by less than 21 days the date on which the meeting is to be held.

(3) If no record date is fixed,

(a) the record date for the determination of shareholders entitled to receive notice of a meeting of shareholders shall be

(i) at the close of business on the last business day preceding the day on which the notice is sent, or,

(ii) if no notice is sent, the day on which the meeting is held,

and

(b) the record date for the determination of shareholders for any purpose other than to establish a shareholder's right to receive notice of a meeting or to vote, shall be at the close of business on the day on which the directors pass the resolution relating to that purpose.

(4) If the directors of a distributing corporation fix a record date then, unless notice of the record date is waived in writing by every holder of a share of the class or series affected whose name is set out in the securities register at the close of business on the day the directors fixed the record date, notice of the record date shall be given not less than 7 days before the date so fixed

(a) by advertisement in a newspaper published or distributed in the place where the corporation has its registered office and in each place in Canada where it has a transfer agent or where a transfer of its shares may be recorded, and

(b) by written notice to each stock exchange in Canada on which the shares of the corporation are listed for trading.

NOTE: Record dates. CBCA s.128 varied to confine subsection (4) to distributing corporations.

Comment

1. S. 128 would allow the directors to fix a "record date" to determine who the shareholders are for any purpose. S. 132

would go on to allow the corporation to prepare a list of shareholders as at the record date for a meeting, and that list could be used to determine who can vote at the meeting. This procedure is designed to replace the arcane concept of "closing the register". The ACA provision is not very clear: s. 58 allows "closure" of the register, presumably meaning closure for all purposes including inspection. Article 17 of Table A, and most of the more or less standard articles of association that are in circulation, also allow suspension of registration for fourteen days preceding the annual meeting and could, of course, provide for suspension for almost any length of time.

2. Under s. 128(4) a distributing corporation which fixes a record date would have to advertise it and give notice to all stock exchanges on which its shares are listed.

3. It will be noted that a corporation would not have to fix a record date under s. 128(1); it "may" fix a record date. It is only corporations with large numbers of shareholders which are likely to do so.

> 129.(1) Notice of the time and place of a meeting of shareholders shall be sent not less than 21 days and not more than 50 days before the meeting,
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> (a) to each shareholder entitled to vote at the meeting,
>
> (b) to each director, and
>
> (c) to the auditor of the corporation.
>
> (2) Notwithstanding section 246(3), a notice of a meeting of shareholders sent by mail to a shareholder, director or auditor in accordance with section 246(1) is deemed to be sent to the shareholder on the day on which it is deposited in the mail.
>
> (3) A notice of a meeting is not required to be sent to shareholders who were not registered on the records of the corporation or its transfer agent on the record date determined under section 128(2) or (3), but failure to receive a notice does not deprive a shareholder of the right to vote at the meeting.
>
> (4) If a meeting of shareholders is adjourned by one or more adjournments for an aggregate of less than 30 days it is not necessary, unless the by-laws otherwise provide, to give notice of the adjourned meeting, other than by announcement at the time of an adjournment.
>
> (5) If a meeting of shareholders is

adjourned by one or more adjournments for an aggregate of 30 days or more, notice of the adjourned meeting shall be given as for an original meeting but, unless the meeting is adjourned by one or more adjournments for an aggregate of more than 90 days, section 143(1) does not apply.

(6) All business transacted at a special meeting of shareholders and all business transacted at an annual meeting of shareholders, except consideration of the financial statements, auditor's report, election of directors and reappointment of the incumbent auditor, is deemed to be special business.

(7) Notice of a meeting of shareholders at which special business is to be transacted shall state

(a) the nature of that business in sufficient detail to permit the shareholder to form a reasoned judgment on that business, and

(b) the text of any special resolution to be submitted to the meeting.

(8) The text of a special resolution may be amended at a meeting of shareholders if the amendments correct manifest errors or are not material.

NOTE: Notice of meeting, adjournment, business and notice of business. CBCA s. 129 varied in subsections (4) and (5). Subsections (2) and (8) are new.

Comment

1. It should be noted that s. 129(1) would require notice to be given to directors and to the auditor as well as to all voting shareholders.

2. The notice period of 21 days is longer than that which is customarily provided in Alberta today, and we had some doubts about it, particularly in the case of a closely held corporation. However, consideration of the time taken by mail service has persuaded us to recommend the adoption of the 21-day period in s. 129(1).

3. We have inserted s. 129(2). We are concerned that in its absence s. 246(1) and (3), which follow the CBCA, would allow shareholders to upset the business done at meetings on the grounds that they had not actually received notices. Such a result would make it difficult to establish a proper foundation for a shareholders' meeting, particularly for a

large corporation.

4. S. 129(3) is necessary in order to give effect to the provision in s. 128(2) allowing the fixing of a record date.

5. If an adjournment is short, s. 129(4) would do away with the common law rule that notice of an adjourned meeting must be given. An announcement at the end of the meeting is sufficient for those who acted upon the notice of the first meeting.

6. S. 129(5), however, would prevent an adjournment without notice to a time when circumstances may be expected to have changed, though it would not require a new proxy solicitation under s. 143(1).

7. S. 129(7) would require that the notice state the nature of "special business" as defined in s. 129(6) "in sufficient detail to permit the shareholder to form a reasoned judgment on that business". The test will often be difficult to apply, and if sufficient information is not given, it is likely that it will be held that the meeting has not been lawfully called and that business done at it is therefore of no effect. However, we think that the problem must be accepted; directors who want to persuade the shareholders to do something should be prepared to tell them in advance what it is and why they should do it.

8. S. 129(7) and (8) would give an answer to a difficult question: should it be possible to amend a special resolution at the meeting? The draft Act circulated with our Draft Report said no: the most important consideration is that shareholders should not find that a special resolution which is passed is not the one of which they were given notice. Our lawyer consultants thought, however, that the draft Act was too strict, and suggested that amendments to special resolutions should be allowed to correct manifest errors or to make changes which are not material; the shareholders would be protected against changes in substance, but the corporation would not have to reconvene another meeting, with all the attendent delay, trouble and expense, merely because some minor error is made in the text of the special resolution. We have accepted their suggestion and s. 129(8) would give effect to it.

> 130. A shareholder and any other person entitled to attend a meeting of shareholders may in any manner waive notice of a meeting of shareholders, and attendance of the shareholder or other person at a meeting of shareholders is a waiver of notice of the meeting, except where he attends a meeting for the express purpose of objecting to the transaction of any business on the grounds that the meeting is not lawfully called.

NOTE: Waiver of notice. CBCA s. 130.

Comment

S. 130 would recognise the right of shareholders to waive proper notice of a meeting. It would also allow a shareholder, without waiving proper notice, to attend the meeting to protest an alleged impropriety. It probably would not allow the shareholder to debate an item of business on the merits and at the same time to maintain that the meeting has not been properly called.

131.(1) A shareholder entitled to vote at an annual meeting of shareholders may

(a) submit to the corporation notice of any matter that he proposes to raise at the meeting, in this Act referred to as a "proposal", and

(b) discuss at the meeting any matter in respect of which he would have been entitled to submit a proposal.

(2) A corporation that solicits proxies shall set out the proposal in the management proxy circular required by section 144 or attach the proposal to it.

(3) If so requested by the shareholder, the corporation shall include in the management proxy circular or attach to it a statement by the shareholder of not more than 200 words in support of the proposal, and the name and address of the shareholder.

(4) A proposal may include nominations for the election of directors if the proposal is signed by one or more holders of shares representing in the aggregate not less than 5% of the shares or 5% of the shares of a class of shares of the corporation entitled to vote at the meeting to which the proposal is to be presented, but this subsection does not preclude nominations made at a meeting of shareholders.

(5) A corporation is not required to comply with subsections (2) and (3) if

(a) the proposal is not submitted to the corporation at least 90 days before the anniversary date of the previous annual meeting of shareholders,

(b) it clearly appears that the proposal has been submitted by the shareholder primarily for the purpose of enforcing a personal claim or redressing a personal

grievance against the corporation, its directors, officers or security holders or any of them, or primarily for the purpose of promoting general economic, political, racial, religious, social or similar causes,

(c) the corporation, at the shareholder's request, included a proposal in a management proxy circular relating to a meeting of shareholders held within 2 years preceding the receipt of the request, and the shareholder failed to present the proposal, in person or by proxy, at the meeting,

(d) substantially the same proposal was submitted to shareholders in a management proxy circular or a dissident's proxy circular relating to a meeting of shareholders held within 2 years preceding the receipt of the shareholder's request and the proposal was defeated, or

(e) the rights being conferred by this section are being abused to secure publicity.

(6) No corporation or person acting on its behalf incurs any liability by reason only of circulating a proposal or statement in compliance with this section.

(7) If a corporation refuses to include a proposal in a management proxy circular, the corporation shall, within 10 days after receiving the proposal, notify the shareholder submitting the proposal of its intention to omit the proposal from the management proxy circular and send to him a statement of the reasons for the refusal.

(8) Upon the application of a shareholder claiming to be aggrieved by a corporation's refusal under subsection (7), the Court may restrain the holding of the meeting to which the proposal is sought to be presented and make any further order it thinks fit.

(9) The corporation or any person claiming to be aggrieved by a proposal may apply to the Court for an order permitting the corporation to omit the proposal from the management proxy circular, and the Court, if it is satisfied that subsection (5) applies,

may make such order as it thinks fit.

(10) If the corporation is a distributing corporation, an applicant under subsection (8) or (9) shall give the Director notice of the application and the Director is entitled to appear and be heard in person or by counsel.

NOTE: Shareholder proposals. CBCA s. 131, varied as to subsection (10).

Comment

1. S. 131(1) would allow a shareholder to get almost any subject onto the agenda for the annual meeting of a corporation. We considered the question whether in the interest of order a limitation should be imposed upon his right to do so, but concluded that experience in Canada does not indicate that shareholders obstruct the conduct of annual meetings and that, at least until experience changes, they should have an opportunity to air their views.

2. S. 131(3) would go on to allow the shareholder of a proxy-soliciting corporation to require the corporation to circulate the proposal and a supporting statement. Those provisions would allow all the shareholders, and not merely those who attend the meeting, to hear both sides. As the corporation's machinery would be used, it seems reasonable to impose restrictions, which appear in s. 131(5), designed to give some assurance that the proposal is made in good faith and for the purposes of the corporation. Since the corporation would be required by law to publish the material, it is appropriate that s. 131(6) should expressly protect it against liability for doing so, leaving the shareholder who put it forward liable for anything wrongful in it unless he is exonerated by another rule of law.

3. S. 131(7), 131(8) and 131(9) would provide a machinery by which, if the shareholder and the corporation disagree about the propriety of including the proposal in the proxy circular, the issue could be raised by the corporation's refusal and dealt with by the court upon the application of either the corporation or the shareholder.

4. S. 131(10) departs from the CBCA by requiring notice to the Director of the Securities Commission of an application under s. 138(8) or (9) only if the corporation is a distributing corporation. We think that it is only where the public is involved that the Director need be brought into a matter of this kind.

5. S. 131(4) expressly provides for a proposal nominating directors, provided that the shareholders joining in it hold 5% of the voting shares.

6. We do not think that the CBCA is entirely clear about the effect of the adoption of a proposal under s. 131. It does

seem clear from CBCA s. 169 and 170 that the adoption by sufficient majorities of a proposal to amend the articles of incorporation is, subject to the filing of articles of amendment and the issue of a certificate of amendment, effective to amend the articles. We have finally concluded that, while CBCA s. 98(5) is not as clear as CBCA s. 169 and 170, the adoption of a proposal to amend the by-laws is effective to amend them. In other cases, the CBCA is silent and we think that the best interpretation is that the adoption of the proposal has no legal effect unless it is to do something which the shareholders have power to do; e.g., we do not think that a proposal that an officer be dismissed, if approved by the shareholders, would dismiss the officer, though it might cause the directors to dismiss him. We think that the policy of the CBCA on the question is appropriate, and we doubt that tinkering with the wording would improve it. We have accordingly included CBCA s. 131 in the draft Act without change.

132.(1) A corporation having more than 15 shareholders entitled to vote at a meeting of shareholders shall prepare a list of shareholders entitled to receive notice of a meeting, arranged in alphabetical order and showing the number of shares held by each shareholder,

(a) if a record date is fixed under section 128(2), not later than 10 days after that date, or

(b) if no record date is fixed,

(i) at the close of business on the last business day preceding the day on which the notice is given, or

(ii) if no notice is given, on the day on which the meeting is held.

(2) If a corporation fixes a record date under section 128(2), a person named in the list prepared under subsection (1)(a) is entitled to vote the shares shown opposite his name at the meeting to which the list relates, except to the extent that

(a) the person has transferred the ownership of any of his shares after the record date, and

(b) the transferee of those shares

(i) produces properly endorsed share certificates, or

(ii) otherwise establishes that he

owns the shares,

and demands, not later than 10 days before the meeting, or such shorter period before the meeting as the by-laws of the corporation may provide, that his name be included in the list before the meeting,

in which case the transferee is entitled to vote his shares at the meeting.

(3) If a corporation does not fix a record date under section 128(2), a person named in a list prepared under subsection (1)(b)(i) is entitled to vote the shares shown opposite his name at the meeting to which the list relates except to the extent that

(a) the person has transferred the ownership of any of his shares after the date on which a list referred to in subsection (1)(b)(i) is prepared, and

(b) the transferee of those shares

(i) produces properly endorsed share certificates, or

(ii) otherwise establishes that he owns the shares,

and demands, not later than 10 days before the meeting or such shorter period before the meeting as the by-laws of the corporation may provide, that his name be included in the list before the meeting,

in which case the transferee is entitled to vote his shares at the meeting.

(4) A shareholder may examine the list of shareholders

(a) during usual business hours at the records office of the corporation or at the place where its central securities register is maintained, and

(b) at the meeting of shareholders for which the list was prepared.

NOTE: Shareholder list. CBCA s. 132 excluding corporations with 15 or fewer shareholders entitled to vote.

Comment

1. CBCA s. 132(1) requires a corporation to prepare a list of shareholders entitled to receive notice of a meeting, either as at the record date fixed, under s. 128, or, if no record date is fixed, as at the close of business on the day before the day on which notice is given, or, finally, if no notice is given, on the day of the meeting. S. 132(2) and s. 133(3) then provide that a person named on the list is entitled to vote, except where shares are transferred and the transferee proves ownership and demands to be put on the list at least 10 days before the meeting.

2. We have two reservations about the provisions of CBCA s. 132(1) to (3) insofar as they would apply to corporations with large numbers of shareholders.

   (1) CBCA s. 132 makes the list the source of a shareholder's right to vote. That is no doubt convenient, but it appears to us to be contrary to good policy and to the legislation which makes the register the governing record, and also to CBCA s. 129(2) which appears to allow a shareholder to vote even though he was not registered on the record date and therefore not on the list (though CBCA s. 132(2) and (3) may answer this last point insofar as a transferee after the record date is concerned). If a person's name is wrongfully on the list, it seems to us that he should not vote, and if a person's name is wrongfully omitted, it appears to us that he should. No doubt the list can be corrected, but we have reservations about the status which the CBCA gives it.

   (2) We do not see why the transferee should have to come in 10 days ahead of time, and we note that the Ontario Act provides for 2 days, which seems to us to be enough time for administrative processes to take place.

   However, it appears to us to be important that transfer agents and others who undertake responsibility for meetings of large corporations should be given consistent directions under the CBCA and the proposed ABCA, and our reservations are not sufficiently grave to suggest a departure from the CBCA in this respect. For the sake of uniformity, we accordingly propose that CBCA s. 132 be adopted by the ABCA for large corporations.

3. We now turn to closely held corporations. It appears to us that there is no need to require a small corporation to prepare a list when its share register is readily intelligible and provides an adequate source of information, and we are quite sure that a requirement that it do so would simply be ignored by the great majority of small corporations in Alberta. It is true that the situation resulting from the list being ignored would usually be corrected by the appearance of the shareholders at the meeting and the waiver by attendance which is implied under CBCA s. 130, but we see no reason to establish unnecessary machinery. Our proposal therefore is that the ABCA s. 132 apply only to corporations with large numbers of

shareholders, and that in the case of closely held corporations the entitlement to vote be in accordance with the share register. We also think that in closely held corporations there is no need to require a transferee of shares to come in before the meeting.

4. That raises the question: what is a "closely held" corporation for this purpose? We think that the appropriate test is whether the number of shareholders is large enough to justify the requirement of an additional procedure. The "closely held" corporation could be equated with a corporation which does not distribute its shares to the public, but there are some large private ACA companies, and public non-distributing ACA companies for which the more elaborate machinery may be appropriate. Our view is that the "closely held" category for this purpose should include corporations with no more than 15 shareholders, i.e., that the requirement that a list be prepared under ABCA s. 132 should not apply to companies with 15 shareholders or less.

> 133.(1) Unless the by-laws otherwise provide, a quorum of shareholders is present at a meeting of shareholders, irrespective of the number of persons actually present at the meeting, if the holder or holders of a majority of the shares entitled to vote at the meeting are present in person or represented by proxy.
>
> (2) If a quorum is present at the opening of a meeting of shareholders, the shareholders present may, unless the by-laws otherwise provide, proceed with the business of the meeting, notwithstanding that a quorum is not present throughout the meeting.
>
> (3) If a quorum is not present at the opening of a meeting of shareholders, the shareholders present may adjourn the meeting to a fixed time and place but may not transact any other business.
>
> (4) If a corporation has only one shareholder, or only one holder of any class or series of shares, the shareholder present in person or by proxy constitutes a meeting.

NOTE: Quorum. CBCA s. 133.

Comment

1. ACA s. 135 provides a quorum of two for a private company or three for a public company. It does so only if the articles of association do not make other provision, and it therefore effectively leaves the quorum to be fixed by the articles. CBCA s. 133(1) provides that if the holders of a majority of the voting shares are present in person or by proxy, there

is a quorum. It does so, however, only "unless the by-laws otherwise provide," and we think that it applies only if the by-laws do not provide for a quorum at all. S. 133(1) of the draft Act follows the CBCA for the sake of uniformity and because the subsection is in itself acceptable.

2. Under s. 133(4) of the draft Act, if there is only one shareholder, or only one holder of shares of one series or class, one shareholder present in person or by proxy would constitute a meeting. It is obviously necessary that he do so.

3. It is not entirely clear from CBCA s. 133(1) whether, if the number of shares held by one shareholder would qualify the holders to constitute a quorum if the shares were held by more than one shareholder, that shareholder constitutes a quorum and a meeting. It may be that s. 18(1)(i) of the Interpretation Act, under which plural words include the singular, would achieve that result so that the holding of the requisite number of shares should qualify one shareholder to constitute a quorum, but we have added the words "holder or" in s. 133(1) of the draft Act to be sure.

4. Under CBCA s. 133(2) it is enough that there is a quorum at the beginning of the meeting; if a shareholder necessary to the quorum leaves or becomes incapable of business, the meeting may continue. S. 133(2) of the draft Act follows the CBCA provision.

5. The ACA itself is silent as to whether, at an adjourned shareholders' meeting where the adjournment was caused by a lack of quorum, a quorum is necessay. Article 36 of Table A, however, provides for an adjournment of one week and says that if a quorum is not present at the adjourned meeting, those present are a quorum. CBCA s. 133(3) merely provides that if there is no quorum the shareholders present may adjourn to a fixed time and place but may do nothing else, so that it does not itself prescribe the time of the adjourned meeting and does not allow the adjourned meeting to continue with a lesser quorum. The explanatory material prepared by the draftsmen shows that the section was founded upon conscious policy: a meeting with less than a quorum of shareholders, in their opinion, should not transact business. We recommend that the proposed ABCA follow the CBCA in that respect, and s. 133(3) of the draft Act does so. If no quorum can be got together, presumably an application would have to be made to the court for an order for the calling of a meeting.

> 134.(1) Unless the articles otherwise provide, each share of a corporation entitles the holder of it to one vote at a meeting of shareholders.
>
> (2) If a body corporate or association is a shareholder of a corporation, the corporation shall recognize any individual authorized by a resolution of the directors or governing body of the body corporate or

association to represent it at meetings of shareholders of the corporation.

(3) An individual authorized under subsection (2) may exercise on behalf of the body corporate or association he represents all the powers it could exercise if it were an individual shareholder.

(4) Unless the by-laws otherwise provide, if 2 or more persons hold shares jointly, one of those holders present at a meeting of shareholders may in the absence of the others vote the shares, but if 2 or more of those persons who are present, in person or by proxy, vote, they shall vote as one on the shares jointly held by them.

NOTE: Right to vote. CBCA s. 134.

Comment

1. The customary rule is: one share, one vote. The articles may, however, provide otherwise, and, of course, corporate constitutions often do create different classes of shares with different voting rights.

2. S. 134(2) would provide an alternative way for a shareholder which is a body corporate or association to name a representative to exercise its rights at meetings of shareholders.

3. S. 134(4) would provide rules for the voting of shares held jointly.

135.(1) Unless the by-laws otherwise provide, voting at a meeting of shareholders shall be by show of hands except where a ballot is demanded by a shareholder or proxyholder entitled to vote at the meeting.

(2) A shareholder or proxyholder may demand a ballot either before or upon the declaration of the result of any vote by show of hands.

NOTE: Voting. CBCA s. 135.

Comment

1. S. 135(1) would confirm customary practice under which votes may be taken by show of hands, but any shareholder can demand a poll in which he can exercise his full voting rights and not merely 1 vote.

2. S. 135(1) would clarify an uncertainty which existed at common law by making it clear that a proxyholder can demand a poll.

3. CBCA s. 135(2) allows a shareholder to demand a ballot "before or after" a vote by show of hands. S. 135(2) of the draft Act would require him to demand a ballot "before or upon" the vote by show of hands, with a view to making it clear, if the CBCA does not do so, that the demand must be made on the spot.

> 136.(1) A resolution in writing signed by all the shareholders entitled to vote on that resolution is as valid as if it had been passed at a meeting of the shareholders.
>
> (2) A resolution in writing dealing with all matters required by this Act to be dealt with at a meeting of shareholders, and signed by all the shareholders entitled to vote at that meeting, satisfies all the requirements of this Act relating to meetings of shareholders.
>
> (3) A copy of every resolution referred to in subsection (1) or (2) shall be kept with the minutes of the meetings of shareholders.

NOTE: Resolution in lieu of meetings. CBCA s. 136 varied as to subsection (1).

Comment

1. S. 136(1) would be extremely useful for closely held corporations with a small number of shareholders, and may be useful for others. It would also be extremely useful for the one shareholder corporation. It is in accordance with the practice in Alberta, where articles of association frequently provide for unanimous written resolutions.

2. The considerations which lead to the requirement of keeping minutes of decisions made at meetings apply equally to a requirement of keeping decisions embodied in written resolutions. S. 136(3) would accordingly require copies of written resolutions to be kept with the minutes.

3. The effect of CBCA s. 136 is that if a director has filed a statement under s. 105(2) or an auditor under s. 162(5), the unanimous written resolution is invalidated. We think that the requirement that these statements be circulated is enough protection for the shareholders, and we have therefore omitted the opening words of CBCA s. 136, which we think would create unnecessary complications and would raise an aura of doubt around all unanimous written resolutions.

> 137.(1) The holders of not less than 5%

of the issued shares of a corporation that carry the right to vote at a meeting sought to be held may requisition the directors to call a meeting of shareholders for the purposes stated in the requisition.

(2) The requisition referred to in subsection (1), which may consist of several documents of like form each signed by one or more shareholders, shall state the business to be transacted at the meeting and shall be sent to each director and to the registered office of the corporation.

(3) Upon receiving the requisition referred to in subsection (1), the directors shall call a meeting of shareholders to transact the business stated in the requisition unless

(a) a record date has been fixed under section 128(2) and notice of the record date has been given under section 128(4),

(b) the directors have called a meeting of shareholders and have given notice of the meeting under section 129, or

(c) the business of the meeting as stated in the requisition includes matters described in section 131(5)(b) to (e).

(4) If the directors do not within 21 days after receiving the requisition referred to in subsection (1) call a meeting, any shareholder who signed the requisition may call the meeting.

(5) A meeting called under this section shall be called as nearly as possible in the manner in which meetings are to be called pursuant to the by-laws, this Part and Part 12.

(6) Unless the shareholders otherwise resolve at a meeting called under subsection (4), the corporation shall reimburse the shareholders the expenses reasonably incurred by them in requisitioning, calling and holding the meeting.

NOTE: Meeting on requisition of shareholders. CBCA s. 137.

Comment

1. It is common for business corporations statutes to allow shareholders holding a specified fraction of the voting shares to compel the directors to convene a meeting of shareholders, and to allow the shareholders themselves to convene the meeting if the directors do not. S. 137 would so so in a manner not unlike that of ACA s. 134.

2. S. 137(1) would allow the holders of 5% of the voting shares to requisition a meeting of shareholders. ACA s. 134 requires that the requisitioning shareholders hold 10%. We do not think that the reduction will open the floodgates, and we think that s. 137 should follow CBCA s. 137 for the sake of uniformity.

3. S. 137(3) would allow the directors to refuse to call the meeting if one is already being called or if the business falls within the vexatious and repetitious categories referred to in s. 131(5)(b) to (e).

4. S. 137(6) would give the requisitioning shareholders a chance to obtain reimbursement of their costs, though only with the express or tacit concurrence of the meeting.

> 138.(1) If for any reason it is impracticable to call a meeting of shareholders of a corporation in the manner in which meetings of those shareholders may be called, or to conduct the meeting in the manner prescribed by the by-laws and this Act, or if for any other reason the Court thinks fit, the Court, upon the application of a director, a shareholder entitled to vote at the meeting or the Director, may order a meeting to be called, held and conducted in such manner as the Court directs.
>
> (2) Without restricting the generality of subsection (1), the Court may order that the quorum required by the by-laws or this Act be varied or dispensed with at a meeting called, held and conducted pursuant to this section.
>
> (3) A meeting called, held and conducted pursuant to this section is for all purposes a meeting of shareholders of the corporation duly called, held and conducted.

NOTE: Meeting called by Court. CBCA s. 138.

Comment

S. 138 with the exception of subsection (2) is functionally equivalent to ACA s. 135(2). S. 138(2) would not alter the substance of the law but would simply ensure that the court

has the power necessary to give effect to it. S. 138 follows its CBCA counterpart.

139.(1) A corporation or a shareholder or director may apply to the Court to determine any controversy with respect to an election or appointment of a director or auditor of the corporation.

(2) Upon an application under this section, the Court may make any order it thinks fit including, without limiting the generality of the foregoing, any one or more of the following:

(a) an order restraining a director or auditor whose election or appointment is challenged from acting pending determination of the dispute;

(b) an order declaring the result of the disputed election or appointment;

(c) an order requiring a new election or appointment, and including in the order directions for the management of the business and affairs of the corporation until a new election is held or appointment made;

(d) an order determining the voting rights of shareholders and of persons claiming to own shares.

NOTE: Court review of election. CBCA s. 139.

Comment

S. 139 would provide a relatively simple, inexpensive and effective procedure for reviewing the election of a director or the appointment of the auditor, and would overcome substantive and procedural difficulties in the present law. See discussion at p. 63 of our Report.

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

NOTE: Pooling agreement. CBCA s. 140(1).

Comment

We think that, on balance, shareholders should be able to agree about the exercise of voting rights even though the agreement may give one shareholder or group of shareholders an advantage in the maintenance of influence or control. We think also that the proposed ABCA should state what the law is, with a view to removing doubt. S. 139.1 would therefore permit pooling agreements among shareholders. It follows CBCA s. 140(1), but we think that it should appear in a separate section, leaving s. 140 to deal with unanimous shareholder agreements only.

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

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

(b) the regulation of the election of directors;

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

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

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

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

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

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

person receives actual knowledge of the unanimous shareholder agreement.

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

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

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

(4) If

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

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

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

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

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

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

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

which the value of the consideration paid for his shares exceeds the fair value of those shares.

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

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

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

NOTE: Unanimous shareholder agreement. CBCA s. 140(2) to (4) substantially varied.

Comment

1. See the general discussion of unanimous shareholder agreements commencing at p. 21 of our Report.

2. CBCA s. 140(2) refers to a written agreement among all the shareholders of the corporation, with or without other parties, "that restricts, in whole or in part, the powers of the directors to manage the business and affairs of the corporation", and validates such an agreement. Elsewhere in the CBCA there are various references to other things that may appear in a unanimous shareholder agrement, which is defined as the agreement described in s. 140(2) or the corresponding declaration of a single shareholder described in s. 140(2.1). S. 140(2) of the draft Act would provide for a broader class of unanimous shareholder agreements, which would be able to deal with any aspect of the management of the company or the relationship among the shareholders, and the definition in s. 2(1)(z) would include that class and a sole shareholder's declaration. The intention of the expansion of the scope of the section is to provide a means by which the shareholders may regulate their relationship as they see fit, subject only to the fundamental things that must appear in the articles of incorporation.

3. Since s. 140(1)(c) would allow the shareholders to assume powers which the draft Act would otherwise impose upon directors, s. 140(7) would relieve the directors of their

duties and liabilities to the extent of the withdrawal, and would impose those duties and liabilities upon the shareholders. In so doing it would follow CBCA s. 140(4).

4. CBCA s. 140(3) makes a transferee of shares a party to an existing unanimous shareholder agreement. The subsection is however subject to CBCA s. 45(8) which makes a unanimous shareholder agreement ineffective against a transferee who has no actual knowledge of it unless it or a reference to it is noted conspicuously on the share certificate. While we are in sympathy with the purpose of CBCA s. 140(3), we can see difficulties in its application. To take only one example, suppose that a unanimous shareholder agreement provides that the shareholders rather than the directors are to make the by-laws, a provision which could be included in a unanimous shareholder agreement under CBCA s. 98(1). We do not see how that agreement, and by-laws made pursuant to it, could be effective with regard to some of the shareholders and not all of them. We have attempted to make provision for the problem of the transferee without notice (which should arise only infrequently) in the way which is set out in s. 140(2) to (6) of the draft Act.

5. S. 140(2) of the draft Act would deal with the situation in which the corporation issues a share certificate from its treasury to a person other than an existing shareholder. The subsection would provide that the new shareholder is deemed to be a party to an existing unanimous shareholder agreement, and that the unanimous shareholder agreement is not terminated; but it would give the new shareholder the right to rescind his contract of purchase of the shares. The new shareholder, in other words, would have the right to accept the shares subject to the unanimous shareholder agreement or to rescind and get back the consideration which he gave.

6. S. 140(3) to (6) of the draft Act would deal with the situation in which a person who is not a party to the unanimous shareholder agreement acquires a share in the corporation by transfer or transmission of the share from a shareholder. S. 140(3) would make him a party to the agreement and would provide that the agreement is not terminated. Under s. 140(4) and (5), if the transferee is a bona fide purchaser and did not have actual knowledge of the agreement, and if his transferor's share certificate did not refer to it, he could elect to object to the agreement, in which case he would be entitled to be paid the fair value of his shares and to sue his transferor for any amount by which the value of the consideration which he paid exceeded the fair value of the shares. It will be seen that in order to prevent a situation arising in which a purchaser could escape from s. 140(3), the corporation would merely have to ensure that all share certificates which it issues refer to the agreement.

7. S. 140(9) would allow the shareholders to exclude s. 140. The exclusion would leave the agreement a mere personal agreement among the parties to it. The addition of the subsection flows from our discussions with our lawyer consultants.

PART 12

PROXIES

141. In this Part,

(a) "form of proxy" means a written or printed form that, upon completion and execution by or on behalf of a shareholder, becomes a proxy;

(b) "proxy" means a completed and executed form of proxy by means of which a shareholder appoints a proxyholder to attend and act on his behalf at a meeting of shareholders;

(c) "registrant" means a person required to be registered to trade or deal in securities under the laws of any jurisdiction;

(d) "solicit" or "solicitation" includes

(i) a request for a proxy whether or not accompanied by or included in a form of proxy,

(ii) a request to execute or not to execute a form of proxy or to revoke a proxy,

(iii) the sending of a form of proxy or other communication to a shareholder under circumstances reasonably calculated to result in the procurement, withholding or revocation of a proxy, and

(iv) the sending of a form of proxy to a shareholder under section 143,

but does not include

(v) the sending of a form of proxy in response to an unsolicited request made by or on behalf of a shareholder,

(vi) the performance of administrative acts or professional services on behalf of a person soliciting a proxy,

(vii) the sending by a registrant of the documents referred to in section 147, or

(viii) a solicitation by a person in respect of shares of which he is the beneficial owner;

(e) "solicitation by or on behalf of the management of a corporation" means a solicitation by any person pursuant to a resolution or instructions of, or with the acquiescence of, the directors or a committee of the directors.

NOTE: Definitions for Part 12. CBCA s. 141 varied in the definition of registrant to refer to a "person" instead of a "securities broker or dealer".

Comment

The definition of "solicit" or "solicitation" in s. 141 is substantially the same as the definition of the same terms in s. 81 of Bill 76 of 1978, The Securities Act, except that s. 81 does not include s. 141(d)(vii) or (viii).

142.(1) A shareholder entitled to vote at a meeting of shareholders may by means of a proxy appoint a proxyholder and one or more alternate proxyholders, who are not required to be shareholders, to attend and act at the meeting in the manner and to the extent authorized by the proxy and with the authority conferred by the proxy.

(2) A proxy shall be executed by the shareholder or by his attorney authorized in writing.

(3) A proxy is valid only at the meeting in respect of which it is given or any adjournment of that meeting.

(4) A shareholder may revoke a proxy

(a) by depositing an instrument in writing executed by him or by his attorney authorized in writing

(i) at the registered office of the corporation at any time up to and including the last business day preceding the day of the meeting, or an adjournment of that meeting, at which the proxy is to be

used, or

(ii) with the chairman of the meeting on the day of the meeting or an adjournment of the meeting, or

(b) in any other manner permitted by law.

(5) The directors may specify in a notice calling a meeting of shareholders a time not exceeding 48 hours, excluding Saturdays and holidays, preceding the meeting or an adjournment of the meeting before which time proxies to be used at the meeting must be deposited with the corporation or its agent.

NOTE: Appointing proxyholder. CBCA s. 142.

Comment

1. S. 142(1) would confirm the customary right of a shareholder to vote by proxy. It would also confirm his right to appoint a proxyholder who is not a shareholder.

2. S. 142(3) would preclude the solicitation of a continuing proxy, and is therefore of practical importance. The reasons for it appear in our Report at p. 111. There would, however, be a way in which a shareholder could leave his affairs in the hands of a trusted man of business for an extended period of time. He would be able to execute a written power of attorney in favour of the man of business, and the attorney would then be able to execute proxies in his own favour for each meeting as required.

3. S. 142(4) would leave the shareholder free to revoke his proxy at any time before the vote.

4. S. 142(5) would give the corporation time to verify and tabulate proxies. The power to require the deposit of proxies in advance could be abused but we think the limitation to a period of 48 hours is a reasonable safeguard against abuse.

143.(1) Subject to subsection (2), the management of a corporation shall, concurrently with giving notice of a meeting of shareholders, send a form of proxy in prescribed form to each shareholder who is entitled to receive notice of the meeting.

(2) If a corporation has not more than 15 shareholders entitled to vote at meetings of shareholders, 2 or more joint holders being counted as one shareholder, the management of the corporation is not required

to send a form of proxy under subsection (1).

(3) If the management of a corporation fails to comply, without reasonable cause, with subsection (1), the corporation is guilty of an offence and liable on summary conviction to a fine of not more than $5000.

(4) If a corporation contravenes subsection (3), then, whether or not the corporation has been prosecuted or convicted in respect of that contravention, any director or officer of the corporation who knowingly authorizes, permits or acquiesces in the contravention is also guilty of an offence and liable on summary conviction to a fine of not more than $5000 or to imprisonment for a term of not more than 6 months or to both.

NOTE: Mandatory solicitation. CBCA s. 143, varied in subsections (1) and (4).

Comment

1. We think that proxies and proxy solicitation should be considered primarily matters of business corporations law and we have therefore dealt with them in Part 12 of the draft Act. See the discussion in our Report at pp. 107-114.

2. We are, however, concerned about the wording of CBCA Regulation 32(5) and (6), which are as follows:

> (5) A form of proxy shall provide a means for the shareholder to specify that the shares registered in his name shall be voted for or against each matter or group of related matters identified in the notice of meeting, a management proxy circular, dissident's proxy circular or a proposal under section 131 of the Act, other than the appointment of an auditor and the election of directors.
>
> (6) A form of proxy may confer authority with respect to matters for which a choice is not provided in accordance with subsection (5) if the form of proxy, the management proxy circular or the dissident's proxy circular states in bold faced type how the proxyholder will vote the shares in respect of each matter or group of related matters.

The reason for our concern is that it appears to us that CBCA Regulation 32(6) could be read (and, indeed, may make any other reading difficult) so that whoever sends the proxy form can elect either to send a form which allows the

shareholder to specify how his votes are to be cast, or to send a form which does not do so but either itself says, or is accompanied by a proxy circular which says, how the designated proxyholder will vote. That reading would, we think, largely negate the effect of CBCA Regulation 32(5), and, indeed, the effect of the scheme. It is also a departure from our present Securities Act which makes it clear that the proxy form may confer a discretionary authority on the proxyholder only if the shareholder does not specify his own choice (and if it or the circular says how it is intended to vote the shares). S. 158(4) and (5) of Ontario Reg. 478/79 carry out what the true intention of the CBCA is or should be and we quote them here as an indication of the kind of regulation which we think should be made:

> (4) Every form of proxy shall provide a means for the security holder to specify that the securities registered in his name shall be voted for or against each matter or group of related matters identified therein or in the notice of meeting or in an information circular, other than the appointment of an auditor and the election of directors.
>
> (5) A proxy may confer discretionary authority with respect to each matter referred to in subsection 4 as to which a choice is not so specified if the form of proxy or the information circular states in bold-face type how the securities represented by the proxy will be voted in respect of each matter or group of related matters.

3. The cost in time and money of preparing and sending out a proxy circular is substantial, and is not likely to be justifiable in a small corporation. S. 143(2) would accordingly exempt from mandatory solicitation corporations with not more than 15 shareholders entitled to vote.

> 144.(1) A person shall not solicit proxies unless
>
> (a) in the case of solicitation by or on behalf of the management of a corporation, a management proxy circular in prescribed form, either as an appendix to or as a separate document accompanying the notice of the meeting, or
>
> (b) in the case of any other solicitation, a dissident's proxy circular in prescribed form stating the purposes of the solicitation
>
> is sent to the auditor of the corporation, to each shareholder whose proxy is solicited

and, if clause (b) applies, to the corporation.

(2) Subsection (1) does not apply to a corporation that has 15 or fewer shareholders entitled to vote at meetings of shareholders.

(3) A person required to send a management proxy circular or dissident's proxy circular shall send concurrently a copy of it to the Director together with a copy of the notice of meeting, form of proxy and any other documents for use in connection with the meeting.

(4) A person who fails to comply with subsection (1) or (3) is guilty of an offence and liable on summary conviction to a fine of not more than $5000 or to imprisonment for a term of not more than 6 months or to both.

(5) If the person who contravenes subsection (3) is a body corporate, then, whether or not the body corporate has been prosecuted or convicted in respect of the contravention, any director or officer of the body corporate who knowingly authorizes, permits or acquiesces in the contravention is also guilty of an offence and liable on summary conviction to a fine of not more than $5000 or to imprisonment for a term of not more than 6 months or to both.

NOTE: Soliciting proxies. CBCA s. 144, varied by the addition of subsection (2) and varied in subsection (4) to read "subsection (1) or (2)" instead of "subsection (1) and (2)".

Comment

1. S. 144(1) would, along with the requirement in s. 143(1) that proxies be solicited, have the effect of requiring that the shareholders be given information upon which to form an opinion on the issues. We have not drafted regulations prescribing the information to be contained in the circular, but we think that they should be along the lines of those made under the CBCA.

2. It will be noted that all proxy solicitations are covered by the subsection. If the solicitation is not "by or on behalf of management" it would fall within the term "any other solicitation"; the person soliciting must send one form of proxy circular or the other.

3. CBCA s. 144(1) appears in terms to cover all corporations. S. 144(2) has been inserted in the draft Act to make it clear that a small corporation need not incur the cost involved in preparing a proxy circular.

4. S. 144(3) would place in the hands of a public official, the Director of the Securities Commission, the circulars being sent to the investors whom it is his function to protect. His function in the case of a non-distributing corporation is not so clear, but the filing of the documents with him would be a useful safeguard for larger non-distributing corporations where it may be expected that there is a substantial number of shareholders outside the control group. If the filing would not be appropriate in a particular case, the corporation could apply for exemption under s. 145(1).

> 145.(1) Upon the application of an interested person, the Director may make an order on such terms as he thinks fit exempting that person from any of the requirements of section 143 or 144(1), which order may have retrospective effect.
>
> (2) The Director may publish in the Registrar's Periodical or otherwise the particulars of exemptions granted under this section together with the reasons for them.

NOTE: Exemption orders. CBCA s. 145.

Comment

1. There may be cases in which the requirement of proxy solicitation, or the requirement of a proxy circular, would be unjustified or contrary to the corporation's interests. S. 145(1) provides a means of obtaining an exemption in such cases.

2. It is desirable that, in general, publicity be given to the exercise of the exempting power, but publicity in some particular cases may be harmful. S. 145(2) would therefore provide for publication on a discretionary basis.

> 146.(1) A person who solicits a proxy and is appointed as a proxyholder shall attend in person or cause an alternate proxyholder to attend the meeting in respect of which the proxy is given and comply with the directions of the shareholder who appointed him.
>
> (2) A proxyholder or an alternate proxyholder has the same rights as the shareholder who appointed him to speak at a meeting of shareholders in respect of any matter, to vote by way of ballot at the meeting and, except where a proxyholder or an alternate proxyholder has conflicting instructions from more than one shareholder, to vote at such a meeting in respect of any

matter by way of any show of hands.

(3) Notwithstanding subsections (1) and (2), if the chairman of a meeting of shareholders declares to the meeting that, if a ballot is conducted, the total number of votes attached to shares represented at the meeting by proxy required to be voted against what to his knowledge will be the decision of the meeting in relation to any matter or group of matters is less than 5% of the votes attached to the shares entitled to vote and represented at the meeting on that ballot, then, unless a shareholder or proxyholder demands a ballot,

(a) the chairman may conduct the vote in respect of that matter or group of matters by a show of hands, and

(b) a proxyholder or alternate proxyholder may vote in respect of that matter or group of matters by a show of hands.

(4) A proxyholder or alternate proxyholder who without reasonable cause fails to comply with the directions of a shareholder under this section is guilty of an offence and liable on summary conviction to a fine of not more than $5000 dollars or to imprisonment for a term of not more than 6 months or to both.

NOTE: Rights and duties of proxyholder. CBCA s. 146.

Comment

1. S. 146(1) is necessary to ensure that, after the proxy solicitation process has been gone through, a proxyholder cannot defeat the wishes of a shareholder by not turning up to vote as he directs, or by refusing to do so. Note that s. 146(4) introduces the idea of reasonable cause.

2. S. 146(2) would make it clear that a proxyholder is entitled to take part in the proceedings as if he were the shareholder whose proxy he holds.

3. S. 146(3) would avoid the necessity of a ballot in a case in which the meeting is dominated by proxies and there are some but not many dissenting proxies. There is a similar provision in ACA s. 143. We have used some of the ACA wording in order to make it clear that the 5% applies only to the votes of the shares represented at the meeting and not to the votes of all the outstanding shares.

147.(1) Shares of a corporation that

are registered in the name of a registrant or his nominee and not benefically owned by the registrant shall not be voted unless the registrant, forthwith after receipt of the notice of the meeting, financial statements, management proxy circular, dissident's proxy circular and any other documents other than the form of proxy sent to shareholders by or on behalf of any person for use in connection with the meeting, sends a copy of those documents to the beneficial owner and, except where the registrant has received written voting instructions from the beneficial owner, a written request for voting instructions.

(2) A registrant shall not vote or appoint a proxyholder to vote shares registered in his name or in the name of his nominee that he does not benefically own unless he receives voting instructions from the beneficial owner.

(3) A person by or on behalf of whom a solicitation is made shall, at the request of a registrant, forthwith furnish to the registrant at that person's expense the necessary number of copies of the documents referred to in subsection (1) other than copies of the document requesting voting instructions.

(4) A registrant shall vote or appoint a proxyholder to vote any shares referred to in subsection (1) in accordance with any written voting instructions received from the beneficial owner.

(5) If requested by a beneficial owner, a registrant shall appoint the beneficial owner or a nominee of the beneficial owner as proxyholder.

(6) The failure of a registrant to comply with this section does not render void any meeting of shareholders or any action taken at a meeting of shareholders.

(7) Nothing in this section gives a registrant the right to vote shares that he is otherwise prohibited from voting.

(8) A registrant who knowingly fails to comply with this section is guilty of an offence and liable on summary conviction to a fine of not more than $5000 or to imprisonment for a term of not more than 6 months or to both.

(9) If the registrant who contravenes

subsection (8) is a body corporate, then, whether or not the body corporate has been prosecuted or convicted in respect of the contravention, any director or officer of the body corporate who knowingly authorizes, permits or acquiesces in the contravention is also guilty of an offence and liable on summary conviction to a fine of not more than $5000 or to imprisonment for a term of not more than 6 months or to both.

NOTE: Duties of registrant. CBCA s. 147.

Comment

It is the registered owner of shares that is entitled to vote them. Many shares however are represented by street certificates registered in the names of brokers who have no beneficial interest in them. The registered owner may have sold them long since and there may therefore be a new beneficial owner unknown to the corporation. It is not appropriate that a common practice of the market should confer voting power upon persons who have no real interest in the shares. This section makes provision against it, without interfering with the broker's right to vote his own shares or with his right to act as a proxyholder.

148.(1) If a form of proxy, management proxy circular or dissident's proxy circular contains an untrue statement of a material fact or omits to state a material fact required in it or necessary to make a statement contained in it not misleading in the light of the circumstances in which it was made, an interested person or the Director may apply to the Court and the Court may make any order it thinks fit including, without limiting the generality of the foregoing, any one or more of the following:

(a) an order restraining the solicitation, the holding of the meeting, or any person from implementing or acting upon any resolution passed at the meeting to which the form of proxy, management proxy circular or dissident's proxy circular relates;

(b) an order requiring correction of any form of proxy or proxy circular and a further solicitation;

(c) an order adjourning the meeting.

(2) An applicant under this section shall give to the Director notice of the

application and the Director is entitled to appear and be heard in person or by counsel.

NOTE: Court orders. CBCA s. 148.

Comment

1. S. 148(1) is necessary to ensure that, if necessary information is omitted from the circular, or if false information is given, the court would have power to see that the situation is rectified before the vote is held.

2. S. 148(2) is intended to ensure that the allegations are brought to the attention of the Director of the Alberta Securities Commission and to give him status to take part in the proceedings with a view to ensuring that the interest of the investors in receiving proper information is protected.

PART 13

FINANCIAL DISCLOSURE

149.(1) Subject to section 150, the directors of a corporation shall place before the shareholders at every annual meeting

(a) the following financial statements as prescribed:

(i) if the corporation has not completed a financial period and the meeting is held after the end of the first 6-month period of that financial period, a financial statement for the period that began on the date the corporation came into existence and ended on a date occurring not earlier than 6 months before the annual meeting;

(ii) if the corporation has completed only one financial period, a financial statement for that year;

(iii) if the corporation has completed 2 or more financial periods, comparative financial statements for the last 2 completed financial periods;

(iv) if the corporation has completed one or more financial periods but the annual meeting is held after 6 months has expired in its current financial period, a financial statement for the period that

(A) began at the commencement of its current financial period, and

(B) ended on a date that occurred not earlier than 6 months before the annual meeting,

in addition to any statements required under subclause (ii) or (iii),

(b) the report of the auditor, if any, and

(c) any further information respecting the financial position of the corporation and the results of its operations required by the articles, the by-laws or any unanimous shareholder agreement.

(2) Nothwithstanding subsection (1)(a)(iii), the financial statements for the earlier of the 2 financial periods referred to in that subclause may be omitted if the reason for the omission is set out in the financial statement, or in a note to them, to be placed before the shareholders at the annual meeting.

NOTE: Annual financial statements. CBCA s. 149 varied in subsections (1)(a) and (2).

Comment

1. See the discussion of Financial Statements commencing at p. 102 of our Report.

2. CBCA Regulation 44, which is based on CBCA s. 149(1), adopts the Handbook of the Canadian Institute of Chartered Accountants as the standard by which financial statements are to be prepared. If s. 149(1) of the proposed Act is adopted, it will be necessary to promulgate a regulation dealing with the form and content of financial statements. S. 254(1)(e) of the draft Act, which follows its CBCA counterpart, would give the Lieutenant-Governor in Council the power to follow the CBCA Regulation 44.

3. In the case of a corporation that has been in existence for a number of years, CBCA s. 149(1)(a) calls for "comparative financial statements" relating separately to the immediately preceding financial period (s. 149(1)(a)(ii)) and, if the meeting is more than 6 months into the existing financial period, a "stub" period in the existing financial period. While it may be implicit in that wording that a comparison must be made between the last and second last financial periods, we think that it should be made explicit (as ACA s. 120(1)(b) does in the case of public companies), and s. 149(1)(a)(iii) of the draft Act would do so. The requirement of comparative statements for Alberta corporations other than public companies would be new. We understand from the Alberta Institute of Chartered Accountants that s. 149(1) would be workable.

4. There may be reasons why the previous year's financial statements would be of little value, for example, if there had been an amalgamation during the financial year; or all the shareholders may waive a requirement of s. 149 or of the regulations. S. 149(2) would allow a corporation in such a case to omit the information and say why.

5. S. 149(2) is similar to the provisions contained in the

Securities Act up to the year 1972. In that year the Securities Act was amended, and it at present requires the consent of the Director before financial statements can be omitted.

6. S. 149 would not apply to a corporation which is subject to and complies with the Securities Act provisions relating to the same subject matter: see s. 150(1) of the draft Act.

> 150.(1) Section 149 does not apply to a corporation which is subject to and complies with the provisions of the Securities Act relating to the financial statements to be placed before the shareholders at every annual meeting.
>
> (2) A corporation may apply to the Director for an order authorizing the corporation to omit from its financial statements any item prescribed, or to dispense with the publication of any financial statement prescribed, and the Director may, if he reasonably believes that the disclosure of the item or statement would be detrimental to the corporation, make the order on any reasonable conditions he thinks fit.

NOTE: Exemption. CBCA s. 150(1) and new.

Comment

1. S. 150(1) is introduced to avoid duplication of requirements upon a corporation which is subject to the Securities Act.

2. S. 150(2) would apply to all corporations whether or not they distribute their securities to the public. There may be non-distributing corporations who wish, for valid reasons, to omit certain items from their financial statements, and we think that the proposed ABCA should provide machinery by which they could do so. While the principal functions of the Director of the Securities Commission relate to distributing corporations, it seems appropriate that the he should be the functionary with power to allow any corporation to omit information on any terms he thinks necessary for the protection of the shareholders.

> 151.(1) A corporation shall keep at its records office a copy of the financial statements of each of its subsidiary bodies corporate and of each body corporate the accounts of which are consolidated in the financial statements of the corporation.
>
> (2) Shareholders of a corporation and their agents and legal representatives may

upon request examine the statements referred to in subsection (1) during the usual business hours of the corporation, and may make extracts from them, free of charge.

(3) A corporation may, within 15 days of a request to examine under subsection (2), apply to the Court for an order barring the right of any person to so examine, and the Court may, if it is satisfied that the examination would be detrimental to the corporation or a subsidiary body corporate, bar that right and make any further order it thinks fit.

(4) A corporation shall give notice of an application under subsection (3) to

(a) the person making a request under subsection (2), and

(b) the Director, if the applicant is a distributing corporation,

and that person and the Director may appear and be heard in person or by counsel.

NOTE: Consolidated statements. CBCA s. 151 varied in subsection (4) to confine the Director's right to notice and to appear to cases of distributing corporations.

Comment

1. S. 151(1) and 151(2) would enable a shareholder of a corporation to see the financial statements of the corporation's subsidiaries and of bodies corporate whose statements are consolidated with its statements. It is doubtful that the shareholder has this right under the ACA.

2. S. 151(3) would allow the court to bar such an examination if the disclosure would be detrimental to the corporation. S. 151(4) would allow the Director of the Securities Commission to appear on an application under s. 151(3) if he believes that the interests of investors so require; unlike its CBCA prototype, however, s. 151(4) would apply only to distributing corporations as the affairs of non-distributing corporations do not generally require supervision by the Director.

152.(1) The directors of a corporation shall approve the financial statements referred to in section 149 and the approval shall be evidenced by the signature of one or more directors.

(2) A corporation shall not issue, publish or circulate copies of the financial

statements referred to in section 149 unless the financial statements are

(a) approved and signed in accordance with subsection (1), and

(b) accompanied by the report of the auditor of the corporation, if any.

NOTE: Approval of financial statements. CBCA s. 152.

Comment

The responsibility of the directors for the financial statements is fundamental to the protection of shareholders through financial disclosure. S. 152 would require the directors to assume that responsibility.

153.(1) A corporation shall, not less then 21 days before each annual meeting of shareholders or before the signing of a resolution under section 136(2) in lieu of the annual meeting, send a copy of the documents referred to in section 149 to each shareholder, except to a shareholder who has informed the corporation in writing that he does not want a copy of those documents.

(2) A corporation that, without reasonable cause, fails to comply with subsection (1) is guilty of an offence and liable on summary conviction to a fine of not more than $5000.

NOTE: Copies to shareholders. CBCA s. 153.

Comment

The distribution of the financial statements to the shareholders before the meeting is also fundamental to their protection through financial disclosure.

154.(1) A distributing corporation shall, not less than 21 days before each annual meeting of shareholders or forthwith after the signing of a resolution under section 136(2) in lieu of the annual meeting, and in any event not later than 15 months after the last date when the last preceding annual meeting should have been held or a resolution in lieu of the meeting should have been signed, send a copy of the documents referred to in section 149 to the Director.

(2) If a distributing corporation

(a) sends to its shareholders, or

(b) is required to file with or send to a public authority or a stock exchange

interim financial statements or related documents, the corporation shall forthwith send copies of them to the Director.

(3) A subsidiary corporation is not required to comply with this section if

(a) the financial statements of its holding corporation are in consolidated or combined form and include the accounts of the subsidiary, and

(b) the consolidated or combined financial statements of the holding corporation are included in the documents sent to the Director by the holding corporation in compliance with this section.

(4) A corporation that fails to comply with this section is guilty of an offence and liable on summary conviction to a fine of not more than $5000.

NOTE: Copies to Director. CBCA s. 154 with the omission of subsection (1)(b) (which extended the section to non-distributing corporations with annual gross revenues exceeding $10 million or with assets exceeding $5 million) and of subsections (2) and (3) which are related to CBCA subsection (1)(b).

Comment

1. S. 154 would require distributing corporations to send their financial statements to the Director of the Securities Commission before the annual meeting which will consider them. It would not continue the requirement of ACA s. 146(3) that a public company file its last balance sheet with its annual return to the Registrar of Companies. Filing with the Director appears to us to be sufficient to protect the shareholders, and would provide him with information which he might need to protect their interests.

2. S. 154 does not include the requirement of CBCA 154(1) that a non-distributing corporation with gross revenues exceeding $10,000,000 or assets exceeding $5,000,000 must also send financial statements to the Director. That requirement does not appear to serve any purpose connected with corporation law. CBCA s. 154(2) and s. 154(3) relate to that

requirement and accordingly have not been included in s. 154.

3. S. 154(2) to 154(4) would go on to require that interim statements sent by a distributing corporation to shareholders, to a public authority or to a stock exchange also be sent to the Director; to excuse filing by a subsidiary whose financial statements are combined or consolidated with statements filed with the Director by its holding corporation; and to provide penalties for failure to comply with the section. These subsections follow CBCA s. 154(4) to 154(6) though, because of the change in s. 154(1) of the draft Act which we have recommended, they would apply only to distributing corporations.

4. S. 154 deals to a great extent with subject matter which is covered by the Securities Act. It is necessary, however, that it do so in order to cover distributing Alberta corporations which do not distribute securities in Alberta.

155.(1) Subject to subsection (5), a person is disqualified from being an auditor of a corporation if he is not independent of the corporation, and its affiliates, and the directors and officers of the corporation and its affiliates.

(2) For the purposes of this section,

(a) independence is a question of fact, and

(b) a person is deemed not to be independent if he or his business partner

(i) is a business partner, a director, an officer or an employee of the corporation or any of its affiliates, or a business partner of any director, officer or employee of the corporation or any of its affiliates,

(ii) beneficially owns or controls, directly or indirectly, an interest in the securities of the corporation or any of its affiliates, or

(iii) has been a receiver, receiver-manager, liquidator or trustee in bankruptcy of the corporation or any of its affiliates within 2 years of his proposed appointment as auditor of the corporation.

(3) An auditor who becomes disqualified under this section shall, subject to subsection (5), resign forthwith after becoming aware of his disqualification.

(4) An interested person may apply to the Court for an order declaring an auditor to be disqualified under this section and the office of auditor to be vacant.

(5) An interested person may apply to the Court for an order exempting an auditor from disqualification under this section and the Court may, if it is satisifed that an exemption would not unfairly prejudice the shareholders, make an exemption order on any terms it thinks fit, which order may have retrospective effect.

NOTE: Qualification of the auditor. CBCA s. 155.

Comment

1. The proposed Act would not define "auditor" or "audit" or prescribe any qualification for an auditor other than independence. See the discussion at pp. 105-106 of our Report.

2. S. 157 of the draft Act would allow the shareholders of any but a distributing corporation to dispense with an auditor. However, if one is appointed, the requirement of independence would be absolute.

3. Secs. 155(2), 155(3), 155(4), and 155(5) go on to define "independence"; to require the auditor to resign if he ceases to be "independent"; to allow an "interested person" to apply to the court for an order declaring an auditor disqualified because he is not independent; and to allow the court to exempt an auditor from disqualification if his lack of independence would not unfairly prejudice the shareholders. These subsections are necessary to fill out the statutory scheme and to provide an escape from it where it is not appropriate or where it has inadvertently been contravened.

4. CBCA s. 155(2)(b)(ii) makes the holding of a material interest in the securities of a corporation or its affiliates grounds for disqualifying an auditor, and the draft Act circulated with our Draft Report followed it. The Institute of Chartered Accountants of Alberta suggested to us, however, that the word "material" be deleted, so that any interest will disqualify him; and we have accepted their suggestion and changed s. 155(2)(b)(ii) of the draft Act accordingly. If the governing body of a group affected by the stringency of the test think a less stringent one inappropriate, we can only express our admiration and recommend accordingly. S. 155(5) would provide relief in an extreme case of hardship.

156.(1) Subject to section 157, shareholders of a corporation shall, by ordinary resolution, at the first annual meeting of shareholders and at each succeeding annual meeting, appoint an auditor to hold office until the close of the next annual meeting.

(2) An auditor appointed under section 99 is eligible for appointment under subsection (1).

(3) Notwithstanding subsection (1), if an auditor is not appointed at a meeting of shareholders, the incumbent auditor continues in office until his successor is appointed.

(4) The remuneration of an auditor may be fixed by ordinary resolution of the shareholders or, if not so fixed, may be fixed by the directors.

NOTE: Auditor's appointment and remuneration. CBCA s. 156.

Comment

1. The directors would have power at the organization meeting under s. 99(1) of the draft Act to appoint an auditor to hold office until the first annual meeting of shareholders.

2. The auditor's primary function is to protect the shareholders. Accordingly, he would be appointed by the shareholders under s. 156(1) and their power to fix his remuneration would be paramount under s. 156(4). The latter provision is somewhat awkward, as the remuneration for an undetermined amount of work cannot effectively be fixed in advance; but it would allow the auditor to go to the shareholders retrospectively if the directors were to try to use the power of fixing his remuneration to control him.

157.(1) The shareholders of a corporation other than a distributing corporation may resolve not to appoint an auditor.

(2) A resolution under subsection (1) is valid only until the next succeeding annual meeting of shareholders.

(3) A resolution under subsection (1) is not valid unless it is consented to by all the shareholders, including shareholders not otherwise entitled to vote.

NOTE: Dispensing with auditor. CBCA s. 157 varied in

subsection (1) to refer to non-distributing corporations and by omitting subsection (4).

Comment

1. S. 157(1) has been altered so that it would only be distributing corporations whose shareholders could not dispense with the appointment of an auditor. Under CBCA s. 157(1), the same prohibition applies to corporations having revenues of $10,000,000 or assets of $5,000,000.

2. It is only by unanimous agreement that the shareholders of a corporation other than a distributing corporation would be able to dispense with the appointment of an auditor. It will be noted that under s. 157(3) any shareholder, whether entitled to a vote or not, would be able to insist that an auditor be appointed. This provision matches s. 153(1) which requires that the financial statements must be sent to each shareholder whether or not that shareholder is entitled to a vote.

3. CBCA s. 157(4) was added by 1978-79 S.C. s. 9, s. 49, and provides that a wholly-owned subsidiary may apply for exemption from the obligation of appointing an auditor. It could have no application following our proposed alterations to s. 154(1) and to s. 157(1), and we have omitted it. No wholly-owned subsidiary would be precluded from dispensing with an auditor under s. 157(1) of the draft Act, and the parent, as sole legal or beneficial shareholder, would be able to adopt a unanimous resolution satisfying s. 157(3).

158.(1) An auditor of a corporation ceases to hold office when

(a) he dies or resigns, or

(b) he is removed pursuant to section 159.

(2) A resignation of an auditor becomes effective at the time a written resignation is sent to the corporation or at the time specified in the resignation, whichever is later.

NOTE: Auditor ceasing to hold office. CBCA s. 158.

159.(1) The shareholders of a corporation may by ordinary resolution at a special meeting remove from office the auditor other than an auditor appointed by the Court under section 161.

(2) A vacancy created by the removal of an auditor may be filled at the meeting at which the auditor is removed or, if not so

filled, may be filled under section 160.

NOTE: Removal of auditor. CBCA s. 159.

Comment

S. 159 confirms the shareholders' control of the auditor's employment.

160.(1) Subject to subsection (3), the directors shall forthwith fill a vacancy in the office of auditor.

(2) If there is not a quorum of directors, the directors then in office shall, within 21 days after a vacancy in the office of auditor occurs, call a special meeting of shareholders to fill the vacancy and, if they fail to call a meeting or if there are no directors, the meeting may be called by any shareholder.

(3) The articles of a corporation may provide that a vacancy in the office of auditor shall only be filled by vote of the shareholders.

(4) An auditor appointed to fill a vacancy holds office for the unexpired term of his predecessor.

(5) Subsections (1) and (2) do not apply if the shareholders have resolved under section 157 not to appoint an auditor.

NOTE: Filling vacancy. CBCA s.160 with the addition of subsection (5).

Comment

1. S. 160(1) would allow the directors to appoint an auditor only if there is a casual vacancy or if the shareholders have removed an auditor without appointing a replacement. The shareholders would have a further opportunity to appoint an auditor at the next annual meeting under s. 156(1) and under s. 160(4). Under s. 160(3) the articles of incorporation could withhold from the directors even this limited power of appointment.

2. S. 160(5) has been added for clarification. If the shareholders have passed a resolution under s. 157(1), then the directors would not be obliged to act under s. 160(1).

161.(1) If a corporation does not have

an auditor, the Court may, upon the application of a shareholder or the Director, appoint and fix the remuneration of an auditor who holds office until an auditor is appointed by the shareholders.

(2) Subsection (1) does not apply if the shareholders have resolved under section 157 not to appoint an auditor.

NOTE: Court-appointed auditor. CBCA s. 161.

Comment

S. 161 would apply as a last resort if the shareholders were not about to meet and the directors were unable or unwilling to appoint an auditor.

162.(1) The auditor of a corporation is entitled to receive notice of every meeting of shareholders and, at the expense of the corporation, to attend and be heard at every meeting on matters relating to his duties as auditor.

(2) If a director or shareholder of a corporation, whether or not the shareholder is entitled to vote at the meeting, gives written notice to the auditor or a former auditor of the corporation not less than 10 days before a meeting of shareholders, the auditor or former auditor shall attend the meeting at the expense of the corporation and answer questions relating to his duties as auditor.

(3) A director or shareholder who sends a notice referred to in subsection (2) shall send concurrently a copy of the notice to the corporation.

(4) An auditor or former auditor of a corporation who fails without reasonable cause to comply with subsection (2) is guilty of an offence and liable on summary conviction to a fine of not more than $5000 or to imprisonment for a term of not more than 6 months or to both.

(5) An auditor who

(a) resigns,

(b) receives a notice or otherwise learns of a meeting of directors or shareholders called for the purpose of removing him from office,

(c) receives a notice or otherwise learns of a meeting of directors or shareholders at which another person is to be appointed to fill the office of auditor, whether because of resignation or removal of the incumbent auditor or because his term of office has expired or is about to expire, or

(d) receives a notice or otherwise learns of a meeting of shareholders at which a resolution referred to in section 157 is to be proposed,

is entitled to submit to the corporation a written statement giving the reasons for his resignation or the reasons why he opposes any proposed action or resolution.

(6) The corporation shall forthwith send a copy of the statement referred to in subsection (5)

(a) to every shareholder entitled to receive notice of any meeting referred to in subsection (1), and

(b) to the Director if the corporation is a distributing corporation,

unless the statement is included in or attached to a management proxy circular required by section 144.

(7) No person shall accept an appointment as or consent to be appointed as auditor of a corporation if he is replacing an auditor who has resigned or been removed or whose term of office has expired or is about to expire until he has requested and received from that auditor a written statement of the circumstances and the reasons why, in that auditor's opinion, he is to be replaced.

(8) Notwithstanding subsection (7), a person otherwise qualified may accept appointment or consent to be appointed as auditor of a corporation if, within 15 days after making the request referred to in that subsection, he does not receive a reply.

NOTE: Rights and liabilities of auditor or former auditor. CBCA s. 162 with variation to subsection (6) and with the omission of subsection (9).

Comment

1. S. 162 is intended to strengthen the position of the auditor vis-a-vis the corporation's management and to ensure that the auditor and the shareholders have access to each other. It would do so in the following ways:

   (1) S. 162(1) would entitle the auditor to receive notice of all shareholders' meetings and to attend them all at the corporation's expense. It would give him an opportunity to communicate to the shareholders anything relevant to his function which he thinks they should hear.

   (2) S. 162(2), (3) and (4) would allow any director or shareholder to compel the attendance of an auditor or former auditor at a meeting of shareholders (again at the corporation's expense). The subsections would give the shareholders an opportunity to find out from the auditor or former auditor anything relevant to his function.

   (3) An auditor who resigns or is about to be replaced would be entitled under s. 162(5) and (6) to give a statement of his reasons for resigning or opposing his replacement, and to have the corporation circulate the statement to the shareholders. If he has resigned because of something wrong with the affairs of the corporation, or if the control group want him replaced because he is preventing them from doing something contrary to the interests of the shareholders, the subsections would give him an opportunity of warning the shareholders.

2. S. 162(6) has been varied to the extent that non-distributing corporations would not have to send a copy of the auditor's statement to the Director of The Securities Commission.

3. An auditor appointed to replace another auditor would be obliged under s. 162(7) and (8) to inquire from his predecessor about the reasons for the predecessor's resignation or replacement. Those reasons may in a particular case disclose to the successor facts about the management of the corporation which he needs to know in order to protect the shareholders.

4. CBCA s. 162(9) declares that the appointment of an auditor who does not make the request from his predecessor under s. 162(7) is void. That subsection has not been carried forward. A responsible auditor will make the inquiry because it is his duty to do so and because failure to carry out that duty may well render him liable for any loss to the corporation that possession of his predecessor's information would enable him to prevent, so that the section may be expected to function satisfactorily without making his appointment void. Further, we are not sure what effects avoiding the appointment would have but it seems to us that they are likely to be inappropriate; e.g., the subsection might be held to mean that the supposed auditor was not

under the duties of an auditor, that all his acts were invalid, or that he has not had the protection of qualified privilege for statements he has made as an auditor. We think that when it becomes apparent that the auditor has not complied with s. 162(7) and (8), the shareholders should be left to their civil remedies against him for any loss suffered by reason of his failure to inquire, to their right to remove him; and to their right to apply under s. 240 for an order compelling him to comply.

> 163.(1) An auditor of a corporation shall make the examination that is in his opinion necessary to enable him to report in the prescribed manner on the financial statements required by this Act to be placed before the shareholders, except those financial statements or parts of those statements that relate to the earlier of the 2 financial years referred to in section 149(1)(a)(iii).
>
> (2) Notwithstanding section 164, an auditor of a corporation may reasonably rely upon the report of an auditor of a body corporate or an unincorporated business the accounts of which are included in whole or in part in the financial statements of the corporation.
>
> (3) For the purpose of subsection (2), reasonableness is a question of fact.
>
> (4) Subsection (2) applies whether or not the financial statements of the holding corporation reported upon by the auditor are in consolidated form.

NOTE: Auditor's duty to examine. CBCA s. 163.

Comment

1. S. 163(1) would leave the regulations to prescribe the manner in which the auditor should report. The regulation would be prepared when the proposed Act is about to come into force. S. 45 of the CBCA Regulations prescribes as the standards to be followed the standards of the Canadian Institute of Chartered Accountants as set out in the CICA Handbook.

2. The auditor of a corporation should not have to duplicate the work of the auditor of another corporation, or of a corporate joint venture or partnership, the accounts of which are included in the financial statements which he is preparing. On the other hand, he should not be able to rely on the other auditor's work when it is clear that the work is not properly done. S. 163(2) would strike the balance by allowing him to rely on the other auditor if it is

reasonable to do so; and s. 163(3) would make reasonableness a question of fact.

> 164.(1) Upon the demand of the auditor of a corporation, the present or former directors, officers, employees or agents of the corporation and the former auditors of the corporation shall furnish such
>
> (a) information and explanations, and
>
> (b) access to records, documents, books, accounts and vouchers of the corporation or any of its subsidiaries
>
> as are, in the opinion of the auditor, necessary to enable him to make the examination and report required under section 163 and that the directors, officers, employees, agents or former auditors are reasonably able to furnish.
>
> (2) Upon the demand of the auditor of a corporation, the directors of the corporation shall
>
> (a) to the extent they are reasonably able to do so, obtain from the present or former directors, officers, employees, agents or auditors of any subsidiary of the corporation the information and explanations that the present or former directors, officers, employees, agents or auditors are reasonably able to furnish and that are, in the opinion of the corporation's auditor, necessary to enable him to make the examination and report required under section 163, and
>
> (b) furnish the information and explanations so obtained to the corporation's auditor.

NOTE: Auditor's right to information. CBCA s. 164 varied in subsection (1) to extend it to former auditors of the corporation and in subsection (2) to extend it to present and former auditors of the subsidiary. Subsection (2) is also varied to add "to the extent they are reasonably able to do so" at the beginning of the clause.

Comment

1. S. 164 would further strengthen the position of the auditor.

S. 164(1) would guarantee him access to records and would obligate former directors, officers, employees or agents to give him information and explanations. It would also go further than its CBCA counterpart and enable him to require a former auditor to give information.

2. S. 164(2) has been varied. Its CBCA counterpart could be read as imposing an absolute obligation upon the directors to obtain information which might not be available to them and we think it desirable to guard against that interpretation.

165.(1) Subject to subsection (3), a distributing corporation shall, and any other corporation may, have an audit committee.

(2) The audit committee of a distributing corporation shall be composed of not less than three directors of the corporation, a majority of whom are not officers or employees of the corporation or any of its affiliates.

(3) A distributing corporation may apply to the Director for an order authorizing the corporation to dispense with an audit committee, and the Director may, if he is satisfied that the shareholders will not be prejudiced by such an order, permit the corporation to dispense with an audit committee on such reasonable conditions as he thinks fit.

(4) An audit committee shall review the financial statements of the corporation before they are approved under section 152.

(5) The auditor of a corporation is entitled to receive notice of every meeting of the audit committee and, at the expense of the corporation, to attend and be heard at the meeting, and, if so requested by a member of the audit committee, shall attend every meeting of the committee held during the term of office of the auditor.

(6) The auditor of a corporation or a member of the audit committee may call a meeting of the committee.

(7) A director or an officer of a corporation shall forthwith notify the audit committee and the auditor of any error or mis-statement of which he becomes aware in a financial statement that the auditor or a former auditor has reported upon.

(8) If the auditor or a former auditor of a corporation is notified or becomes aware

of an error or mis-statement in a financial statement upon which he has reported, and if in his opinion the error or mis-statement is material, he shall inform each director accordingly.

(9) When under subsection (8) the auditor or a former auditor informs the directors of an error or mis-statement in a financial statement,

(a) the directors shall prepare and issue revised financial statements or otherwise inform the shareholders, and

(b) if the corporation is a distributing corporation, the corporation shall send the revised financial statments to the Director or inform the Director of the error or mis-statement in the same manner that the shareholders were informed of it.

(10) Every director or officer of a corporation who knowingly fails to comply with subsection (7) or (9) is guilty of an offence and liable on summary conviction to a fine of not more than $5000 or to imprisonment for a term of not more than 6 months or to both.

NOTE: Audit committee. CBCA s. 165 with subsection (8) modified because of the change to section 154.

Comment

1. S. 165(1) would require a distributing corporation, and allow any other corporation, to have an audit committee of directors. In the case of a distributing corporation, a majority of the members of the audit committee would be required to be independent of management.

2. Under s. 165(3), the function of the audit committee would be to "review the financial statements before they are approved under s. 152", i.e., approved by the directors. The review would inevitably bring the committee into communication with the auditor, who would be entitled under s. 165(4) and s. 165(5) to receive notices of and attend the meetings of the committee, to attend upon request, and even to call a meeting of the committee; and the committee would have a duty to ask for, and the auditor to give, any information which would indicate that the auditor has not received all necessary information or has any suspicions about the way in which the affairs of the corporation are being conducted. The audit committee would then have a duty to communicate to the directors any information received and

opinions which they have formed; but it would still be for the full board, under s. 152(1), to approve or reject the statements.

3. S. 165(3) would allow an exemption from the obligation of having an audit committee to be granted by the Director of the Securities Commission if he is satisfied that the shareholders will not be prejudiced.

4. S. 165(7) to s. 165(10) deal with a topic somewhat different from that of the audit committee, i.e., what would happen if it should become apparent that a mistake has been made in a financial statement. A director or officer would be required to notify the audit committee and the auditor; an auditor or former auditor would be required to notify each director; and the directors would be obliged to issue revised financial statements or otherwise inform the shareholders and, if the corporation is a distributing corporation, the Director of the Securities Commission, of errors of which they are told by the auditor.

166. Any oral or written statement or report made under this Act by the auditor or a former auditor of a corporation has qualified privilege.

NOTE: Qualified privilege for auditor's statements and reports. CBCA s. 166.

Comment

A statement made in the course of an auditor's duty may well be entitled to a qualified privilege under the common law. S. 166 however gives it statutory confirmation. If the law compels an auditor to make statements, as the draft Act would do, it should protect him so long as he acts from the proper motives.

PART 14

FUNDAMENTAL CHANGES

167.(1) Subject to sections 170 and 171, the articles of a corporation may by special resolution be amended to

(a) change its name, subject to section 12,

(b) add, change or remove any restriction upon the business or businesses that the corporation may carry on,

(c) change any maximum number of shares that the corporation is authorized to issue;

(d) create new classes of shares,

(e) change the designation of all or any of its shares, and add, change or remove any rights, privileges, restrictions and conditions, including rights to accrued dividends, in respect of all or any of its shares, whether issued or unissued,

(f) change the shares of any class or series, whether issued or unissued, into a different number of shares of the same class or series or into the same or a different number of shares of other classes or series,

(g) divide a class of shares, whether issued or unissued, into series and fix the number of shares in each series and the rights, privileges, restrictions and conditions of that series,

(h) authorize the directors to divide any class of unissued shares into series and fix the number of shares in each series and the rights, privileges, restrictions and conditions of that series,

(i) authorize the directors to change the rights, privileges, restrictions and conditions attached to unissued shares of any series,

(j) revoke, diminish or enlarge any

authority conferred under clauses (h) and (i),

(k) increase or decrease the number of directors or the minimum or maximum number of directors, subject to sections 102 and 107,

(l) subject to section 45(8), add, change or remove restrictions on the transfer of shares, or

(m) add, change or remove any other provision that is permitted by this Act to be set out in the articles.

(2) The directors of a corporation may, if authorized by the shareholders in the special resolution effecting an amendment under this section, revoke the resolution before it is acted upon without further approval of the shareholders.

(3) Notwithstanding subsection (1), but subject to section 12, where a corporation has a designating number as a name, the directors may amend its articles to change that name to a verbal name.

NOTE: Amendment of articles. CBCA s. 167 except for the omission of subsection (1)(b) relating to change of registered office and subsection (1)(e.1) relating to changes in stated capital.

Comment

1. S. 167(1) would provide a relatively simple procedure which would allow the corporation itself to make important changes in its ground rules. See the discussion of Fundamental Changes in our Report pp. 47-57.

2. Unless a special resolution is signed by all the shareholders entitled to vote, it means a resolution passed by majority of not less than two-thirds of the votes cast: see the definition in s. 1(1)(y) of the draft Act. The ACA would protect a minority holding more than one quarter of the votes against a special resolution, but the CBCA, and the proposed ABCA, would protect the minority only if it holds more than one third of votes.

3. Some, but not all, changes in the articles of incorporation would trigger a class vote under s. 170 and the appraisal right under s. 184.

4. CBCA s. 167(1)(b) has been deleted, as the draft Act would not require the place of the registered office to be shown in the articles of incorporation.

5. The draft Act does not include a counterpart of CBCA s. 167(1)(e.1) which would allow the corporation, by special resolution, to "reduce or increase its stated capital which, for the purposes of this amendment is deemed to be set out in the articles". We are not sure what the subclause meant, or why it was inserted in the CBCA during the Senate deliberations. S. 36 of the draft Act deals with reduction of stated capital in general and s. 26 deals with increase of stated capital where it is appropriate; CBCA s. 167(e.1) therefore appears either to be redundant or to be a separate head of power without the appropriate safeguards and circumscriptions. Finally, we do not fully grasp the consequences of amending the articles to change something which is not there in fact but which is deemed to be there. In the draft Act which accompanied our Draft Report we mentioned our puzzlement and said we would consider the provision further, but no one came forward to urge its continuance upon us.

6. S. 167(2) would add to flexibility in general; in particular it would allow the directors to resile from a fundamental change if shareholders exercise their right to dissent from it under s. 184.

> 168.(1) Subject to sections 170 and 171, a distributing corporation may by special resolution amend its articles in accordance with the regulations to constrain the issue or transfer of its shares
>
> (a) to persons who are not resident Canadians, or
>
> (b) to enable the corporation or any of its affiliates to qualify under any law of Canada or any province of Canada referred to in the regulations
>
> (i) to obtain a licence to carry on any business,
>
> (ii) to become a publisher of a Canadian newspaper or periodical, or
>
> (iii) to acquire shares of a financial intermediary as defined in the regulations.
>
> (2) A corporation referred to in subsection (1) may by special resolution amend its articles to remove any constraint on the issue or transfer of its shares.
>
> (3) The directors of a corporation may, if authorized by the shareholders in the special resolution effecting an amendment

under subsection (1), revoke the resolution before it is acted upon without further approval of the shareholders.

(4) Subject to sections 254(2) and (3), the Lieutenant Governor in Council may make regulations with respect to a corporation that constrains the issue or transfer of its shares prescribing

(a) the disclosure required of the constraints in documents issued or published by the corporation,

(b) the duties and powers of the directors to refuse to issue or register transfers of shares in accordance with the articles of the corporation,

(c) the limitations on voting rights of any shares held contrary to the articles of the corporation,

(d) the powers of the directors to require disclosure of beneficial ownership of shares of the corporation and the right of the corporation and its directors, employees and agents to rely on such disclosure and the effects of such reliance, and

(e) the rights of any person owning shares of the corporation at the time of an amendment to its articles constraining share issues or transfers.

(5) An issue or a transfer of a share or an act of a corporation is valid notwithstanding any failure to comply with this section or the regulations.

NOTE: Constrained shares. CBCA s. 168 varied in subsection (1)(b) to include a reference to provincial laws. CBCA s. 168(2) was repealed in 1978.

Comment

S. 168(1) makes it clear that a corporation would be able to constrain its shareholdings to meet any requirement of minimum Canadian shareholdings.

169.(1) Subject to subsection (2), a director or a shareholder who is entitled to vote at an annual meeting of shareholders

may, in accordance with section 131, make a proposal to amend the articles.

(2) Notice of a meeting of shareholders at which a proposal to amend the articles is to be considered shall set out the proposed amendment and, where applicable, shall state that a dissenting shareholder is entitled to be paid the fair value of his shares in accordance with section 184, but failure to make that statement does not invalidate an amendment.

NOTE: Proposal for amendment. CBCA s. 169.

Comment

S. 169(1) would allow any voting shareholder to initiate proceedings directed towards an amendment of the articles of incorporation.

170.(1) The holders of shares of a class or, subject to subsection (2), of a series are entitled to vote separately as a class or series upon a proposal to amend the articles to

(a) increase or decrease any maximum number of authorized shares of that class, or increase the maximum number of authorized shares of a class having rights or privileges equal or superior to the rights or privileges attached to the shares of that class,

(b) effect an exchange, reclassification or cancellation of all or part of the shares of that class,

(c) add, change or remove the rights, privileges, restrictions or conditions attached to the shares of that class and, without limiting the generality of the foregoing,

(i) remove or change prejudicially rights to accrued dividends or rights to cumulative dividends,

(ii) add, remove or change prejudicially redemption rights,

(iii) reduce or remove a dividend

preference or a liquidation preference, or

(iv) add, remove or change prejudicially conversion privileges, options, voting, transfer or pre-emptive rights, or rights to acquire securities of a corporation, or sinking fund provisions,

(d) increase the rights or privileges of any class of shares having rights or privileges equal or superior to the rights or privileges attached to the shares of that class,

(e) create a new class of shares having rights or privileges equal or superior to the rights or privileges attached to the shares of that class,

(f) make the rights or privileges of any class of shares having rights or privileges inferior to the rights or privileges of the shares of that class equal or superior to the rights or privileges of the shares of that class,

(g) effect an exchange or create a right of exchange of all or part of the shares of another class into the shares of that class, or

(h) constrain the issue or transfer of the shares of that class or extend or remove that constraint.

(2) The holders of a series of shares of a class are entitled to vote separately as a series under subsection (1) only if the series is affected by an amendment in a manner different from other shares of the same class.

(3) Subsection (1) applies whether or not shares of a class or series otherwise carry the right to vote.

(4) A proposed amendment to the articles referred to in subsection (1) is adopted when the holders of the shares of each class or series entitled to vote separately on the amendment as a class or series have approved the amendment by a special resolution.

NOTE: Class votes . CBCA s. 170 except for the 1978 amendment to CBCA subsection (1) which allows the articles to exclude a class vote on amendments referred to in clauses(a), (b) and (e).

Comment

1. S. 170(1) would confer a right upon shareholders whose interests would be affected by a number of changes in capitalization and in the rights attached to shares, to have a vote by class. S. 170(3) provides that the right applies even if the shares do not otherwise carry a right to vote. S. 170(4), in effect, provides that the change can not be effected unless each affected class adopts the special resolution. The section would confer an important new protection upon shareholders, particularly preferred shareholders.

2. The protection applies if the rights of the class itself are to be affected; ACA s. 69(2) has a similar requirement, and adds the requirement of a court order. S. 170(1), however, would go further and confer the protection if the change will increase the numbers, rights or privileges of shares which have or will have rights equal or superior to the rights of the class in question.

3. 1978-79 S.C. c. 9 s. 55 amended CBCA s. 170(1) to allow the articles of incorporation to exclude paragraphs (a), (b), and (e) from the protection given by the subsection. S. 170(1) of the draft Act would not give effect to that change, as such an exclusion appears to us to detract substantially from the protection of the shareholders of special classes. Our comment on s. 170 of the draft Act circulated with our Draft Report foreshadowed this departure from the CBCA and requested comment on it; no one suggested returning to the CBCA.

> 171.(1) Subject to any revocation under section 167(2) or 168(3), after an amendment has been adopted under section 167, 168 or 170, articles of amendment in prescribed form shall be sent to the Registrar.
>
> (2) If an amendment effects or requires a reduction of stated capital, section 36(3) and (4) applies.

NOTE: Delivery of articles of amendment. CBCA s. 171.

> 172. Upon receipt of articles of amendment, the Registrar shall issue a certificate of amendment in accordance with section 255.

NOTE: Certificate of amendment. CBCA s. 172.

173.(1) An amendment becomes effective on the date shown in the certificate of amendment and the articles are amended accordingly.

(2) No amendment to the articles affects an existing cause of action or claim or liability to prosecution in favour of or against the corporation or any of its directors or officers, or any civil, criminal or administrative action or proceeding to which a corporation or any of its directors or officers is a party.

NOTE: Effect of certificate. CBCA s. 173.

Comment

S. 171, 172 and 173 follow the policy of the CBCA and of the draft Act by requiring the corporation to file articles of amendment and by providing that the amendment is effective when the Registrar issues his certificate of amendment.

174.(1) The corporation may at any time, and shall when reasonably so directed by the Registrar, restate by special resolution the articles of incorporation as amended.

(2) Restated articles of incorporation in prescribed form shall be sent to the Registrar.

(3) Upon receipt of restated articles of incorporation, the Registrar shall issue a certificate of registration of restated articles in accordance with section 255.

(4) Restated articles of incorporation are effective on the date shown in the certificate of registration of restated articles and supersede the original articles of incorporation and all amendments to them.

NOTE: Restated articles of incorporation. CBCA s. 174 varied in subsection (1) to remove the power of directors to restate the articles in the absence of a direction from the Registrar.

Comment

CBCA s. 174(1) allows the directors at any time to restate the articles of incorporation as amended. CBCA s. 174(4), which has been carried forward as s. 174(4) of the draft Act, provides that the restated articles of incorporation

supersede the original articles and amendments. Because of the seriousness of the effect of the restatement, s. 174(1) of the draft Act would merely allow the corporation to restate the articles by special resolution.

175.(1) Two or more corporations, including holding and subsidiary corporations, may amalgamate and continue as one corporation.

(2) Subsection (1) does not apply if one of the corporations is a professional corporation.

NOTE: Amalgamation. CBCA s. 175.

Comment

1. S. 175 to 180 of the draft Act follow the corresponding sections of the CBCA. "Registrar" has been substituted for "Director" and s. 179(4) has been expanded to make it clear that the Registrar should have the statutory declaration under s. 179(2) before issuing a certificate of amalgamation.

2. S. 175 to 180 would apply only to amalgamations between two Alberta corporations. S. 180.1 would apply to an amalgamation between an Alberta corporation and an extra-provincial body corporate.

3. The basic procedure for amalgamation under s. 175 to 180 is not unlike the basic procedure under the ACA, with the following exceptions:

   (1) The ACA requirement of a court order approving the amalgamation is not included in the CBCA. However, shareholders would be protected by having the right to dissent from the amalgamation and to be bought out under s. 184. If there is oppression, they would also have a claim under s. 234. Creditors would be protected by the requirement of the statutory declaration under s. 179(2).

   (2) S. 178 would provide simplified procedures for the amalgamation of an Alberta holding corporation and a wholly-owned Alberta subsidiary, and for the amalgamation of two wholly-owned Alberta subsidiaries of a holding company wherever incorporated.

4. Under the ACA, a professional corporation cannot amalgamate with another professional corporation or with an ordinary corporation because its liability is not limited in the sense required by ACA s. 16(1)(d). Since no similar provision appears in the ABCA, s. 175(2) has been added; professional corporations are subject to special controls under the statutes which allow them to engage in the practice of professions, and the availability of

amalgamation would not be appropriate to them.

176.(1) Each corporation proposing to amalgamate shall enter into an agreement setting out the terms and means of effecting the amalgamation and, in particular, setting out

(a) the provisions that are required to be included in articles of incorporation under section 6,

(b) the name and address of each proposed director of the amalgamated corporation,

(c) the manner in which the shares of each amalgamating corporation are to be converted into shares or other securities of the amalgamated corporation,

(d) if any shares of an amalgamating corporation are not to be converted into securities of the amalgamated corporation, the amount of money or securities of any body corporate that the holders of those shares are to receive in addition to or instead of securities of the amalgamated corporation,

(e) the manner of payment of money instead of the issue of fractional shares of the amalgamated corporation or of any other body corporate the securities of which are to be received in the amalgamation,

(f) whether the by-laws of the amalgamated corporation are to be those of one of the amalgamating corporations and, if not, a copy of the proposed by-laws, and

(g) details of any arrangements necessary to perfect the amalgamation and to provide for the subsequent management and operation of the amalgamated corporation.

(2) If shares of one of the amalgamating corporations are held by or on behalf of another of the amalgamating corporations, the amalgamation agreement shall provide for the cancellation of those shares when the amalgamation becomes effective without any repayment of capital in

respect of those shares, and no provision shall be made in the agreement for the conversion of those shares into shares of the amalgamated corporation.

NOTE: Amalgamation agreement. CBCA s. 176.

177.(1) The directors of each amalgamating corporation shall submit the amalgamation agreement for approval to a meeting of the holders of shares of the amalgamating corporation of which they are directors and, subject to subsection (4), to the holders of each class or series of those shares.

(2) A notice of a meeting of shareholders complying with section 129 shall be sent in accordance with that section to each shareholder of each amalgamating corporation and shall

(a) include or be accompanied by a copy or summary of the amalgamation agreement, and

(b) state that a dissenting shareholder is entitled to be paid the fair value of his shares in accordance with section 184, but failure to make that statement does not invalidate an amalgamation.

(3) Each share of an amalgamating corporation carries the right to vote in respect of an amalgamation whether or not it otherwise carries the right to vote.

(4) The holders of shares of a class or series of shares of an amalgamating corporation are entitled to vote separately as a class or series in respect of an amalgamation if the amalgamation agreement contains a provision that, if contained in a proposed amendment to the articles, would entitle those holders to vote as a class or series under section 170.

(5) Subject to subsection (4), an amalgamation agreement is adopted when the shareholders of each amalgamating corporation have approved of the amalgamation by special resolutions.

(6) An amalgamation agreement may provide that at any time before the issue of a certificate of amalgamation the agreement may be terminated by the directors of an

amalgamating corporation, notwithstanding approval of the agreement by the shareholders of all or any of the amalgamating corporations.

NOTE: Shareholder approval of amalgamation agreement. CBCA s. 177.

178.(1) A holding corporation and one or more of its wholly-owned subsidiary corporations may amalgamate and continue as one corporation without complying with sections 176 and 177 if

(a) the amalgamation is approved by a resolution of the directors of each amalgamating corporation, and

(b) the resolutions provide that

(i) the shares of each amalgamating subsidiary corporation shall be cancelled without any repayment of capital in respect of those shares,

(ii) except as may be prescribed, the articles of amalgamation shall be the same as the articles of incorporation of the amalgamating holding corporation, and

(iii) no securities shall be issued by the amalgamated corporation in connection with the amalgamation.

(2) Two or more wholly-owned subsidiary corporations of the same holding body corporate may amalgamate and continue as one corporation without complying with sections 176 and 177 if

(a) the amalgamation is approved by a resolution of the directors of each amalgamating corporation, and

(b) the resolutions provide that

(i) the shares of all but one of the amalgamating subsidiary corporations shall be cancelled without any repayment of capital in respect of those shares,

(ii) except as may be prescribed, the articles of amalgamation shall be the same as the articles of incorporation of the amalgamating subsidiary corporation whose shares are not cancelled, and

(iii) the stated capital of the amalgamating subsidiary corporations whose shares are cancelled shall be added to the stated capital of the amalgamating subsidiary corporation whose shares are not cancelled.

NOTE: Vertical and horizontal short form amalgamation. CBCA s. 178.

Comment

The ACA makes no special provision for an amalgamation between a holding corporation and one of its wholly-owned subsidiaries, or between 2 wholly-owned subsidiaries of the same holding corporation. S. 178 of the draft Act follows CBCA s. 178.

179.(1) Subject to section 177(6), after an amalgamation agreement has been adopted under section 177 or an amalgamation has been approved under section 178, articles of amalgamation in prescribed form shall be sent to the Registrar together with the documents required by sections 19 and 101.

(2) The articles of amalgamation shall have attached to them the amalgamation agreement, if any, and a statutory declaration of a director or an officer of each amalgamating corporation that establishes to the satisfaction of the Registrar that

(a) there are reasonable grounds for believing that

(i) each amalgamating corporation is and the amalgamated corporation will be able to pay its liabilities as they become due, and

(ii) the realizable value of the amalgamated corporation's assets will not be less than the aggregate of its

liabilities and stated capital of all classes, and

(b) there are reasonable grounds for believing that

(i) no creditor will be prejudiced by the amalgamation, or

(ii) adequate notice has been given to all known creditors of the amalgamating corporations and no creditor objects to the amalgamation otherwise than on grounds that are frivolous or vexatious.

(3) For the purposes of subsection (2), adequate notice is given if

(a) a notice of the proposed amalgamation in writing is sent to each known creditor having a claim against the corporation that exceeds $1000,

(b) a notice of the proposed amalgamation is published once in a newspaper published or distributed in the place where the corporation has its registered office and reasonable notice of the proposed amalgamation is given in each province in Canada where the corporation carries on business, and

(c) each notice states that the corporation intends to amalgamate with one or more specified corporations in accordance with this Act unless a creditor of the corporation objects to the amalgamation within 30 days from the date of the notice.

(4) Upon receipt of articles of amalgamation and the other documents required by subsections (1) and (2), and upon receipt of the prescribed fees, the Registrar shall issue a certificate of amalgamation in accordance with section 255.

NOTE: Delivery of articles of amalgamation and statutory declaration to Registrar. CBCA s. 179 varied.

Comment

1. The document required by s. 19, which is referred to in s. 179(1), is the notice of registered office and records office if any. The document required by s. 101 is the notice of directors.

2. CBCA s. 179(4) does not say expressly that the statutory declaration must be filed with the Registrar before the certificate of amalgamation is issued. We think that the filing is necessary for the protection of creditors, and s. 179(4) of the draft Act would so provide. It would also require the amalgamation agreement to be filed and the appropriate fees to be paid.

180. On the date shown in a certificate of amalgamation

(a) the amalgamation of the amalgamating corporations and their continuance as one corporation become effective,

(b) the property of each amalgamating corporation continues to be the property of the amalgamated corporation,

(c) the amalgamated corporation continues to be liable for the obligations of each amalgamating corporation,

(d) an existing cause of action, claim or liability to prosecution is unaffected,

(e) a civil, criminal or administrative action or proceeding pending by or against an amalgamating corporation may be continued to be prosecuted by or against the amalgamated corporation,

(f) a conviction against, or ruling, order or judgment in favour of or against, an amalgamating corporation may be enforced by or against the amalgamated corporation, and

(g) the articles of amalgamation are deemed to be the articles of incorporation of the amalgamated corporation and the certificate of amalgamation is deemed to be the certificate of incorporation of the amalgamated corporation.

NOTE: Effect of certificate of amalgamation. CBCA s. 180.

180.1(1) A corporation may amalgamate with an extra-provincial corporation and continue as one corporation under this Act if

(i) the extra-provincial corporation is authorized to amalgamate with the corporation by the laws of the jurisdiction in which the extra-provincial corporation is incorporated, and

(ii) one is the wholly-owned subsidiary of the other.

(2) Subsection (1) does not apply if the Alberta corporation is a professional corporation.

(3) A corporation and an extra-provincial corporation proposing to amalgamate shall enter into an amalgamation agreement setting out the terms and means of effecting the amalgamation and, in particular,

(a) providing for the matters enumerated in section 176(1)(a), (b) and (g),

(b) providing that the shares of the wholly-owned subsidiary shall be cancelled without any repayment of capital in respect of those shares, and

(c) providing that no securities shall be issued by the amalgamated corporation in connection with the amalgamation.

(4) An amalgamation under this section is adopted when

(a) the agreement is approved by the directors of the Alberta corporation, and

(b) the agreement is approved by the directors or comparable governing body of, or the members of, the extra-provincial corporation, whichever body is required under the laws of the jurisdiction of incorporation of the extra-provincial corporation to approve it, and

(c) the extra-provincial corporation has otherwise complied with the law of the jurisdiction in which it is incorporated.

(5) An amalgamation agreement under this section may provide that at any time before the issue of a certificate of amalgamation, the agreement may be terminated by the directors of the corporation or the directors or comparable governing body of the extra-provincial corporation, notwithstanding any previous approval of the agreement.

(6) Sections 179 and 180 apply to an amalgamation under this section as if both of the amalgamating bodies corporate were corporations except that the notice referred to in section 179(3)(b) shall also be published or distributed in each jurisdiction outside Canada where either body corporate carries on business.

NOTE: Amalgamation of a corporation and an extra-provincial corporation where one is the wholly-owned subsidiary of the other. ACA s. 156.1 varied.

Comment

Section 180.1 is the equivalent of ACA s. 156.1 but modified to be as consistent as possible with s. 175 to 178 and 180 of the draft Act respecting the amalgamation of two or more Alberta corporations.

Unlike the vertical short form of amalgamation under s. 178(1) of the draft Act, an amalgamation under s. 180.1 would require an amalgamation agreement. We think that that provision would add some measure of protection to shareholders of a holding extra-provincial corporation.

181.(1) An extra-provincial corporation may, if so authorized by the laws of the jurisdiction where it is incorporated, apply to the Registrar for a certificate of continuance.

(2) The provisions of the articles of continuance of an extra-provincial corporation may, without so stating, vary from the provisions of the extra-provincial corporation's act of incorporation, articles, letters patent or memorandum or articles of association, if the variation is one which a corporation incorporated under this Act could effect by way of amendment to its articles.

(3) Articles of continuance in

prescribed form shall be sent to the Registrar together with the documents required by sections 19 and 101.

(4) Upon receipt of articles of continuance and the documents required by sections 19 and 101, the Registrar shall issue a certificate of continuance in accordance with section 255.

(5) On the date shown in the certificate of continuance

(a) the extra-provincial corporation becomes a corporation to which this Act applies as if it had been incorporated under this Act,

(b) the articles of continuance are deemed to be the articles of incorporation of the continued corporation, and

(c) the certificate of continuance is deemed to be the certificate of incorporation of the continued corporation.

(6) The Registrar shall forthwith send a copy of the certificate of continuance to the appropriate official or public body in the jurisdiction in which continuance under this Act was authorized.

(7) When an extra-provincial corporation is continued as a corporation under this Act,

(a) the property of the extra-provincial corporation continues to be the property of the corporation,

(b) the corporation continues to be liable for the obligations of the extra-provincial corporation,

(c) an existing cause of action, claim or liability to prosecution is unaffected,

(d) a civil, criminal or administrative action or proceeding pending by or against the extra-provincial corporation may be continued to be prosecuted by or against the corporation, and

(e) a conviction against, or ruling, order or judgment in favour of or

against, the extra-provincial corporation may be enforced by or against the corporation.

(8) Subject to section 45(8), a share of an extra-provincial corporation issued before the extra-provincial corporation was continued under this Act is deemed to have been issued in compliance with this Act and with the provisions of the articles of continuance irrespective of whether the share is fully paid or irrespective of any designation, rights, privileges, restrictions or conditions set out on or referred to in the certificate representing the share, and continuance under this section does not deprive a holder of any right or privilege that he claims under, or relieve him of any liability in respect of, an issued share.

(9) Notwithstanding section 24(1), if a corporation continued under this Act had, before it was so continued, issued a share certificate in registered form that is convertible to a share certificate in favour of bearer, the corporation may, if a holder of such a share certificate exercises the conversion privilege attached to it, issue a share certificate in favour of bearer for the same number of shares to the holder.

(10) For the purposes of subsections (8) and (9), "share" includes an instrument referred to in section 29(1), a share warrant or a like instrument.

(11) If the Registrar determines upon the application of an extra-provincial corporation, that it is not practicable to change a reference to the nominal or par value of shares of a class or series that it was authorized to issue before it was continued under this Act, the Registrar may, notwithstanding section 24(1), permit the extra-provincial corporation to continue to refer in its articles to those shares, whether issued or unissued, as shares having a nominal or par value.

(12) A corporation shall set out in its articles the maximum number of shares of a class or series referred to in subsection (11) and may not amend its articles to increase that maximum number of shares or to change the nominal or par value of those shares.

NOTE: Continuance of an extra-provincial corporation as an Alberta corporation. CBCA s. 181 varied.

Comment

1. S. 181 would allow any extra-provincial corporation , as of right to continue under the proposed ABCA, subject only to being authorized by the laws of its incorporating jurisdiction to do so.

2. We are advised by the Registrar that the certificate of continuance should refer to the date of incorporation as well as the date of the certificate of continuance. The regulations should so provide.

3. S. 181(11) and 181(12) would make provision for a case in which the abolition of par value shares would cause difficulty. The corporation would be able to continue to refer to the shares as having a nominal or par value. No additional par value shares could be created.

4. An extra-provincial company which "continues" under s. 181 would be treated for all purposes as a corporation incorporated under the proposed ABCA.

5. CBCA s. 181(1.1) allows the articles of continuance to effect any amendment to the corporate charter which a CBCA corporation can make to its own articles of incorporation. It was added to the CBCA in the 1978 amendments. It is an analogue to CBCA s. 261(1.1)(b), the mandatory continuance section. S. 181(2) of the draft Act is to the same general effect. An extra-provincial corporation proposing to continue would have to amend its charter so that upon continuance it would comply with the proposed ABCA.

182.(1) Subject to subsection (9), a corporation may, if

(a) it is authorized by the shareholders in accordance with this section, and

(b) the Registrar approves the proposed continuance in another jurisdiction upon being satisfied that the continuance will not adversely affect creditors or shareholders of the corporation,

apply to the appropriate official or public body of another jurisdiction requesting that the corporation be continued as if it had been incorporated under the laws of that other jurisdiction.

(2) A notice of a meeting of shareholders complying with section 129 shall be sent in accordance with that section to each sharenolder and shall state that a dissenting shareholder is entitled to be paid the fair value of his shares in accordance with section 184, but failure to make that

statement does not invalidate a discontinuance under this Act.

(3) Each share of the corporation carries the right to vote in respect of a continuance whether or not it otherwise carries the right to vote.

(4) An application for continuance becomes authorized when the shareholders voting on it have approved of the continuance by a special resolution.

(5) The directors of a corporation may, if authorized by the shareholders at the time of approving an application for continuance under this section, abandon the application without further approval of the shareholders.

(6) Upon receipt of notice satisfactory to him that the corporation has been continued under the laws of another jurisdiction, and upon giving his approval under subsection (1), the Registrar shall file the notice and issue a certificate of discontinuance.

(7) Section 255 applies with the necessary changes to the notice filed under subsection (6) as though the notice were articles that conform to law.

(8) This Act ceases to apply to the corporation on the date shown in the certificate of discontinuance.

(9) A corporation shall not be continued as a body corporate under the laws of another jurisdiction unless those laws provide in effect that

(a) the property of the corporation continues to be the property of the body corporate,

(b) the body corporate continues to be liable for the obligations of the corporation,

(c) an existing cause of action, claim or liability to prosecution is unaffected,

(d) a civil, criminal or administrative action or proceeding pending by or against the corporation may be continued to be prosecuted by or against the body corporate, and

(e) a conviction against, or ruling,

order or judgment in favour of or against the corporation may be enforced by or against the body corporate.

NOTE: Continuance of an Alberta corporation as a body corporate into another jurisdiction. CBCA s. 182 varied in subsections (1) and (7) and omitting subsection (2) which is not appropriate to Alberta.

Comment

1. S. 182 would allow an Alberta corporation to discontinue its Alberta registration and "continue" in another jurisdiction as if incorporated under the laws of that jurisdiction. The ability of the corporation to transfer its registration would of course depend upon the laws of the jurisdiction to which it wishes to transfer its registration.

2. S. 182(1) would require the corporation to establish to the satisfaction of the Registrar that the change would not adversely affect creditors or shareholders. The draft Act circulated with our Draft Report would have assigned the supervisory function to the Director of The Securities Commission, but we received representations that it should be assigned to the Registrar, and both the Registrar and The Securities Commission agreed.

3. S. 182(4) would require authority for the application for continuance to be given by special resolution of the shareholders, and, because a change in the basic law of the corporation may well affect them, shareholders who normally have no vote would be entitled to vote on the special resolution. Continuance is a fundamental change which would entitle a shareholder to dissent and be bought out under s. 184. If a shareholder has indicated his intention to dissent, the Registrar should be sure that the obligation to carry out the appraisal right would be recognized by the law of the new jurisdiction.

183.(1) A sale, lease or exchange of all or substantially all the property of a corporation other than in the ordinary course of business of the corporation requires the approval of the shareholders in accordance with subsections (2) to (6).

(2) A notice of meeting of shareholders complying with section 129 shall be sent in accordance with that section to each shareholder and shall

(a) include or be accompanied by a copy or summary of the agreement of sale, lease or exchange, and

(b) state that a dissenting shareholder

is entitled to be paid the fair value of his shares in accordance with section 184, but failure to make that statement does not invalidate a sale, lease or exchange referred to in subsection (1).

(3) At the meeting referred to in subsection (2) the shareholders may authorize the sale, lease or exchange and may fix or authorize the directors to fix any of its terms and conditions.

(4) Each share of the corporation carries the right to vote in respect of a sale, lease or exchange referred to in subsection (1) whether or not it otherwise carries the right to vote.

(5) The holders of shares of a class or series of shares of the corporation are entitled to vote separately as a class or series in respect of a sale, lease or exchange referred to in subsection (1) only if that class or series is affected by the sale, lease or exchange in a manner different from the shares of another class or series.

(6) A sale, lease or exchange referred to in subsection (1) is adopted when the holders of each class or series entitled to vote on it have approved of the sale, lease or exchange by a special resolution.

(7) The directors of a corporation may, if authorized by the shareholders approving a proposed sale, lease or exchange, and subject to the rights of third parties, abandon the sale, lease or exchange without further approval of the shareholders.

NOTE: Extraordinary sale, lease or exchange. CBCA s. 183 with subsections (1) and (1.1) dealing with borrowing powers omitted. See comment.

Comment

1. The effect of s. 183 would be that "a sale, lease or exchange of all or substantially all the property of a corporation other than in the ordinary course of business of the corporation" could not be made without the approval of the shareholders. That approval could be given by special resolution (see s. 183(6)), but, under s. 183(4) otherwise non-voting shares would carry a right to vote and, under s. 183(5), the classes would be entitled to vote separately if they would be affected differently.

2. CBCA s. 183(1) and (1.1) deal with the powers of directors to borrow money on behalf of the corporation. We do not think that these two subsections should appear in the Part of the Act dealing with fundamental change since there is no reference to them in either s. 167 or 184, and the exercise of such powers by the directors of a corporation would not generally be regarded as a fundamental change. We have therefore relocated these two subsections as a new s. 98.1 under Part 9 of the draft Act dealing with the powers of the directors and officers of the corporation.

184.(1) Subject to sections 185 and 234, a holder of shares of any class of a corporation may dissent if the corporation resolves to

(a) amend its articles under section 167 or 168 to add, change or remove any provisions restricting or constraining the issue or transfer of shares of that class,

(b) amend its articles under section 167 to add, change or remove any restrictions upon the business or businesses that the corporation may carry on,

(c) amalgamate with another corporation, otherwise than under section 178 or 180.1,

(d) be continued under the laws of another jurisdiction under section 182, or

(e) sell, lease or exchange all or substantially all its property under section 183.

(2) A holder of shares of any class or series of shares entitled to vote under section 170 may dissent if the corporation resolves to amend its articles in a manner described in that section.

(3) In addition to any other right he may have, but subject to subsection (20), a shareholder entitled to dissent under this section and who complies with this section is entitled to be paid by the corporation the fair value of the shares held by him in respect of which he dissents, determined as of the close of business on the last business day before the day on which the resolution from which he dissents was adopted.

(4) A dissenting shareholder may only claim under this section with respect to all

the shares of a class held by him or on behalf of any one beneficial owner and registered in the name of the dissenting shareholder.

(5) A dissenting shareholder shall send to the corporation a written objection to a resolution referred to in subsection (1) or (2)

(a) at or before any meeting of shareholders at which the resolution is to be voted on, or

(b) if the corporation did not send notice to the shareholder of the purpose of the meeting or of his right to dissent, within a reasonable time after he learns that the resolution was adopted and of his right to dissent.

(6) An application may be made to the Court by originating notice after the adoption of a resolution referred to in subsection (1) or (2),

(a) by the corporation, or

(b) by a shareholder if he has sent an objection to the corporation under subsection (5),

to fix the fair value in accordance with subsection (3) of the shares of a shareholder who dissents under this section.

(7) If an application is made under subsection (6), the corporation shall, unless the Court otherwise orders, send to each dissenting shareholder a written offer to pay him an amount considered by the directors to be the fair value of the shares.

(8) Unless the Court otherwise orders, an offer referred to in subsection (7) shall be sent to each dissenting shareholder

(a) at least 10 days before the date on which the application is returnable, if the corporation is the applicant, or

(b) within 10 days after the corporation is served with a copy of the originating notice, if a shareholder is the applicant.

(9) Every offer made under subsection (7) shall

(a) be made on the same terms, and

(b) contain or be accompanied by a statement showing how the fair value was determined.

(10) A dissenting shareholder may make an agreement with the corporation for the purchase of his shares by the corporation, in the amount of the corporation's offer under subsection (7) or otherwise, at any time before the Court pronounces an order fixing the fair value of the shares.

(11) A dissenting shareholder

(a) is not required to give security for costs in respect of an application under subsection (6), and

(b) except in special circumstances shall not be required to pay the costs of the application or appraisal.

(12) In connection with an application under subsection (6), the Court may give directions for

(a) joining as parties all dissenting shareholders whose shares have not been purchased by the corporation and for the representation of dissenting shareholders who, in the opinion of the Court, are in need of representation,

(b) the trial of issues and interlocutory matters, including pleadings and examinations for discovery,

(c) the payment to the shareholder of all or part of the sum offered by the corporation for the shares,

(d) the deposit of the share certificates with the Court or with the corporation or its transfer agent,

(e) the appointment and payment of independent appraisers, and the procedures to be followed by them,

(f) the service of documents, and

(g) the burden of proof upon the parties.

(13) Upon an application under subsection (6), the Court shall make an order

(a) fixing the fair value of the shares in accordance with subsection (3) of all dissenting shareholders who are parties to the application,

(b) giving judgment in that amount against the corporation and in favour of each of those dissenting shareholders, and

(c) fixing the time within which the corporation must pay that amount to a shareholder.

(14) Upon

(a) the action approved by the resolution from which the shareholder dissents becoming effective,

(b) the making of an agreement between the corporation and the dissenting shareholder as to the payment to be made by the corporation for his shares under subsection (3) or (10), whether by the acceptance of the corporation's offer or otherwise, or

(c) the pronouncement of an order under subsection (13),

whichever first occurs, the shareholder ceases to have any rights as a shareholder other than the right to be paid the fair value of his shares in the amount agreed to between the corporation and the shareholder or in the amount of the judgment, as the case may be.

(15) Subsection (14)(a) does not apply to a shareholder referred to in subsection (5)(b).

(16) Until one of the events mentioned in subsection (14) occurs,

(a) the shareholder may withdraw his dissent, or

(b) the corporation may rescind the resolution,

and in either event proceedings under this section shall be discontinued.

(17) The Court may in its discretion allow a reasonable rate of interest on the amount payable to each dissenting shareholder, from the date on which the shareholder ceases to have any rights as a shareholder by reason of subsection (14) until the date of payment.

(18) If subsection (20) applies, the corporation shall, within 10 days after

(a) the pronouncement of an order under subsection (13), or

(b) the making of an agreement between the shareholder and the corporation as to the payment to be made for his shares,

notify each dissenting shareholder that it is unable lawfully to pay dissenting shareholders for their shares.

(19) Notwithstanding that a judgment has been given in favour of a dissenting shareholder under subsection (13)(b), if subsection (20) applies, the dissenting shareholder, by written notice delivered to the corporation within 30 days after receiving the notice under subsection (18), may withdraw his notice of objection, in which case the corporation is deemed to consent to the withdrawal and the shareholder is reinstated to his full rights as a shareholder, failing which he retains a status as a claimant against the corporation, to be paid as soon as the corporation is lawfully able to do so or, in a liquidation, to be ranked subordinate to the rights of creditors of the corporation but in priority to its shareholders.

(20) A corporation shall not make a payment to a dissenting shareholder under this section if there are reasonable 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 corporation's assets would thereby be less than the aggregate of its liabilities.

NOTE: Shareholder's right to dissent and to be paid the fair value of his shares. CBCA s. 184 with substantial variations.

Comment

1. S. 184(3) would confer an important new right upon a minority shareholder, the "appraisal right". It is the right to dissent from the kinds of fundamental change listed in s. 184(1) and (2), and to have the corporation buy his shares at fair value if it makes the change. See the discussion of this subject at pp. 128-135 of our Report.

2. S. 184(1) to (4), which confer the appraisal right, follow their CBCA counterparts (except for the deletion in s. 184(3) of reference to an order under s. 185.1. In particular, s. 184(3) provides that the shareholder is to be paid "fair value", which will be determined by the court with regard to all the circumstances of the case, and which may or may not reflect a change in value brought about by the fundamental change.

3. S. 184(5) to (16) would replace CBCA 184(5) to (22) and would provide a substantially different procedure for the enforcement of the appraisal right. The essence of the proposed procedure is that after a notice of objection by the shareholder under s. 184(5) and the adoption of the resolution making the fundamental change, either party would be able to apply to the court to determine the fair value of the shares and the court would give judgment for that amount under s. 184(13), whereupon the shareholder would cease to be a shareholder and would be entitled to be paid (s. 184(14)). The parties could in the meantime agree on the amount, and either party could under s. 184(16) resile until one of three things happens: a binding agreement under s. 184(10); the fundamental change becoming effective; or the giving of judgment by the court.

4. The procedure is intended to be simple and flexible. The corporation would be required to make an offer (s. 184(7)) and explain it (s. 184(9)(b)); all dissenting shareholders would be brought into the same proceeding (s. 184(12)(a)); and the court would have incidental powers necessary to conduct an inexpensive and efficient proceeding (s. 184(6), (12) and (13)).

5. The corporation would have the burden of sending to the shareholders proper notice of the special resolution and of the appraisal right (s. 184(5)(b)). The shareholder would have the burden of sending his written objection before the meeting (s. 184(5)); if proper notice is not given he would have the burden of sending his written objection within a reasonable time after learning that the resolution was adopted and that he has an appraisal right.

6. The draft Act circulated with our Draft Report would have provided that if a notice were <u>sent</u> but not <u>received</u> the shareholder would have the right to dissent upon learning of the actions taken, but representatives which were made to us satisfied us that the detriment resulting from the adverse practical consequences in all cases of such a provision would outweigh the advantage of protecting an occasional shareholder who fails to receive notice of a shareholder's meeting through no fault of his own and who would have

objected if he had received it.

7. S. 184(18) to (20) would make rather elaborate provision to preclude payment to a dissenting shareholder if either a liquidity or a solvency test is not met, and to allow the dissenting shareholder in such a case to elect between his rights as a shareholder and a position as a deferred creditor.

8. S. 184(17) would allow the court to award interest from the date on which the shareholder ceases to have the right of a shareholder. It departs from CBCA s. 184(23) which allows the interest to start on the effective date of the fundamental change.

PART 15

CORPORATE REORGANIZATION AND ARRANGEMENTS

185.(1) In this section, "order for reorganization" means an order of the Court made under

(a) section 234,

(b) the Bankruptcy Act (Canada) approving a proposal, or

(c) any other Act of the Parliament of Canada or an Act of the Legislature that affects the rights among the corporation, its shareholders and creditors.

(2) If a corporation is subject to an order for reorganization, its articles may be amended by the order to effect any change that might lawfully be made by an amendment under section 167.

(3) If the Court makes an order for reorganization, the Court may also

(a) authorize the issue of debt obligations of the corporation, whether or not convertible into shares of any class or having attached any rights or options to acquire shares of any class, and fix the terms of those debt obligations, and

(b) appoint directors in place of or in addition to all or any of the directors then in office.

(4) After an order for reorganization has been made, articles of reorganization in prescribed form shall be sent to the Registrar together with the documents required by sections 19 and 108, if applicable.

(5) Upon receipt of articles of reorganization, the Registrar shall issue a certificate of amendment in accordance with section 255.

(6) An order for reorganization becomes effective on the date shown in the certificate of amendment and the articles of incorporation are amended accordingly.

(7) A shareholder is not entitled to

dissent under section 184 if an amendment to the articles of incorporation is effected under this section.

NOTE: Articles of reorganization resulting from Court order. CBCA s. 185 varied to refer to the Registrar and the Legislature.

Comment

S. 185 might be somewhat anomalous in the proposed ABCA. Insofar as proceedings under s. 234 are concerned, the power and procedures under s. 185 either duplicate or could be inserted in s. 234. It is doubtful that the province can constitutionally add to the powers exerciseable by the court in bankruptcy. S. 185(1)(c) seems to be of limited or no application. We have however included the section in the draft Act for whatever value it may have and for uniformity.

186.(1) In this section, "arrangement" includes, but is not restricted to

(a) an amendment to the articles of a corporation,

(b) an amalgamation of 2 or more corporations,

(c) an amalgamation of a body corporate with a corporation that results in an amalgamated corporation subject to this Act,

(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,

(g) a liquidation and dissolution of a corporation,

(h) a compromise between a corporation and its creditors or any class of its creditors or between a

corporation and the holders of its shares or debt obligations or any class of those holders, or

(i) any combination of the foregoing.

(2) An application may be made to the Court by a corporation or a security holder or creditor of a corporation for an order approving an arrangment in respect of the corporation.

(3) If an arrangment can be effected under any other provision of this Act, an application may not be made under this section unless it is impracticable to effect the arrangement under that other provision.

(4) In connection with an application under this section, the Court, unless it dismisses the application,

(a) shall order the holding of a meeting of shareholders or a class or classes of shareholders to vote on the proposed arrangement,

(b) shall order a meeting of persons who are creditors or holders of debt obligations of the corporation or of options or rights to acquire securities of the corporation, or any class of those persons, if the Court considers that those persons or that class of persons are affected by the proposed arrangement,

(c) may, with respect to any meeting referred to in clause (a) or (b), give any directions in the order respecting

(i) the calling of and the giving of notice of the meeting,

(ii) the conduct of the meeting,

(iii) subject to subsection (6), the majority required to pass a resolution at the meeting, and

(iv) any other matter it thinks fit,

and

(d) may make an order appointing counsel to represent, at the expense of the corporation, the

interests of the shareholders or any of them.

(5) The notice of a meeting referred to in subsection (4)(a) or (b) shall contain or be accompanied by

(a) a statement explaining the effect of the arrangement, and

(b) if the application is made by the corporation, a statement of any material interests of the directors of the corporation, whether as directors, security holders or creditors, and the effect of the arrangement on those interests.

(6) An order made under subsection (4)(c)(iii) in respect of any meeting may not provide for any majority that is less than the following:

(a) in the case of a vote of the shareholders or a class of shareholders, a majority of at least two-thirds of the votes cast by the shareholders voting on the resolution,

(b) in the case of a vote of creditors or a class of creditors, a majority in number representing at least two-thirds of the amount of their claims,

(c) in the case of a vote of the holders of debt obligations or a class of those holders, a majority in number representing at least two-thirds of the amount of their claims, and

(d) in the case of a vote of holders of options or rights to acquire securities, the majority that would be required under clause (a) or (c) if those holders had acquired ownership of the securities.

(7) Notwithstanding anything in subsections (4) to (6), if a resolution required to be voted upon pursuant to the order under subsection (4) is in writing and signed by all the persons entitled to vote on the resolution,

(a) the meeting required to be held by the order need not be held, and

(b) the resolution is as valid as if it had been passed at a meeting.

(8) If the application is in respect of a distributing corporation, the applicant shall give the Director notice of the application and the Director is entitled to appear and be heard in person or by counsel.

(9) After the holding of the meetings required by an order under subsection (4) or the submission to it of written resolutions that comply with subsection (7), the Court shall hear the application and may in its discretion

(a) approve the arrangement as proposed by the applicant or as amended by the Court, or

(b) refuse to approve the arrangement,

and make any further order it thinks fit.

(10) After an order referred to in subsection (9)(a) has been made, the corporation shall send to the Registrar

(a) a copy of the order,

(b) articles of arrangement in prescribed form,

(c) articles of amalgamation or a statement of intent to dissolve pursuant to section 204 in prescribed form, if applicable, and

(d) the documents required by sections 19 and 108, if applicable,

and the Registrar shall file them.

(11) Upon filing any documents referred to in subsections (10)(b) and (c), the Registrar shall issue the appropriate certificate in accordance with section 255.

(12) An arrangement becomes effective

(a) on the date shown in the certificate issued pursuant to subsection (11), or

(b) if no certificate is required to be issued pursuant to subsection (11), on the date the documents are filed pursuant to subsection (10).

(13) An arrangement as approved by the

Court is binding on the corporation and all other persons.

NOTE: Court-approved arrangements. CBCA s. 185.1 and ACA s. 154 substantially varied.

Comment

1. See the general discussion of Reorganizations and Arrangements at pp. 51-54 of our Report.

2. S. 186 includes the list of things included in "arrangements" by CBCA s. 185.1. In addition it includes compromises with creditors (s. 186(1)(h), and the opening words would allow the Court to interpret the word "arrangement" as broadly as the same word has been interpreted in ACA s. 154 and its English and Canadian counterparts. ACA s. 154, which provides for compromises and arrangements involving ACA companies, their shareholders and members, has proved its usefulness over the years, and we think that its substance should be carried forward. The usefulness of ACA s. 154 is somewhat limited because it constitutionally cannot encroach upon Parliament's legislative jurisdiction over insolvency, but we think that there are still cases to which it can apply, and we do not think that the specific exclusion of insolvent corporations in CBCA s. 185.1(3) needs to be made in the draft Act.

3. S. 186(4)(a) would make a shareholders' meeting mandatory, and would also make mandatory meetings of affected classes of the corporation's creditors and holders of rights to acquire securities. S. 186(6) would require approval by special majorities. In so doing the draft Act would be closer to ACA s. 154 than is CBCA s. 185.1(4)(c), which merely empowers the court to require meetings. Our view is that the affected classes should have a chance to vote on an arrangement. The court would still have residual discretions to disapprove a proposal under s. 186(4) and s. 186(9).

PART 16

TAKE-OVER BIDS - COMPULSORY PURCHASE

187.(1) In this Part,

(a) "dissenting offeree" means an offeree who does not accept a take-over bid and a person who acquires from an offeree a share for which a take-over bid is made;

(b) "offer" includes an invitation to make an offer;

(c) "offeree" means a person to whom a take-over bid is made;

(d) "offeree corporation" means a corporation whose shares are the object of a take-over bid;

(e) "offeror" means a person, other than an agent, who makes a take-over bid, and includes 2 or more persons who, directly or indirectly,

(i) make take-over bids jointly or in concert, or

(ii) intend to exercise jointly or in concert voting rights attached to shares for which a take-over bid is made;

(f) "share" means a share with or without voting rights and includes

(i) a security currently convertible into such a share, and

(ii) currently exercisable options and rights to acquire such a share or such a convertible security;

(g) "take-over bid" means an offer made by an offeror to shareholders to acquire all of the shares of any class of shares of an offeree corporation not already owned by the offeror, and includes every take-over bid by a corporation to repurchase all of the shares of any class of its shares which leaves outstanding voting shares of the corporation.

NOTE: Definitions for Part 16. CBCA s. 187 for (b) to (9), with variations in (9). CBCA s. 199(1) for (a).

188.(1) A take-over bid is deemed to be dated as of the date on which it is sent.

(2) If within the time limited in a take-over bid for its acceptance or within 120 days after the date of a take-over bid, whichever period is the shorter, the bid is accepted by the holders of not less than 90% of the shares of any class of shares to which the take-over bid relates, other than shares of that class held at the date of the take-over bid by or on behalf of the offeror or an affiliate or associate of the offeror, the offeror is entitled, upon the bid being so accepted and upon complying with this section, to acquire the shares of that class held by the dissenting offerees.

(3) The rights of an offeror and offeree under this section are subject to any unanimous shareholder agreement.

NOTE: Compulsory acquisition of shares of dissenting offeree after take-over bid. CBCA s. 199(2). Subsections (1) and (3) added.

189.(1) An offeror may acquire shares held by a dissenting offeree by sending by registered mail within 60 days after the date of termination of the take-over bid and in any event within 180 days after the date of the take-over bid, an offeror's notice to each dissenting offeree and to the Director stating that

(a) the offerees holding more than 90% of the shares to which the bid relates have accepted the take-over bid,

(b) the offeror is bound to take up and pay for or has taken up and paid for the shares of the offerees who accepted the take-over bid,

(c) a dissenting offeree is required to elect

(i) to transfer his shares to the offeror on the terms on which the offeror acquired the shares of the offerees who accepted the take-over bid, or

(ii) to demand payment of the fair value of his shares

(A) by notifying the offeror, and

(B) by applying to the Court to fix the fair value of the shares of the dissenting offeree,

within 60 days after the date of the sending of the offeror's notice,

(d) a dissenting offeree who does not notify the offeror and apply to the Court in accordance with clause (c)(ii) is deemed to have elected to transfer his shares to the offeror on the same terms that the offeror acquired the shares from the offerees who accepted the take-over bid, and

(f) a dissenting offeree shall send the certificates covering his shares to which the take-over bid relates to the offeree corporation within 20 days after he receives the offeror's notice.

(2) Concurrently with sending the offeror's notice under subsection (1), the offeror shall send or deliver to the offeree corporation a notice of adverse claim in accordance with section 73 with respect to each share held by a dissenting offeree.

NOTE: Offeror's notices. CBCA s. 199(3) and (4) varied.

190.(1) A dissenting offeree to whom an offeror's notice is sent under section 189(1) shall, within 20 days after he receives that notice, send his share certificates of the class of shares to which the take-over bid relates to the offeree corporation.

(2) Within 20 days after the offeror sends an offeror's notice under section 189(1), the offeror shall pay or transfer to the offeree corporation the amount of money or other consideration that the offeror would have had to pay or transfer to a dissenting offeree if the dissenting offeree had elected to accept the take-over bid under section 189(1)(c)(i).

NOTE: Surrender of share certificate and payment of money. CBCA s. 199(5) and (6).

191.(1) The offeree corporation is deemed to hold in trust for the dissenting offerees the money or other consideration it receives under section 190(2), and the offeree corporation shall deposit the money in a separate account in a bank or other body corporate any of whose deposits are insured by the Canada Deposit Insurance Corporation or guaranteed by the Quebec Deposit Insurance Board, and shall place the other consideration in the custody of a bank or such other body corporate.

(2) Within 30 days after the offeror sends an offeror's notice under section 189(1), the offeree corporation shall, if the offeror has paid or transferred to the offeree corporation the money or other consideration referred to in section 190(2),

(a) issue to the offeror a share certificate in respect of the shares that were held by dissenting offerees,

(b) give to each dissenting offeree who elects to accept the take-over bid terms under section 189(1)(c)(i) and who sends or delivers his share certificates as required under section 190(1), the money or other consideration to which he is entitled, disregarding fractional shares, which may be paid for in money, and

(c) send to each dissenting shareholder who has not sent his share certificates as required under section 190(1) a notice stating that

(i) his shares have been cancelled,

(ii) the offeree corporation or some designated person holds in trust for him the money or other consideration to which he is entitled as payment for or in exchange for his shares, and

(iii) the offeree corporation will, subject to sections 192 to 198, send that money or other

consideration to him forthwith after receiving his shares.

NOTE: Offeree corporation's obligations. CBCA s. 199(7) and (8).

192. If a dissenting offeree has elected to demand payment of the fair value of his shares under section 189(1)(c), the offeror may, within 20 days after it has paid the money or transferred the other consideration under section 190(2), apply to the Court to fix the fair value of the shares of that dissenting offeree.

NOTE: Offeror's right to apply. CBCA s. 199(9).

193. A dissenting offeree is not required to give security for costs in an application made under this Part.

NOTE: No security for costs. CBCA s. 199(2).

194. If more than one application is made under sections 189 and 192, the offeror or a dissenting offeree may apply to have the applications heard together.

NOTE: Procedure on application. CBCA s. 199(12) and (13), varied.

195. Upon an application under this Part, the Court shall fix a fair value for the shares of each dissenting offeree who is a party to the application.

NOTE: Court to fix fair value. CBCA s. 199(14).

196. The Court may in its discretion appoint one or more appraisers to assist the Court to fix a fair value for the shares of a dissenting offeree.

NOTE: Power of Court. CBCA s. 199(15).

197. The final order of the Court shall be made against the offeror in favour of each

dissenting offeree who has elected to demand payment of the fair value of his shares for the fair value of his shares as fixed by the Court.

NOTE: Final order. CBCA s. 199(16)

198. In connection with proceedings under this Part, the Court may make any order it thinks fit and, without limiting the generality of the foregoing, it may do any or all of the following:

(a) fix the amount of money or other consideration that is required to be held in trust under section 191(1);

(b) order that that money or other consideration be held in trust by a person other than the offeree corporation;

(c) allow a reasonable rate of interest on the amount payable to each dissenting offeree from the date he sends or delivers his share certificates under section 190(1) until the date of payment;

(d) order that any money payable to a shareholder who cannot be found be paid to the Provincial Treasurer and section 220(3) applies in respect of money so paid.

NOTE: Additional powers of Court. CBCA s. 199(17).

199.(1) If the take-over bid is an offer by a corporation to re-purchase its own shares

(i) section 189(2) does not apply, and

(ii) section 190(2) does not apply, but the corporation shall comply with section 191(1) within 20 days after it sends an offeror's notice under section 189(1).

(2). If

(a) the take-over bid is an offer by a corporation to repurchase its own shares, and

(b) the corporation is prohibited by section 32

(i) from depositing or placing the consideration for the shares pursuant to section 191(1), or

(ii) paying the amount for the shares fixed by the Court pursuant to section 195.

the corporation

(c) shall re-issue to the dissenting offeree the shares for which the corporation is not allowed to pay,and

(d) is entitled to use for its own benefit any money or consideration deposited or placed under section 191(1), and

the dissenting offeree is reinstated to his full rights, as a shareholder.

NOTE: Corporation's offer to re-purchase its own shares. Insolvency of corporation. New.

Comment

1. Under Part 16, one who under a bid to take over all the outstanding shares of a class has acquired 90% or more of the shares would have the right to acquire the remainder without the consent of the holders.

2. Part 16 would apply to all corporations, including closely held ones, unless it is excluded by unanimous shareholder agreement under s. 188(3).

3. Shares held by the offeror, the offeror's affiliates and the offeror's associates cannot be counted in the 90%, i.e., the 90% must be acquired at arm's length (s. 188(2)). This gives effect to the principle enunciated, e.g., in Esso Standard (Inter-Amer.) Inc. v. J.W. Enterprises Inc. [1963] SCR 144.

4. By virtue of the extended definition of "share in s. 187(1)(f)," Part 16 would apply to a bid to take over all the debt obligations of a class which are convertible into shares, and it would apply to a bid to take over all of a class of share options or purchase rights which are currently exercisable. While the use of the extended definition gives rise to some difficulties of interpretation we have decided to follow it for the present so as to be generally, though not literally, consistent with the CBCA and the Saskatchewan BCA; we do not think that Part 16 should or would be read so as to include in one class both

the issued shares of a class and instruments which may be converted into shares of that class. The existence of outstanding rights to acquire shares may well cause a problem to the take-over bidder who wishes to acquire complete ownership of the class but we do not think that it is feasible to use the machinery of Part 16 for a composite bid covering different kinds of securities.

5. We do not think that CBCA s. 199(2) gives rise to the difficulty which arose in Rathie v. Montreal Trust Co. [1953] 2 SCR 204, where the Supreme Court of Canada held that the offeree shareholders must be given 120 days to accept the takeover bid (see Australian Consolidated Press v. Australian Newsprint Mills Holdings Ltd., (1960) 105 CLR 473 (H.C.); Gregory v. Canadian Allied Property Investments Limited [1979] 3 WWR 609 (BCCA)). However, out of excess of caution we have slightly changed s. 188(2) of the draft Act so to remove any remaining doubt on the point.

6. In addition to some drafting changes, we have made the following changes of some substance in CBCA's s. 199:

   (1) CBCA s. 199(10) requires the dissenting offeree to apply to the Court to fix the fair value of the shares within the 20 days following the 20 days within which the offeror is entitled to bring a similar application; the first 20 days commences with the date on which the offeror pays over to the offeree corporation the consideration for the shares. Instead, the draft Act would require the offeror to state in its notice under s. 189(1) that the offeree must apply within 60 days of the sending of the notice. Our main reason is that the offeree may not know when he must apply; he may not know when the offeror pays the money, and the corporation's notice under s. 191(2)(c) may be tardy or not sent at all. We think that our proposal will clarify the situation for both parties.

   (2) Some of the provisions in CBCA section 199 are not entirely appropriate to an offer by a corporation to re-purchase its own shares. Sections 198 and 199 of the draft Act is intended to overcome any resulting difficulties.

   (3) S. 199 of the draft Act would make provision for the case in which a corporation repurchasing its own shares becomes insolvent. The provision is that the shares would be re-issued and the compulsory acquisition stopped. Needless to say insolvency is unlikely to occur.

7. It is theoretically somewhat awkward that the offeror's right to acquire the shares of the dissenting offeree should arise on the acceptance of the take-over bid by the holders of 90% of the shares (s. 188(2)) but that the offeror could not take the first step to give effect to that right until the date of termination of the bid (s. 189(1)). However, it seems unlikely that this circumstance will give rise to a problem in practice.

8. S. 191(2)(c)(i) contemplates a unilateral cancellation of the dissenting offeree's share certificates by the corporation. A share certificate may have been transferred or hypothecated to an innocent third party; or the dissenting offeree may after cancellation transfer it to a bona fide purchaser who relies on its negotiability. These problems are theoretically awkward; but the corporation will hold the take-over bid price until the share certificate is produced, and there should not be a practical problem.

PART 17

LIQUIDATION AND DISSOLUTION

200. Any proceedings taken under this Part to dissolve or to liquidate and dissolve a corporation shall be stayed if the corporation is at any time found to be insolvent within the meaning of the Bankruptcy Act (Canada).

NOTE: Staying proceedings. CBCA s. 201(2).

Comment

1. CBCA s. 201(1) provides that Part 17 does not apply to a corporation that is insolvent or bankrupt. See Report pp. 153-155 for a discussion of our reasons for not including that provision in the draft Act.

2. The drafters of the CBCA made the following statement about CBCA Part 17 (Proposals, p. 148):

> 441. Because Part 17.00 is such a thorough reorganization of the law of corporate dissolution it is not possible to compare it, section by section, with the present law. Its closest model in Canada is probably the dissolution provisions in provincial corporations Acts. A better example, and one in which we found many useful ideas, is the New York Business Corporation Law. Procedurally, Part 17.00 is straightforward, the terminology is consistent with that used throughout the Draft Act, and the steps in a dissolution follow the pattern established in other Parts. Thus, "articles" are sent to the Registrar, he issues a certificate of dissolution, and so on.

As Part 17 of the draft Act generally follows CBCA Part 17, those remarks apply here.

201.(1) If a corporation is dissolved under this Part any interested person may apply to the Registrar to have the corporation revived.

(2) Articles of revival in prescribed form shall be sent to the Registrar.

(3) Upon receipt of articles of revival, the Registrar shall issue a certificate of revival in accordance with section 255.

(4) A corporation is revived on the date shown on the certificate of revival, and thereafter the corporation, subject to any reasonable terms that may be imposed by the Registrar and to the rights acquired by any person after its dissolution, has all the rights and privileges and is liable for the obligations that it would have had if it had not been dissolved.

NOTE: Revival. CBCA s. 202 varied to exclude revivals of bodies corporate dissolved under s. 261.

Comment

We think that s. 201 is appropriate insofar as it would provide for revival of an ABCA corporation and the consequences of revival. See the discussion at pp. 161-163 of our Report.

202.(1) Any interested person may apply to the Court for an order reviving

(a) a body corporate dissolved under section 261,

(b) a body corporate that was dissolved under The Companies Act or its predecessors before or after the coming into force of this Act and that was not at the time of its dissolution a not-for-profit company as defined in section 261(1), or

(c) a body corporate that was dissolved by reason of the operation of subsection (6).

(2) An applicant under subsection (1) shall give notice of the application to the Registrar and the Registrar is entitled to appear and be heard in person or by counsel.

(3) An order under subsection (1) may revive the body corporate for a limited period

(a) for the purpose of enabling it to apply for continuance under section 261, or

(b) for the purpose of carrying out particular acts specified in the order.

(4) In an order under subsection (1)

the Court may

(a) give directions as to the holding of meetings of shareholders, the appointment of directors and meetings of directors,

(b) in the case of a body corporate revived for the purpose of enabling it to apply for continuance under section 261, give directions regarding any matter that the shareholders are required or authorized to provide for pursuant to subsections (4) and (6) of that section,

(c) specify any provisons of The Companies Act that are not to apply to the body corporate during the period of its revival, or declare that any provisions of The Companies Act are to apply to the body corporate with the variations prescribed by the order, and

(d) change the name of the body corporate to a number designated or name approved by the Registrar.

(e) give any other directions the Court thinks fit.

(5) Subject to subsection (4)(c), The Companies Act applies to a body corporate revived under this section.

(6) A body corporate revived by an order under this section is dissolved upon the expiration of the time limited by the order unless it is sooner continued as a corporation under section 261.

(7) If an order is made under this section, the applicant shall forthwith send a certified copy of the order to the Registrar who shall file it and restore the body corporate to the register under The Companies Act.

(8) Upon the making of an order under this section, the body corporate, subject to the order and to the rights acquired by any person after its dissolution, has all the rights and privileges and is liable for the obligations that it would have had if it had not been dissolved.

NOTE: Revival of companies dissolved under s. 261 or under the ACA for a particular purpose or for the purpose of

continuance. New. Compare ACA s. 189.

Comment

The procedure for revival under s. 201 does not make provision for ensuring that the body corporate, upon revival, will have a corporate structure and constitution complying with the proposed ABCA. If the body corporate was an ABCA corporation upon dissolution, the structure and constitution will be appropriate. However, if the body corporate was not an ABCA corporation, the structure and constitution will not be appropriate. The principal purpose of s. 202 is to provide a procedure by which a body corporate which was not an ABCA corporation can be revived so that proceedings can be taken under the direction of the court to comply with s. 261. S. 202 would also permit the court to restore the body corporate for a limited time or purpose.

203.(1) A corporation that has not issued any shares and that has no property and no liabilities may be dissolved at any time by resolution of all the directors.

(2) A corporation that has no property and no liabilities may be dissolved by special resolution of the shareholders or, if it has issued more than one class of shares, by special resolutions of the holders of each class whether or not they are otherwise entitled to vote.

(3) A corporation that has property or liabilities or both may be dissolved by special resolution of the shareholders or, if it has issued more than one class of shares, by special resolutions of the holders of each class whether or not they are otherwise entitled to vote, if

(a) by the special resolution or resolutions the shareholders authorize the directors to cause the corporation to distribute all property and discharge all liabilities, and

(b) the corporation has distributed any property and discharged any liabilities before it sends articles of dissolution to the Registrar pursuant to subsection (4).

(4) Articles of dissolution in prescribed form shall be sent to the Registrar.

(5) Upon receipt of articles of dissolution, the Registrar shall issue a certificate of dissolution in accordance with section 255.

(6) The corporation ceases to exist on the date shown in the certificate of dissolution.

NOTE: Dissolution by directors or shareholders in special cases. CBCA s. 203.

Comment

1. All of s. 203 but s. 203(3) appeared in the original CBCA. In that form it applied only to the special case where a corporation has no property and no liabilities. At first blush, that sounds like a very special case, but the corporation could put itself in that position by distributing its property and paying its liabilities.

2. Presumably someone wanted authority to pass a special resolution directing the directors to cause the corporation to distribute property and discharge liabilities, so that CBCA s. 203(2.1) was added. This appears to us to be a useful provision. No one is hurt because the company can be restored to the register. A somewhat similar provision appears in the ACA as s. 188(4) (though well concealed). S. 188(4) requires a statutory declaration, but we do not see any magic in that.

3. Note that special resolutions of each class of shareholders would be required under s. 203(3), and that would be so even if the shares are ordinarily non-voting shares.

204.(1) The directors may propose, or a shareholder who is entitled to vote at an annual meeting of shareholders may, in accordance with section 131, make a proposal for the voluntary liquidation and dissolution of a corporation.

(2) Notice of any meeting of shareholders at which voluntary liquidation and dissolution is to be proposed shall set out the terms of the liquidation and dissolution.

(3) A corporation may liquidate and dissolve by special resolution of the shareholders or, if the corporation has issued more than one class of shares, by special resolution of the holders of each class whether or not they are otherwise entitled to vote.

(4) A statement of intent to dissolve

in prescribed form shall be sent to the Registrar.

(5) Upon receipt of a statement of intent to dissolve, the Registrar shall issue a certificate of intent to dissolve in accordance with section 255.

(6) Upon issue of a certificate of intent to dissolve, the corporation shall cease to carry on business except to the extent necessary for the liquidation, but its corporate existence continues until the Registrar issues a certificate of dissolution.

(7) After issue of a certificate of intent to dissolve, the corporation shall

(a) immediately cause notice of the issue of the certificate to be sent or delivered to each known creditor of the corporation,

(b) forthwith publish notice of the issue of the certificate

(i) in the Registrar's periodical, and

(ii) once in a newspaper published or distributed in the place where the corporation has its registered office,

and take reasonable steps to give notice of the issue of the certificate in every jurisdiction where the corporation was carrying on business at the time it sent the statement of intent to dissolve to the Registrar,

(c) proceed to collect its property, to dispose of properties that are not to be distributed in kind to its shareholders, to discharge all its obligations and to do all other acts required to liquidate its business, and

(d) after giving the notice required under clauses (a) and (b) and adequately providing for the payment or discharge of all its obligations, distribute its remaining property, either in money or in kind among its shareholders according to their respective rights.

(8) The Registrar or any interested person may, at any time during the liquidation of a corporation, apply to the Court for an order that the liquidation be continued under the supervision of the Court as provided in this Part, and upon the application the Court may so order and make any further order it thinks fit.

(9) An applicant under this section shall give the Registrar notice of the application, and the Registrar is entitled to appear and be heard in person or by counsel.

(10) At any time after the issue of a certificate of intent to dissolve and before the issue of a certificate of dissolution, a certificate of intent to dissolve may be revoked

(a) by sending to the Registrar a statement of revocation of intent to dissolve in prescribed form and approved in the same manner as the resolution under subsection (3), and

(b) by publishing the statement in the Registrar's periodical.

(11) Upon receipt of a statement of revocation of intent to dissolve, the Registrar shall issue a certificate of revocation of intent to dissolve in accordance with section 255.

(12) On the date shown in the certificate of revocation of intent to dissolve, the revocation is effective and the corporation may continue to carry on its business or businesses.

(13) If a certificate of intent to dissolve has not been revoked and the corporation has complied with subsection (7), the corporation shall prepare articles of dissolution.

(14) Articles of dissolution in prescribed form shall be sent to the Registrar.

(15) Upon receipt of articles of dissolution, the Registrar shall issue a certificate of dissolution in accordance with section 255.

(16) The corporation ceases to exist on the date shown in the certificate of dissolution.

NOTE: Voluntary liquidation and dissolution. CBCA s. 204 varied in (7)(b). Compare with with the Saskatchewan BCA s. 204(7)(b).

Comment

1. It is rather startling at first to note that the corporation itself would be able to do its own liquidation under s. 204 in four easy steps, without benefit of liquidator. However, upon analysis, that result appears appropriate.

2. The shareholders would be protected firstly by the fact that they would be entitled to share rateably if there is anything for the shareholders, secondly, by the requirement of a special resolution, thirdly, by the right to apply for court supervision under s. 204(8), and fourthly, by the oppression remedy or alternatively a derivative action.

3. The creditors would be protected as follows:

   (1) They would have to receive notice under s. 204(5) and if they object to the corporation going into voluntary liquidation they may apply for court supervision under 204(8).

   (2) If the directors pay out corporate property by way of dividend, leaving the corporation insolvent, they would be liable under s. 113(2).

   (3) If the directors pay out by way of capital distribution, leaving accounts unpaid, they will be liable under s. 113(2) or s. 36, depending upon the form in which the capital distribution took place.

   (4) The creditors, if unpaid, would have a cause of action against the shareholders under s. 219 and could recover anything paid to the shareholders.

4. In view of the efficiency of the procedure, and the fact that it does not appear to prejudice anyone's interest, we think that it should be adopted.

5. We followed SBCA s. 204(7)(b) rather than CBCA s. 204(7)(b). The Saskatchewan subsection requires one notice in the Gazette and one in the newspaper at the place of the registered office plus reasonable steps to give notice wherever the corporation is doing business. The difference is that the CBCA does not call for publication in the Gazette but does call for publication once a week for four consecutive weeks in the place of the registered office. In view of the fact that all creditors are to receive notice we do not think the four notices necessary. We have however diverged from the Saskatchewan s. 204(7)(b) by requiring publication in the Registrar's periodical rather than the Gazette.

6. There is in Part 17 no list of priorities for payment of

creditors. That may make it more difficult to use Part 17 in the case of a company which is in fact insolvent, though if the directors do realize the property and then distribute the proceeds pro rata, there is probably not much that the creditors can do about it. Part 17 is not intended to make specific provision for insolvent corporations.

205.(1) Subject to subsections (2) and (3), if a corporation

(a) has not commenced business within 3 years after the date shown in its certificate of incorporation,

(b) has not carried on its business for 3 consecutive years, or

(c) is in default for a period of one year in sending to the Registrar any notice or document required by this Act,

the Registrar may dissolve the corporation by issuing a certificate of dissolution under this section or he may apply to the Court for an order dissolving the corporation, in which case section 210 applies.

(2) The Registrar shall not dissolve a corporation under this section until he has

(a) given 120 days notice of his decision to dissolve the corporation to the corporation and to each director of the corporation, and

(b) published notice of his decision to dissolve the corporation in the Registrar's periodical.

(3) Unless cause to the contrary has been shown or an order has been made by the Court under section 239, the Registrar may, after expiry of the period referred to in subsection (2), issue a certificate of dissolution in prescribed form.

(4) The corporation ceases to exist on the date shown in the certificate of dissolution.

NOTE: Dissolution by Registrar. CBCA s. 205 varied in subsections (1)(c) and (2)(b).

Comment

1. This section appears to be consistent with ACA s. 188, though the procedures are somewhat different. It follows CBCA s. 205 except for the deletion of non-payment of fees as a cause for dissolution, and except for s. 205(2).

2. The corporation would be able to apply for revival under s. 201 after being dissolved under s. 205.

3. CBCA s. 205(2)(b) calls for an additional publication in a paper published or distributed in a place where the corporation has its registered office. Saskatchewan deleted this, and we have done the same as we do not see any reason for it. We have also deleted the CBCA requirement for publication in the Gazette.

206.(1) The Director or any interested person may apply to the Court for an order dissolving a corporation if the corporation has

(a) failed for 2 or more consecutive years to comply with the requirements of this Act with respect to the holding of annual meetings of shareholders,

(b) contravened section 16(2), 21, 151 or 153, or

(c) procured any certificate under this Act by misrepresentation.

(2) An applicant under this section shall give the Director notice of the application, and the Director is entitled to appear and be heard in person or by counsel.

(3) Upon an application under this section or section 205, the Court may order that the corporation be dissolved or that the corporation be liquidated and dissolved under the supervision of the Court, and the Court may make any other order it thinks fit.

(4) Upon receipt of an order under this section, section 205 or section 207, the Registrar shall

(a) if the order is to dissolve the corporation, issue a certificate of dissolution in prescribed form, or

(b) if the order is to liquidate and dissolve the corporation under the supervision of the Court, issue a certificate of intent to dissolve in prescribed form and publish

notice of the order in the Registrar's periodical.

(5) The corporation ceases to exist on the date shown in the certificate of dissolution.

NOTE: Dissolution by court order. CBCA s. 206 varied in subsection (4)(b) to remove the requirement for additional publication in the Gazette.

Comment

1. S. 206 deals with things that are more serious than the mere failure to file documents which is covered by s. 205. We think it appropriate that the Director of The Securities Commission have a discretion to apply for an order for dissolution, as well as an interested person.

2. 206(1)(a) and (c) are self-explanatory. 206(1)(b) would extend the use of dissolution as a sanction to cases in which the corporation carries on a business which it is restricted from carrying on (s. 16(2)); cases in which it fails to allow the appropriate people access to corporate records (s. 21); cases in which it fails to keep or allow access to the financial statements of subsidiaries with which its accounts are consolidated (s. 151); and cases in which it fails to send copies of the financial statements to shareholders (s. 153). These extensions are quite severe, at least in the last three cases, but no doubt the court would exercise its discretion to refrain from dissolving the corporation upon condition that the default is made up and this sanction is certainly one that is more likely to work than the power to prosecute. Note that under 206(3) "the Court may make any other order it thinks fit".

3. Note that a corporation dissolved under this section would be able to apply for revival under s. 201.

207.(1) The Court may order the liquidation and dissolution of a corporation or any of its affiliated corporations upon the application of a shareholder,

(a) if the Court is satisfied that in respect of a corporation or any of its affiliates

(i) any act or omission of the corporation or any of its affiliates effects a result,

(ii) the business or affairs of the corporation or any of its affiliates are or have been carried on or conducted in a manner, or

(iii) the powers of the directors of the corporation or any of its affiliates are or have been exercised in a manner

that is oppressive or unfairly prejudicial to or that unfairly disregards the interests of any security holder, creditor, director or officer, or

(b) if the Court is satisfied that

(i) a unanimous shareholder agreement entitles a complaining shareholder to demand dissolution of the corporation after the occurrence of a specified event and that event has occurred, or

(ii) it is just and equitable that the corporation should be liquidated and dissolved.

(2) Upon an application under this section, the Court may make any order under this section or section 234 it thinks fit.

(3) Section 235 applies to an application under this section.

NOTE: Other grounds for liquidation and dissolution pursuant to court order. CBCA s. 207.

Comment

1. Note that s. 207 meshes in with s. 234. Under s. 234(3)(n) the applicant can ask for liquidation and dissolution, and this is repeated in s. 234(8). Then, s. 207(1)(a) gives as grounds for dissolution the same grounds as those which trigger s. 234, and 207(2) says that the court may make "such order under. . . s. 234 as it thinks fit".

2. It will be noted that s. 207(1)(b) would retain the "just and equitable" provision.

3. S. 207(3) would prevent the shareholders' ratification of an act from being an absolute bar to an application for liquidation by reason of that act, though the shareholders' views could be taken into consideration. That is the effect of s. 235.

208.(1) An application to the Court to supervise a voluntary liquidation and dissolution under section 204(8) shall state

the reasons, verified by an affidavit of the applicant, why the Court should supervise the liquidation and dissolution.

(2) If the Court makes an order applied for under section 204(8), the liquidation and dissolution of the corporation shall continue under the supervision of the Court in accordance with this Act.

NOTE: Application for court supervision. CBCA s. 208.

Comment

1. S. 208(1) would call for an affidavit verifying the reasons for the application for liquidation under supervision of the court. We are somewhat concerned whether this would require a creditor to swear to facts which may not be in his possession and thus stop him from getting his remedy, but we think on the whole that he will have some facts, such as the fact that he has not been paid. It seems likely that a creditor would apply if he is being stalled or if there is reason to suspect that assets are being got rid of at an under-value.

2. S. 208(2) is the substantive provision that brings voluntary liquidation and dissolution under the supervision of the court.

209.(1) An application to the Court under section 207(1) shall state the reasons, verified by an affidavit of the applicant, why the corporation should be liquidated and dissolved.

(2) Upon the application under section 207(1), the Court may make an order requiring the corporation and any person having an interest in the corporation or a claim against it to show cause, at a time and place specified in the order but not less than 4 weeks after the date of the order, why the corporation should not be liquidated and dissolved.

(3) Upon an application under section 207(1), the Court may order the directors and officers of the corporation to furnish to the Court all material information known to or reasonably ascertainable by them, including

(a) financial statements of the corporation,

(b) the name and address of each shareholder of the corporation, and

(c) the name and address of each creditor or claimant, including any creditor or claimant with unliquidated, future or contingent claims, and any person with whom the corporation has a contract.

(4) A copy of an order made under subsection (2) shall be

(a) published as directed in the order, at least once in each week before the time appointed for the hearing, in a newspaper published or distributed in the place where the corporation has its registered office, and

(b) served upon the Registrar and each person named in the order.

(5) Publication and service of an order under this section shall be effected by the corporation or by such other person and in such manner as the Court may order.

NOTE: Show cause order. CBCA s. 209.

Comment

1. With regard to the section as a whole, our comment is that it is really procedural and may have no place in the Act. However, we think that it might as well stay there for the sake of uniformity.

2. We have a greater concern about s. 209(2). We think, by a majority, that it should not be for the corporation to show cause why it should not be dissolved, but that it should rather be for the applicant to show cause why the corporation should be dissolved. However, we do recognize that if the section were changed to give effect to that view there would be one procedure under the CBCA in the Court of Queen's Bench, and another procedure under the ABCA in the Court of Queen's Bench, dealing with precisely the same kind of subject matter under the two different statutes. There is obviously a strong argument for uniformity under those circumstances, and s. 209(2) therefore follows the CBCA.

210. In connection with the dissolution or the liquidation and dissolution of a corporation, the Court may make any order it thinks fit including, without limiting the generality of the foregoing, any one or more of the following:

(a) an order to liquidate;

(b) an order appointing a liquidator, with or without security, fixing his remuneration or replacing a liquidator;

(c) an order appointing inspectors or referees, specifying their powers, fixing their remuneration or replacing inspectors or referees;

(d) an order determining the notice to be given to any interested person, or dispensing with notice to any person;

(e) an order determining the validity of any claims made against the corporation;

(f) an order at any stage of the proceedings, restraining the directors and officers from

(i) exercising any of their powers, or

(ii) collecting or receiving any debt or other property of the corporation, or from paying out or transferring any property of the corporation, except as permitted by the Court;

(g) an order determining and enforcing the duty or liability of any director, officer or shareholder

(i) to the corporation, or

(ii) for an obligation of the corporation;

(h) an order approving the payment, satisfaction or compromise of claims against the corporation and the retention of assets for that purpose, and determining the adequacy of provisions for the payment or discharge of obligations of the corporation, whether liquidated, unliquidated, future or contingent;

(i) an order disposing of or destroying the documents and records of the corporation;

(j) upon the application of a creditor, the inspectors or the liquidator,

an order giving directions on any matter arising in the liquidation;

(k) after notice has been given to all interested parties, an order relieving a liquidator from any omission or default on any terms the Court thinks fit or confirming any act of the liquidator;

(l) subject to section 216, an order approving any proposed interim or final distribution to shareholders in money or in property;

(m) an order disposing of any property belonging to creditors or shareholders who cannot be found;

(n) upon the application of any director, officer, security holder, creditor or the liquidator,

(i) an order staying the liquidation on any terms and conditions the Court thinks fit,

(ii) an order continuing or discontinuing the liquidation proceedings, or

(iii) an order to the liquidator to restore to the corporation all its remaining property;

(o) after the liquidator has rendered his final account to the Court, an order dissolving the corporation.

NOTE: Powers of the Court. CBCA s. 210 with the omission in the opening portion of the section of ", if it is satisfied that the corporation is able to pay or adequately provide for the discharge of all its obligations,".

Comment

1. CBCA s. 210 confers jurisdiction on the court only if the court "is satisfied that the corporation is able to pay or adequately provide for the discharge of its obligations". The words are included in the CBCA in order to ensure that if there is a suggestion of insolvency action would be taken under the Bankruptcy Act and not under the liquidation provisions of the CBCA. We do not on the whole think that it is necessary to make that sharp a distinction. There may be cases, in which it is not clear whether the corporation is insolvent. The province, of course cannot deal with insolvency or bankruptcy as such but we doubt that dropping

the words would make the section unconstitutional. We have therefore deleted the quoted words.

2. Otherwise, we think that the section should be adopted.

211. If the Court makes an order for the liquidation of a corporation, the liquidation commences when the order is made.

NOTE: Commencement of liquidation. CBCA s. 211 reworded.

Comment

We have reworded CBCA s. 211 to make it clear that the section would apply only to a liquidation ordered by the Court.

212.(1) If the Court makes an order for liquidation of a corporation,

(a) the corporation continues in existence but shall cease to carry on business, except the business that is, in the opinion of the liquidator, required for an orderly liquidation, and

(b) the powers of the directors and shareholders cease and vest in the liquidator, except as specifically authorized by the Court.

(2) The liquidator may delegate any of the powers vested in him by subsection (1)(b) to the directors or shareholders.

NOTE: Cessation of business and of powers of directors and shareholders. CBCA s. 212.

Comment

We think that s. 212, which follows CBCA s. 212, is also unobjectionable and is necessary. A qualification on that statement is that we rather wonder about the delegation power in s. 212(2) in view of the fact that the liquidator would be acting under court order but would apparently be able to delegate without approval by the court, but we do not feel strongly enough to depart from uniformity with the CBCA.

213.(1) When making an order for the liquidation of a corporation or at any later time, the Court may appoint any person,

including a director, an officer or a shareholder of the corporation or any other body corporate, as liquidator of the corporation.

(2) If an order for the liquidation of a corporation has been made and the office of liquidator is or becomes vacant, the property of the corporation is under the control of the Court until the office of liquidator is filled.

NOTE: Appointment of liquidator. CBCA s. 213.

Comment

1. S. 213(1) would allow the Court to appoint any person as liquidator and does not prescribe qualifications. That is left to the court, and we think that that is in order.

2. We are not sure whether s. 213(2) is necessary, but it may be that there will be circumstances under which it is desirable to have the court exercise control of the property, and at worst the subsection does no harm.

214. A liquidator shall

(a) forthwith after his appointment give notice of his appointment to the Registrar and to each claimant and creditor known to the liquidator,

(b) forthwith publish notice in the Registrar's periodical and once a week for 2 consecutive weeks in a newspaper published or distributed in the place where the corporation has its registered office and take reasonable steps to give notice in each province in Canada where the corporation carries on business, stating the fact of his appointment and requiring any person

(i) indebted to the corporation, to provide a statement of account respecting the indebtedness and to pay to the liquidator at the time and place specified any amount owing,

(ii) possessing property of the corporation, to deliver it to the liquidator at the time and place specified, and

(iii) having a claim against the corporation, whether liquidated, unliquidated, future or contingent, to present particulars of the claim in writing to the liquidator not later than 2 months after the first publication of the notice,

(c) take into his custody and control the property of the corporation,

(d) open and maintain a trust account for the moneys of the corporation,

(e) keep accounts of the money of the corporation received and paid out by him,

(f) maintain separate lists of the shareholders, creditors and other persons having claims against the corporation,

(g) if at any time the liquidator determines that the corporation is unable to pay or adequately provide for the discharge of its obligations, apply to the Court for directions,

(h) deliver to the Court and to the Registrar, at least once in every 12 - month period after his appointment or more often as the Court may require, financial statements of the corporation in the form required by section 149 or in any other form the liquidator thinks proper or as the Court may require, and

(i) after his final accounts are approved by the Court, distribute any remaining property of the corporation among the shareholders according to their respective rights.

NOTE: Duties of liquidator. CBCA s. 214.

Comment

The duties as set out in s. 214 appear to us to be sensible and sufficient.

215.(1) A liquidator may

(a) retain lawyers, accountants, engineers, appraisers and other professional advisers,

(b) bring, defend or take part in any civil, criminal or administrative action or proceeding in the name and on behalf of the corporation,

(c) carry on the business of the corporation as required for an orderly liquidation,

(d) sell property of the corporation publicly or privately,

(e) do all acts and execute any documents in the name and on behalf of the corporation,

(f) borrow money on the security of the property of the corporation,

(g) settle or compromise any claims by or against the corporation, and

(h) do all other things for the liquidation of the corporation and distribution of its property.

(2) A liquidator is not liable if he relies in good faith upon

(a) financial statements of the corporation represented to him by an officer of the corporation or in a written report of the auditor of the corporation to reflect fairly the financial condition of the corporation, or

(b) an opinion, a report or a statement of a lawyer, an accountant, an engineer, an appraiser or other professional adviser retained by the liquidator.

(3) If a liquidator has reason to believe that any person has in his possession or under his control, or has concealed, withheld or misappropriated any property of the corporation, he may apply to the Court for an order requiring that person to appear before the Court at the time and place designated in the order and to be examined.

(4) If the examination referred to in subsection (3) discloses that a person has in

his possession or under his control, or has concealed, withheld or misappropriated property of the corporation, the Court may order that person to restore it or pay compensation to the liquidator.

NOTE: Powers of liquidator. CBCA s. 215.

Comment

The powers conferred by CBCA s. 215 appear to us to be necessary and sensible. S. 215 would adopt them.

216.(1) A liquidator shall pay the costs of liquidation out of the property of the corporation and shall pay or make adequate provision for all claims against the corporation.

(2) Within one year after his appointment, and after paying or making adequate provision for all claims against the corporation, the liquidator shall apply to the Court

(a) for approval of his final accounts and for an order permitting him to distribute in money or in kind the remaining property of the corporation to its shareholders according to their respective rights, or

(b) for an extension of time, setting out the reasons for the extension.

(3) If a liquidator fails to make the application required by subsection (2), a shareholder or creditor of the corporation may apply to the Court for an order for the liquidator to show cause why a final accounting and distribution should not be made.

(4) A liquidator shall give notice of his intention to make an application under subsection (2) to the Registrar, each inspector appointed under section 210, each shareholder, each creditor known to him and any person who provided a security or fidelity bond for the liquidator.

(5) If the Court approves the final accounts rendered by a liquidator, the Court shall make an order

(a) directing the Registrar to issue a

certificate of dissolution,

(b) directing the custody or disposal of the documents and records of the corporation, and

(c) subject to subsection (6), discharging the liquidator.

(6) The liquidator shall forthwith send or deliver a certified copy of the order referred to in subsection (5) to the Registrar.

(7) Upon receipt of the order referred to in subsection (5), the Registrar shall issue a certificate of dissolution in accordance with section 255.

(8) The corporation ceases to exist on the date shown in the certificate of dissolution.

NOTE: Final accounts and discharge of liquidator; issue of certificate of dissolution. CBCA s. 216 varied to include references to creditors in subsections (3) and (4) and to remove the requirement in subsection (4) for newspaper publication of the notice.

Comment

1. We think that in general CBCA s. 216 is satisfactory and should be adopted. We have two points of reservation.

2. The first point appears in CBCA s. 216(3). Under that subsection only a shareholder can apply if the liquidator delays. It appears to us that a creditor may also be adversely affected by delay, and we do not see that he has any other quick and efficient method of bringing the matter before the court. We have therefore extended s. 216(3) so that either a creditor or a shareholder would be able to apply.

3. We are somewhat concerned about the requirement of publication in a newspaper under s. 216(4). There has already been a notice of the appointment of liquidator, and that should have produced claims by any creditors who read newspapers. Then, all other claims should by this point have been ascertained. Further, it seems to us that direct notice should be given to each known creditor. We have therefore added to those to whom notice is given each creditor, and we have deleted the provision for publication of the notice in a newspaper.

217.(1) If in the course of liquidation of a corporation the shareholders resolve or

the liquidator proposes to

(a) exchange all or substantially all the property of the corporation for securities of another body corporate that are to be distributed to the shareholders, or

(b) distribute all or part of the property of the corporation to the shareholders in kind,

a shareholder may apply to the Court for an order requiring the distribution of the property of the corporation to be in money.

(2) Upon an application under subsection (1), the Court may order that

(a) all the property of the corporation be converted into and distributed in money, or

(b) the applicant be paid the fair value of his shares, in which case the Court

(i) may determine whether any other shareholder is opposed to the proposal and if so, join that shareholder as a party,

(ii) may appoint one or more appraisers to assist the Court to fix the fair value of the shares,

(iii) shall fix the fair value of the shares of the applicant and the other shareholders joined as parties as of a date determined by the Court,

(iv) shall give judgment in the amount of the fair value against the corporation and in favour of each of the shareholders who are parties to the application, and

(v) fix the time within which the liquidator must pay that amount to a shareholder after delivery of his shares to the liquidator, if his share certificate has not been delivered to the Court or to the liquidator at the time the order is pronounced.

NOTE: Shareholder's right to distribution in money or the fair value of his shares. CBCA s. 217 varied as to subsection (2)(b).

Comment

1. S. 217 applies in either of two events. One event is that the property is turned over to another company for securities which are then to be distributed to the shareholders. The other event is that there is a proposal to distribute property. In either event the shareholder may apply to have his distribution in money.

2. The court then has two choices. It may direct that all the property of the corporation be converted into and distributed in money, which is simple enough.

3. The court's second choice is to determine all those who want money and then "fix a fair value for the shares of the applicant", give judgment, and set a time for payment. S. 217(2)(b) is somewhat re-drafted but follows the CBCA in principle.

218.(1) A person who has been granted custody of the documents and records of a dissolved corporation remains liable to produce those documents and records for 6 years following the date of its dissolution or until the expiry of such other shorter period as may be ordered under section 216(5).

(2) A person who, without reasonable cause, contravenes subsection (1) is guilty of an offence and liable on summary conviction to a fine of not more than $5000 or to imprisonment for a term of not more than 6 months or to both.

NOTE: Custody of records after dissolution. CBCA s. 218.

219.(1) In this section, "shareholder" includes the legal representatives of a shareholder.

(2) Notwithstanding the dissolution of a body corporate under this Act,

(a) a civil, criminal or administrative action or proceeding commenced by or against the body corporate before its dissolution may be continued as if the body corporate

had not been dissolved,

(b) a civil, criminal or administrative action or proceeding may be brought against the body corporate within 2 years after its dissolution as if the body corporate had not been dissolved, and

(c) any property that would have been available to satisfy any judgment or order if the body corporate had not been dissolved remains available for that purpose.

(3) Service of a document on a corporation after its dissolution may be effected by serving the document upon a person shown in the last notice filed under section 101 or 108.

(4) Notwithstanding the dissolution of a body corporate under this Act, a shareholder to whom any of its property has been distributed in the liquidation is liable to any person claiming under subsection (2) to the extent of the amount received by that shareholder upon the distribution, and an action to enforce that liability may be brought within 2 years after the date of the dissolution of the body corporate.

(5) The Court may order an action referred to in subsection (4) to be brought against the persons who were shareholders as a class, subject to any conditions the Court thinks fit and, if the plaintiff establishes his claim, the Court may refer the proceedings to a referee or other officer of the Court who may

(a) add as a party to the proceedings before him each person who was a shareholder found by the plaintiff,

(b) determine, subject to subsection (4), the amount that each person who was a shareholder shall contribute towards satisfaction of the plaintiff's claim, and

(c) direct payment of the amounts so determined.

NOTE: Continuation of actions after dissolution. CBCA s. 219.

Comment

1. It will be remembered that the liquidation provisions, unless the court is involved, would leave the corporation a great deal of latitude. The other side of that coin is that if property is distributed to shareholders that should have been used to pay creditors, the creditors under 219(4) and 219(5) would be able to proceed against the shareholders to get back what was improperly distributed. This appears to us to be an appropriate provision.

2. The view expressed above is based upon the proposition that the reference in 219(4) to "property (that) has been distributed" means property that has been distributed in the liquidation. It should not apply to a previous distribution. If a previous distribution was wrongful, then the appropriate rights arose out of it. If a previous distribution was rightful then the later liquidation should not affect it. On that account CBCA s. 219(4) has been varied in s. 219(4) of the draft Act by the addition of the words "in the liquidation" in order to be clear on this point.

220.(1) Upon the dissolution of a body corporate under this Act, the portion of the property distributable to a creditor or shareholder who cannot be found shall be converted into money and paid to the Provincial Treasurer.

(2) A payment under subsection (1) is deemed to be in satisfaction of a debt or claim of the creditor or shareholder.

(3) If at any time a person establishes that he is entitled to any money paid to the Provincial Treasurer under this Act, the Provincial Treasurer shall pay an equivalent amount to him out of the General Revenue Fund.

NOTE: Unknown claimants. CBCA s. 220.

Comment

1. Once it is determined that a creditor or shareholder is entitled to receive a share of a distribution and cannot be found, the property to be distributed to him would be converted into money (if it isn't already money) and paid to the Provincial Treasurer who will pay it back to the creditor or shareholder if he ever appears.

2. Our interpretation of s. 220(2) is that the claim is satisfied insofar as the corporation is concerned, so that the liquidator can be discharged, but that that does not deprive the creditor or shareholder of the right to appear and show his entitlement under s. 220(3).

3. The section appears to us to provide an appropriate way of disposing of the claims of persons who cannot be found.

> 221.(1) Subject to sections 219(2) and 220, property of a body corporate that has not been disposed of at the date of its dissolution under this Act vests in Her Majesty in right of Alberta.
>
> (2) If a body corporate is revived as a corporation under section 201 or section 202, any property, other than money that vested in Her Majesty pursuant to subsection (1), that has not been disposed of shall be returned to the corporation and there shall be paid to the corporation out of the General Revenue Fund
>
> (a) an amount equal to any money received by Her Majesty pursuant to subsection (1), and
>
> (b) if property other than money vested in Her Majesty pursuant to subsection (1) and that property has been disposed of, an amount equal to the lesser of
>
> (i) the value of that property at the date it vested in Her Majesty, and
>
> (ii) the amount realized by Her Majesty from the disposition of that property.

NOTE: Property not disposed of. CBCA s. 221.

Comment

1. If some property of the company has been overlooked and not disposed of, title would go to the Crown. However, it appears that at any time the company could be revived under s. 201 or 202 and would receive an amount equal to any money received by the Crown (apparently without interest); and that, in the case of property other than money, it would receive the lesser of the value of the property at the date of vesting and the amount of proceeds of disposition of the property (so that Her Majesty could make a profit but could not be made to bear a loss). The usual situation will be that the property will not actually go to the Crown but that the company will be restored once the existence of the property comes to light.

2. We think that this is a reasonable arrangement to deal with the problem of overlooked property.

PART 18

INVESTIGATION

221.1 In this Part, "affiliated corporation" with reference to a corporation includes an Alberta company affiliated with that corporation.

NOTE: "Affiliated corporation" defined to include Alberta companies. New.

222.(1) A security holder or the Director may apply to the Court, ex parte or upon such notice as the Court may require, for an order directing an investigation to be made of the corporation and any of its affiliated corporations.

(2) If, upon an application under subsection (1), it appears to the Court that there is sufficient grounds to conduct an investigation to determine whether

(a) the business of the corporation or any of its affiliates is or has been carried on with intent to defraud any person,

(b) the business or affairs of the corporation or any of its affiliates are or have been carried on or conducted, or the powers of the directors are or have been exercised, in a manner that is oppressive or unfairly prejudicial to or that unfairly disregards the interests of a security holder,

(c) the corporation or any of its affiliates was formed for a fraudulent or unlawful purpose or is to be dissolved for a fraudulent or unlawful purpose, or

(d) persons concerned with the formation, business or affairs of the corporation or any of its affiliates have in connection therewith acted fraudulently or dishonestly,

the Court may order an investigation to be made of the corporation and any of its affiliated corporations.

(3) If a security holder makes an application under subsection (1) or section 223, he shall give the Director reasonable notice of the application and the Director is entitled to appear and be heard in person or by counsel.

(4) An applicant under this section or section 223 is not required to give security for costs.

(5) An application under this section or section 223 shall be heard in camera unless the Court otherwise orders.

(6) No person may publish anything relating to proceedings under this section or section 223 except with the authorization of the Court or the written consent of the corporation being investigated.

(7) Documents in the possession of the Court or the Director and relating to an application under this section or section 223 are confidential unless the Court otherwise orders.

(8) Subsections (6) and (7) do not apply to an order of the Court under this section or section 223.

(9) Notwithstanding subsections (6) and (7), the Director may release information and copies of documents referred to in subsection (7) to any public official referred to in section 224(2).

NOTE: Court order for investigation. CBCA s. 222 varied by the addition of subsections (7), (8) and (9), by extending subsection (5) to all applications and by the extending subsections (3) to (9) to applications under s. 223.

Comment

1. For the reasons for providing for an investigation, see pp. 123-124 of our Report.

2. S. 222(1) would allow any shareholder to apply for an order directing an investigation, while ACA s. 160 requires that the applicant hold 10% of the issued shares. A requirement that the applicants hold a specified percentage of the issued shares is a major barrier to the proper use of the investigation device, and the requirement that grounds for the order be shown to the court is, we think, sufficient protection against any abuse which might flow from allowing any shareholder to apply.

3. S. 222(1), by its use of the term "security holder", would also confer upon the holder of a bond, debenture, note or other indebtedness or guarantee of the corporation the right to apply for an investigation. It would, we think, be unusual to find a case in which the court would consider it appropriate to make an order upon the application of such a creditor, but it might do so if the creditor's debenture is convertible into shares, or if it appears likely that the corporation is a sham set up to inveigle investors into lending money to it.

4. S. 222(1) would also allow the Director of the Securities Commission to apply. We would expect him to do so if a security holder has satisfied him that there should be an investigation and if it seems appropriate that the burden of applying for it should be assumed by a public official rather than the security holders. There may also be a case in which he concludes that there is a public interest in having the affairs of a corporation investigated which is separate and apart from the interest of those directly involved with the corporation. S. 222(3) would also require that he be given notice of an application and would entitle him to attend and take part; this provision is desirable so that he may be able to see that the Securities Commission takes whatever action is necessary to protect investors.

5. S. 222(1) would allow a security holder to apply for an order directing an investigation not only into the corporation the securities of which he holds but also its affiliated corporations, i.e., its parent, its subsidiaries, and corporations controlled by the persons who control it. Upon occasion it may be necessary to investigate both a corporation and an affiliate in order to discover a scheme to defraud the corporation's shareholders, and we do not think that the division of the undertaking among different corporate bodies should be able to frustrate the investigation. Although the conduct of the affairs of an affiliate which is an extra-provincial corporation would be grounds for an investigation of the Alberta corporation, s. 222(1) would not authorize an investigation of the extra-provincial corporation. The special definition of "affiliated corporation" in S. 221.1 (which does not appear in the CBCA) would, however, include all Alberta companies, whether or not they have brought themselves under the proposed ABCA.

6. CBCA s. 222(2), if read literally, requires the Court to find that the wrongdoing has taken place before it can make the order for an investigation. If that interpretation were given, the section would be largely stultified. If, on the other hand, a Court were to interpret the section less restrictively, its order would still have to embody a finding which is likely to be interpreted as a finding of wrongdoing before adjudication and even before investigation. S. 222(2) of the draft Act has therefore been worded so as to make it clear that the Court could make an order if there are sufficient grounds for the investigation and without deciding whether the alleged wrongdoing exists. We expect that on the one hand, the court will not order an investigation if the applicant does

not establish facts which show a strong possibility of wrongdoing; and we expect that it will not, on the other hand, require the applicant, as a condition of obtaining an investigation, to prove the existence of the wrongdoing which the investigation is intended to discover.

7. S. 172 of the English Companies Act empowers the Board of Trade to appoint inspectors when it appears that there is good reason so to do, and s. 186 of the OBCA empowers the court to make an order if the application is made in good faith and if the order is prima facie in the interests of the corporation or its security holders. We think it best that the draft Act follow the CBCA (except for the change mentioned in Comment #6) in the interests of the uniform development of the law and because we think that it permits the court to make an order where suspicion is reasonable and well grounded, and to refuse one where it is not.

8. A requirement that an applicant for an investigation put up security for costs, such as that imposed by ACA s. 160(3), is a major impediment to the proper use of investigations. S. 222(4) would therefore make it clear that there is no such requirement. S. 223(1)(k) and (3) deal with costs generally.

9. S. 222(5) and (6) would protect the privacy of proceedings leading to the investigation order by requiring in camera proceedings in all cases and by prohibiting publication of anything relating to the proceedings without the consent of the corporation or order of the court. It would go further than CBCA s. 222(5) which provides for an in camera hearing only if the application for an investigation order is made ex parte, and CBCA s. 222(6) which attaches confidentiality only to ex parte proceedings.

10. There appear to us to be two reasons for confidentiality. The first is that there may be a case in which the wrongdoers will cover their tracks unless the inspector comes without warning. The second is that publication of the fact of the proceedings may do injury to the corporation even though the allegations being made are as yet unsubstantiated. The first reason applies only to ex parte applications. The second reason, however, applies to all applications for investigations, whether ex parte or upon notice, and we think that it is sufficient to justify a requirement that all applications for investigation be heard in camera, and that publication of anything relating to the proceedings be prohibited until the court has an opportunity to deal with the question. S. 222(5) and 222(6) would therefore go beyond the CBCA subsections and apply to all applications, whether ex parte or not, and s. 222(6) would also make the court records confidential. In view of the fact that an order for investigation does not itself determine anything, we think that the usual reasons for open courts are of less force and may be overridden. However, if the corporation itself agrees to publication (as it might well do on the grounds that full information is better than rumours) the reasons for confidentiality would disappear.

11. S. 222(9) would be a departure from the CBCA principle of

confidentiality in connection with ex parte applications, and from the principle of confidentiality which we have advocated for ex parte applications and applications upon notice. The departure is justified by the public interest in effective policing of corporate affairs by Securites Commissions and police forces; if they cannot exchange information about a corporation with widespread interests, effective regulation will be impeded and may well be prevented. See s. 224(2), which would confer similar powers on an inspector.

223.(1) Upon an application under section 222 or upon a subsequent applicaton, the Court may make any order it thinks fit including, without limiting the generality of the foregoing, any or all of the following:

(a) an order appointing an inspector, who may be the Director, fixing the remuneration of an inspector, or replacing an inspector;

(b) an order determining the notice to be given to any interested person, or dispensing with notice to any person;

(c) an order authorizing an inspector to enter any premises in which the Court is satisfied there might be relevant information, and to examine any thing and make copies of any document or record found on the premises;

(d) an order requiring any person to produce documents or records to the inspector;

(e) an order authorizing an inspector to conduct a hearing, administer oaths and examine any person upon oath, and prescribing rules for the conduct of the hearing;

(f) an order requiring any person to attend a hearing conducted by an inspector and to give evidence upon oath;

(g) an order giving directions to an inspector or any interested person on any matter arising in the investigation;

(h) an order requiring an inspector to make an interim or final report to the Court;

(i) an order determining whether a report of an inspector should be published and, if so, ordering the Director to publish the report in whole or in part or to send copies to any person the Court designates;

(j) an order requiring an inspector to discontinue an investigation;

(k) an order requiring any person other than the corporation to pay all or part of the costs of the investigation.

(2) An inspector shall send

(a) to the Director, and

(b) unless the Court otherwise orders, to the auditor,

a copy of every report made by the inspector under this Part.

(3) Unless the Court otherwise orders, the corporation shall pay the costs of the investigation.

(4) Any interested person may apply to the Court for directions on any matter arising in the investigation.

NOTE: Powers of the Court. CBCA s. 223, varied.

Comment

1. The role of the inspector should, we think, be considered investigative, not judicial. The powers which the court may confer upon him are generally satisfactory for that role.

2. CBCA s. 223(1)(a) duplicates CBCA s. 222(2) and has been deleted from s. 223 of the draft Act.

3. S. 223(1)(a) would leave the choice of inspector within the court's discretion. The Director of the Securities Commission may upon occasion be an appropriate choice.

4. S. 223(1)(c), (d), (e) and (f) would allow the court to confer upon the inspector power to examine records and to compel production of them, and the power to require testimony to be given under oath. In many cases an inspector without such powers could not conduct an effective investigation; and the fact that the powers must be conferred by a specific court order is, we think, sufficient protection against abuse.

5. The "hearing" contemplated by s. 223(1)(e) and (f) is merely

an investigative and not an adversarial operation; it is a formal procedure for examining a witness.

6. An important question is whether or not the inspector's report should be made available to interested parties or the public. It is not appropriate to say that all reports must be published or that all reports must be kept confidential. We think that the court should give directions based upon the circumstances of the particular case and s. 223(1)(i) would provide for such directions. (See also s. 224(2) and s. 225(1)). All reports should, however, go to the Director of the Securities Commission to enable him to perform his monitoring function, and s. 223(2) would so provide. The Institute of Chartered Accountants of Alberta pointed out that in general, such reports deal with matters which should be brought to the attention of the corporations auditor, and s. 223(2) has been changed so as to give effect to that consideration.

7. Another important question is that of the costs of the application and of the investigation. In the first instance they would be borne by whoever incurs them, i.e., the applicant as to his costs of the application, the Director as to his costs of the application and of an investigation (if he is the inspector), and the corporation as to any expense to which it is put to participate in the proceedings and to produce records and witnesses. The CBCA as originally enacted made no provision about costs unless it includes a power to deal with costs in the general power "to make any order it [the Court] thinks fit" with which s. 223(1) commences. The 1978-79 CBCA amendments added s. 223(1)(l) which allows the court to require the corporation to pay costs and which may by implication exclude a power to assess costs against the wrongdoers or the applicant. The draft Act would depart from the CBCA by providing in s. 223(1)(k) that the court may require any person other than the corporation to pay any or all of the costs of the investigation, and by allowing it to order otherwise under s. 223(3). In the absence of any such order, s. 223(3) of the draft Act would require the corporation to pay the costs.

8. S. 223(4) is not in the CBCA. It is added to make it clear that anyone with an interest in the proceedings would be able to apply to have directions given for the conduct of the investigation.

> 224.(1) An inspector under this Part has the powers set out in the order appointing him.
>
> (2) In addition to the powers set out in the order appointing him, an inspector appointed to investigate a corporation may furnish to, or exchange information and otherwise cooperate with, any public official in Canada or elsewhere who is authorized to exercise investigatory powers and who is investigating, in respect of the corporation,

any allegation of improper conduct that is the same as or similar to the conduct described in section 222(2).

(3) An inspector shall upon request produce to an interested person a copy of any order made under section 222 or 223(1).

NOTE: Powers of inspector. CBCA s. 224.

Comment

1. S. 224(2) is, we think, necessary in order to assist the effective policing of corporate affairs: see the comment on s. 222(9). See also Canadian Javelin v. Sparling (1979) 4 B.L.R. 153 (F.C.T.D.).

2. A person with an interest should be able to see the order, and, indeed, should have the right to see it before conforming to it. S. 224(3) so provides.

225.(1) A hearing conducted by an inspector shall be heard in camera unless the Court otherwise orders.

(2) An individual who is being examined at a hearing conducted by an inspector under this Part has a right to be represented by counsel during the examination.

NOTE: Hearings by inspector. CBCA s. 225, varied.

Comment

1. CBCA s. 225(1) provides that an interested person may apply to have a hearing conducted in camera. Since the investigation is not a judicial proceeding, and since the information which is elicited is likely to be confidential and may be damaging, we think that the emphasis should be the other way and that in the occasional case where there is a reason why other persons should be permitted to attend the hearing application should have to be made to allow them to do so.

2. S. 223(1)(e) and (f) talk of a "hearing". We think it apparent from the context that the "hearing" would merely consist of an interrogation of a witness under oath, and would not involve the presence of adversaries (though the court could, we expect, direct otherwise under its general powers). There is nothing in s. 223 that suggests that a witness must submit to being examined by anyone but the inspector, at least in the absence of specific direction.

3. CBCA s. 225(2) reads as follows:

(2) A person whose conduct is being investigated or who is being examined at a hearing conducted by an inspector under this Part has a right to be represented by counsel.

We have some difficulty with this. If the phrase "at a hearing" does not modify "person whose conduct is being investigated", the subsection might mean that that person has a right to be represented by counsel at all times, i.e., that the investigator would have to allow counsel to be present at all times, including, e.g., time when he is examining records. If the phrase "at a hearing" does modify "person whose conduct is being investigated", the subsection might mean that that person has a right to be represented by counsel at all times when the investigator is interrogating a witness under oath. We think the first alternative clearly inappropriate, and we think the second also to be inappropriate, though less obviously so. The investigator should be able to investigate without the trappings of an adjudicator. It would also be strange to allow a person to be represented by counsel when the person himself has no right to be present, and when there is no reason to think that the witness must submit to questions by counsel. Damaging statements may well be made at an interrogation under oath; but damaging statements may be made in documents and records and in informal interviews. If there is a person whose conduct is being investigated, the inspector would have a duty to hear him on all points (and the report would be discredited if he did not), and if the person being investigated did not like the way in which the inspector is conducting the investigation, he could apply to the court for directions. Bearing in mind that the report is not binding on anyone, we think the protections to the person being investigated are adequate.

4. We think that what the CBCA s. 225(2) really means, and that what is appropriate whatever it means, is that the person being examined at a hearing has the right to be represented by counsel. The functions of counsel would be limited to ensuring that questions asked are relevant and do not infringe privilege, and that if the questions are incriminating, the witness is given the protection of s. 226.

5. A person whose conduct is being investigated would, of course, have a perfect right to consult and take the advice of counsel at all times before, after and during the investigation and to take whatever legal steps counsel might advise. Nothing in the draft Act would affect that right.

226. A person shall not be excused from attending and giving evidence and producing books, papers, documents or records to an inspector under this Part on the grounds that the oral evidence or documents required of him may tend to criminate him or subject him to any proceeding or penalty, but no such oral evidence so required shall be used or is

receivable against him in any proceedings thereafter instituted against him under any Act of Alberta.

NOTE: Compelling evidence. CBCA 226 varied.

Comment

S. 226 would require a witness to give evidence even though it incriminates him. The witness would be protected against the use of his own oral evidence in prosecutions under Alberta statutes. He would not be protected in civil proceedings, and in criminal proceedings he would be left to the federal law. CBCA s. 226 appears to say that documents and records produced by an individual cannot be used against him in proceedings under federal Acts; that seems to us to allow the individual to neutralize objectively existing evidence by producing it, and s. 226 would not go that far.

227. Any oral or written statement or report made by an inspector or any other person in an investigation under this Part has absolute privilege.

NOTE: Absolute privilege. CBCA s. 227.

Comment

The common law would probably confer a qualified privilege on the inspector and upon a witness, as the inspector would be under a duty to report and the witness would be under a duty to make statements to him. It is, however, desirable to go further and give them protection against being harrassed by legal proceedings in which they would have to prove lack of malice, something that in the nature of things might be difficult for some witnesses. The consequence of conferring an absolute privilege could be that a defamed person would have no remedy, but we think that that consequence must be accepted in the interests of establishing an efficient system of investigations.

228.(1) The Director, if he is satisfied that there is sufficient reason to do so, may appoint an investigator who

(a) may make enquiries of any person relating to the business, affairs, and management of the corporation, and the ownership of securities of a corporation, or

(b) may make enquiries of any person relating to compliance with this Act.

(2) Except with the previous consent in writing of the corporation, no information or document or record produced to an investigator making enquiries under this section or anyone employed by him may be published or disclosed except to the Director or in the course of any civil, criminal or administrative action or proceeding.

(3) A person who contravenes this section is guilty of an offence and liable on summary conviction to a fine of not more than $5000 or to imprisonment for a term of not more than one year, or both.

NOTE: Enquiries by investigator. New.

Comment

1. S. 228 is not related to the previous sections in Part 18, and it is not related to CBCA s. 228.

2. CBCA s. 228 confers upon the Director a power to investigate the ownership or control of a security of a corporation or its affiliates, and, in the course of such an investigation, to compel disclosure by anyone whom he believes to have or have had any interest in the security or by anyone who acts or has acted for such a person. It does so for the purposes of enforcing regulations under s. 168 (constrained shares), Part X (insider trading), Part XII (Proxies and proxy solicitation) and Part XVI (take-over bids). All these matters come under the Securities Act and we do not think that anything is gained by including them again here. We have therefore deleted CBCA s. 228 except for the general power under subsection (1)(a).

3. CBCA s. 230 gives the Director power to make inquiries of any person relating to compliance with the Act. We think that it would be useful in his function as monitor of corporate activities to expand the power of inquiry to include the power to inquire into the business, affairs and management of a corporation, and s. 228 of the draft would do that. The power does not include a power to compel an answer, but it would give the Director standing to make an inquiry which might well enable him to perform a mediating function or to satisfy a complaint.

4. S. 228(2) is intended to ensure the confidentiality of information communicated to the investigator. S. 228(3) goes on to provide a penalty for a breach of confidentiality.

229. Nothing in this Part affects the privilege that exists in respect of a solicitor and his client.

NOTE: Solicitor-client privilege. CBCA s. 229.

Comment

S. 229 might not be necessary, but it would remove any doubt about the inviolability of the solicitor-client privilege.

230. A copy of the report of an inspector under section 223, certified as a true copy by the inspector, is admissible as evidence of the facts stated in it without proof of the inspector's appointment or of his signature.

NOTE: Inspector's report as evidence. New.

Comment

1. We think that the inspector's report should have some evidentiary value. It is a report made by an official appointed by the court and under powers conferred by the court; and interested persons could ask the court to give the inspector directions under which he must conduct the investigation. Although, as we have said, the inspector is not an adjudicator and need not, unless so directed, employ all the trappings of an adversarial procedure, we do not think that a report so prepared should be treated as having no effect or as being only a source of information.

2. ACA s. 162 makes an inspector's report evidence of the opinion of the inspectors. Since that opinion itself does not appear to have any evidentiary effect, we think that the proposed ABCA should go farther.

3. We have considered the suggestion that the report should be admitted as evidence of its contents only if it is not contested. Again, that seems to us to discount its importance too much.

4. We think that the report should be evidence of its contents. We expect that a court would then accept it as proof in the absence of contrary evidence or demonstrable weaknesses. If contrary evidence were to be adduced, the proponents of the facts stated in the report would probably feel impelled to adduce supporting evidence; but it would be for the court to consider all the circumstances, including the apparent merits of the report, and to decide what weight to give it. We have considered going somewhat further and suggesting that the report be prima facie evidence, but have concluded that it is better to leave its weight entirely to the court. S. 230 gives effect to these views.

PART 19

REMEDIES, OFFENCES AND PENALTIES

231. In this Part,

(a) "action" means an action under this Act or any other law

(b) "complainant" means

(i) a registered holder or beneficial owner, or a former registered holder or beneficial owner, of a security of a corporation or any of its affiliates,

(ii) a director or an officer or a former director or officer of a corporation or of any of its affiliates,

(iii) the Director, or

(iv) any other person who, in the discretion of the Court, is a proper person to make an application under this Part.

NOTE: CBCA s. 231, varied as to definition of "action."

Comment

S. 231(a) does not follow CBCA s. 231. See Comment 3 on s. 232.

232.(1) Subject to subsection (2), a complainant may apply to the Court for leave to

(a) bring an action in the name and on behalf of a corporation or any of its subsidiaries, or

(b) intervene in an action to which a corporation or any of its subsidiaries is a party, for the purpose of prosecuting, defending or discontinuing the action on behalf of the corporation or subsidiary.

(2) No leave may be granted under subsection (1) unless the Court is satisfied that

(a) the complainant has given reasonable notice to the directors of the corporation or its subsidiary of his intention to apply to the Court under subsection (1) if the directors of the corporation or its subsidiary do not bring, diligently prosecute, defend or discontinue the action,

(b) the complainant is acting in good faith, and

(c) it appears to be in the interests of the corporation or its subsidiary that the action be brought, prosecuted, defended or discontinued.

NOTE: Commencing derivative action. CBCA s. 232.

Comment

1. See the discussion of remedies for wrongs committed against the corporation, its shareholders and others, at pp. 135-152 of our Report.

2. S. 232(1) does away with the difficulties caused by the rule in Foss v. Harbottle. It does so by allowing a shareholder to commence an action in the corporation's name or to intervene in an existing action to which it is a party.

3. CBCA s. 231 defines "action" as "an action under this Act". That definition might appear to be desirable as, in its absence, a complainant might apply under s. 232(1) for leave to bring an action in the corporation's name which is not based upon a breach of the duties imposed by the Act or an infringement of the corporate constitution and which is motivated simply by a desire to reverse a bona fide business decision of the directors not to sue. It appears to us however that that is not a serious risk in view of the traditional unwillingness of the courts to interfere in corporate affairs and in view of the tests established by s. 232(2). It appears to us also that there are likely to be cases in which a shareholder should be allowed to apply for leave to bring a derivative action which is not specifically provided for in the Act, e.g., an action to recover money or property from a third party who has purchased it from the corporation in the knowledge that the corporation's agent was selling it at an undervalue in breach of his duty. We have therefore incorporated in s. 231(a) of the draft Act the all-encompassing definition of "action" which was contained in the draft CBCA instead of the narrow definition which was incorporated in CBCA s. 231 as enacted.

4. S. 232 would allow a security holder of a corporation to apply for leave to bring an action in the name of a subsidiary. The extension appears desirable; wrongful acts

in the subsidiary may well affect the interests of shareholders as seriously as wrongful acts in their own corporation, and the group in control of the parent might use the associated control of the subsidiary to prevent the subsidiary from taking action against the wrongdoers.

5. S. 232(1) would also allow some persons other than shareholders to apply for leave to bring, or intervene in, an action. It is a "complainant" who may do so, and "complainant" is defined by s. 231 to include past and present legal and beneficial owners of shares and debt obligations not only of the corporation but of "affiliates", i.e., parents, subsidaries and companies controlled by the same parent or other person; present and past directors and officers of all such corporations; the Director of the Securities Commission; and any other person whom the court considers proper.

6. S. 232(2) would impose conditions which must be satisfied before the court could give leave under s. 232(1) to bring or to intervene in an action. : s. 232(2)(a) recognises that the proper persons to take action on a corporation's behalf are its directors, and would require that they be given a chance to do so; s. 232(2)(b) would require the complainant to show good faith; and s. 232(2)(c) would require the court to find that the bringing or maintenance of the action appears to be in the best interests of the corporation.

7. Under OBCA s. 99, which is the counterpart of CBCA s. 232, the courts have taken a reasonable view of what must be done to show that it is prima facie in the interests of the corporation or its shareholders that the action be commenced. It has been held at the trial level that the court is not to try the action on the hearing of the application but should allow it to proceed if the applicant is acting in good faith and has complied with the requirements of the section, and if it appears that the action is not frivolous or vexatious and could reasonably succeed, and that it is in the interests of the shareholders: see Marc-Jay Investments Ltd. and Levy (1974) 5 O.R. (2nd) 235, 50 D.L.R. (3rd) 45; and Armstrong v. Gardiner (1978) 20 O.R. (2nd) 648. In MacEachern v. McDougall et. al. (unreported, March 9, 1979), the Ontario Divisional Court said that "it is not desirable or feasible that the Court in this type of application do anything more than determine whether the material filed discloses a triable issue...". We expect that the courts will take a similar view of CBCA s. 232(2)(c) and its Alberta counterpart.

233. In connection with an action brought or intervened in under section 232 or 234(3)(q), the Court may at any time make any order it thinks fit including, without limiting the generality of the foregoing, any or all of the following:

(a) an order authorizing the

complainant or any other person to control the conduct of the action;

(b) an order giving directions for the conduct of the action;

(c) an order directing that any amount adjudged payable by a defendant in the action shall be paid, in whole or in part, directly to former and present security holders of the corporation or its subsidiary instead of to the corporation or its subsidiary;

(d) an order requiring the corporation or its subsidiary to pay reasonable legal fees incurred by the complainant in connection with the action.

NOTE: Powers of the Court. CBCA s. 233.

Comment

The explanatory note of the CBCA drafters to the prototype of s. 233 is as follows:

> 483. Section 19.03 is designed to give very broad discretion to the court to supervise generally the conduct of a derivative action providing maximum flexibility in respect of interim financing of the litigation and the control over the conduct of the action in a way that obviates a multiplicity of actions. Moreover, in certain cases, e.g., where a corporation has redeemed or purchased its own shares or has been liquidated or dissolved, a court can order payment directly to shareholders and former shareholders of the amount recovered, thus resolving a technical problem that has resulted in obvious injustice in some U.S. cases. In addition it enables the court to permit the amount recovered to flow directly through to shareholders, precluding the wrongdoers from sharing in the recovery by the corporation.

We have some doubts about the point last mentioned: if the corporation has suffered injury at the hands of a control group who hold 60% of the shares, the minority, holding 40%, should not be paid 100% of the damages. However, the court would be able to take the shareholdings into consideration in determining the amount that the minority should receive; and there is something to be said, in a case in which the control group has committed a serious wrong against the corporation, for taking steps to ensure that the

compensation for the wrong is not put under the dominion of the wrongdoers by paying it into the corporation. We have resolved our doubts in favour of recommending that the court be given the power to order payment to the shareholders and others referred to in s. 233(c).

234.(1) A complainant may apply to the Court for an order under this section.

(2) If, upon an application under subsection (1), the Court is satisfied that in respect of a corporation or any of its affiliates

(a) any act or omission of the corporation or any of its affiliates effects a result,

(b) the business or affairs of the corporation or any of its affiliates are or have been carried on or conducted in a manner, or

(c) the powers of the directors of the corporation or any of its affiliates are or have been exercised in a manner

that is oppressive or unfairly prejudicial to or that unfairly disregards the interests of any security holder, creditor, director or officer, the Court may make an order to rectify the matters complained of.

(3) In connection with an application under this section, the Court may make any interim or final order it thinks fit including, without limiting the generality of the foregoing, any or all of the following:

(a) an order restraining the conduct complained of;

(b) an order appointing a receiver or receiver-manager;

(c) an order to regulate a corporation's affairs by amending the articles or by-laws;

(d) an order declaring that any amendment made to the articles or by-laws pursuant to clause (c) operates notwithstanding any unanimous shareholder agreement made before or after the date of the order, until the Court otherwise orders;

(e) an order directing an issue or exchange of securities;

(f) an order appointing directors in place of or in additon to all or any of the directors then in office;

(g) an order directing a corporation, subject to section 32(2), or any other person, to purchase securities of a security holder;

(h) an order directing a corporation or any other person to pay to a security holder any part of the money paid by him for securities;

(i) an order directing a corporation, subject to section 40, to pay a dividend to its shareholders or a class of its shareholders;

(j) an order varying or setting aside a transaction or contract to which a corporation is a party and compensating the corporation or any other party to the transaction or contract;

(k) an order requiring a corporation, within a time specified by the Court, to produce to the Court or an interested person financial statements in the form required by section 149 or an accounting in any other form the Court may determine;

(l) an order compensating an aggrieved person;

(m) an order directing rectification of the registers or other records of a corporation under section 236;

(n) an order for the liquidation and dissolution of the corporation;

(o) an order directing an investigation under Part 18 to be made;

(p) an order requiring the trial of any issue;

(q) an order granting leave to the applicant to

(i) bring an action in the name and on behalf of the corporation or any of its

subsidiaries, or

(ii) intervene in an action to which the corporation or any of its subsidiaries is a party, for the purpose of prosecuting, defending or discontinuing an action on behalf of the corporation or any of its subsidiaries.

(4) This section does not confer upon the court power to revoke a certificate of amalgamation.

(5) If an order made under this section directs an amendment of the articles or by-laws of a corporation, no other amendment to the articles or by-laws shall be made without the consent of the Court, until the Court otherwise orders.

(6) If an order made under this section directs an amendment of the articles of a corporation, the directors shall send articles of reorganization in prescribed form to the Registrar together with the documents required by sections 19 and 108, if applicable.

(7) A shareholder is not entitled to dissent under section 184 if an amendment to the articles is effected under this section.

(8) An applicant under this section may apply in the alternative under section 207(1)(a) for an order for the liquidation and dissolution of the corporation.

NOTE: Relief by the Court on the ground of oppression or unfairness. CBCA s. 234 varied.

Comment

1. For comment on the term "complainant", see Comment No. 5 on s. 232. The extensions of the remedy to past shareholders, to the shareholders of affiliates, to the present and past directors and officers of the corporation and its affiliates, to the Director of the Securities Commission, and to such other persons as the court considers proper, are novel and in theory far-reaching. Applications are, however, subject to the control of the court, which is not required to grant the relief, and the extensions appear on the whole to be desirable in the interest of ensuring that relief is not denied in proper cases for technical reasons.

2. The complainant would bring the application under s. 234(1) in his own right, unlike the application under s. 232 in

which the complainant would seek leave to enforce a right of the corporation.

3. Insofar as shareholders and their own corporation are concerned, s. 234(2) would state in general terms the grounds which the courts have recognised as giving rise to a shareholder's right to bring action. The grounds are more clearly organized, and would go beyond the traditional language of "oppression" to that of "unfairness". The drafters of the CBCA thought (p. 163), and we agree, that

> "on summing up that standards set out in s. [234(2)] it is difficult to improve on the frequently quoted interpretation of s. 210 [of the U.K. Companies Act, 1948] 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."

The same grounds would apply to the other categories of complainants.

4. S. 234(2) would not require that the complainant himself be the object of oppression; indeed, the Director of the Securities Commission could not be, and we doubt that officers, as such, have personal "interests" which are entitled to protection under s. 234. However, we think that the courts can be trusted to ensure that busybodies are not allowed to abuse the machinery established by the section, and we think the structure of s. 234(2) is necessary to ensure that a proper application is not stifled for lack of someone with standing to bring it.

5. It should be noted that, although only a creditor who is a security holder could apply under s. 234, the application could be founded upon the oppression of a creditor whether or not he is the kind of creditor who is a security holder. The inclusion of the word "creditor" should ensure that a shareholder would not be denied relief on the grounds that it is in his character as a creditor and not in his character as shareholder that he is oppressed.

6. We are somewhat dubious about a provision that empowers the court to make "any order it thinks fit". We include these words for the sake of uniformity and expect that the court will give them an interpretation which will be appropriate to the purpose of the section.

7. Even apart from those general words at the beginning, the individual powers set out in s. 234(3) appear broad enough to enable the court to do justice in any case, including as they do, the power to issue injunctions, the power to change the corporation's constitution and to replace its directors,

the power to rectify registers, the power to liquidate and dissolve the corporation and the power to set aside contracts and direct the payment of money.

8. We see no reason to question the injunctive power under s. 234(3)(a), or the power to appoint a receiver or receiver-manager under s. 234(3)(b). The powers to direct an investigation under s. 234(3)(o) and to put the company into liquidation under s. 234(3)(n), though drastic, flow from the basis of the claim in oppression. Subject to comment 9, the power to change the company's constitution under s. 234(3)(c) is appropriate to a case in which the wrongdoers have established or changed it so as to facilitate oppression. The powers relating to the issue and buy-back of securities under s. 234(3)(e), (g) and (h) are useful incidentals. The powers to require financial statements under s. 234(3)(k), to change directors under s. 234(3)(f), and to rectify registers and records under s. 234(3)(m) are necessary.

9. We do not think that the proposed ABCA should follow CBCA s. 234(3)(c) by empowering the court to create or amend a unanimous shareholder agreement. Conceptually we find it difficult to say that what appears in a court order is an agreement among individuals, and we are reluctant to make the necessary change in the definition of unanimous shareholder agreement which we think would be necessary to give effect to a legal fiction of this kind. Perhaps our views are stronger because of the increased scope which we can foresee for the unanimous shareholder agreement. We think that a provision allowing the court to amend the articles of incorporation so as to override a unanimous shareholder agreement is sufficient to achieve the objects of s. 234, and s. 234(3)(d) has been added in order to achieve that result.

10. While the power to direct the payment of a dividend might be read into the general words which open s. 234(3), we think it desirable to remove doubt by adding a specific power, which appears in s. 234(3)(i), of the draft Act. The denial of dividends may be one of the principal means of oppression, and we do not think that the courts would use the power to order that one be paid except in a case in which the denial is used for that purpose.

11. CBCA s. 234(6) provides that payments are not to be made under CBCA s. 234(3)(f) or (g) unless a liquidity test and a solvency test are met. In the case of CBCA 234(3)(g) (an order repaying all or part of the money paid by a security holder for a security) it seems to us that the complainant's claim must be one based on misrepresentation or something of that kind, and that there is no reason to postpone it to the claims of creditors; the draft Act therefore does not require that either test be satisfied. In the case of CBCA s. 234(3)(f) (an order for repurchase of securities) it appears to us that the most likely case is that of a re-purchase of shares and that the appropriate tests are therefore those in s. 32(2); and s. 234(3)(g) of the draft Act so provides. In the case of s. 234(3)(i) (which we have added), the appropriate tests appear to us to be those in s.

40; and s. 234(3)(i) so provides.

12. We are concerned about s. 234(3)(j), the power to set aside contracts. If it should be interpreted to affect the rights of outsiders dealing with the corporation in good faith we would think that it goes too far; but it should be interpreted as merely being intended to prevent a wrongdoer from keeping the proceeds of his wrongdoing under guise of contract, we are in favour of it. We accept it as we expect that the courts will apply it only in the latter kind of case.

13. We are also concerned about s. 234(3)(l), "an order compensating an aggrieved person". We are not entirely sure whether it will be held to create a new cause of action for damages against another person for oppression. It appears to do so, but it might be interpreted merely as a procedural means of enforcing one which would arise under the present law. We accept it, however, as we expect that the courts will exercise the power only when it is appropriate to do so.

14. S. 234(3)(q) would allow the court, in an application under s. 234, to give the relief which it could give in an application under s. 232, i.e., leave to bring or maintain an action on behalf of the corporation. Its purpose is to avoid a situation in which an application must be dismissed merely because the applicant made the wrong choice of procedure.

15. In Ruskin v. Canada All-News Radio Ltd. (1979) 7 B.L.R. 142 (Ont. H.C.) Mr. Justice Eberle of the Ontario High Court purported to revoke a certificate of amalgamation (though he withdrew the order when the parties gave suitable undertakings). It appears to us that the court should not have the power to do so. While the circumstances in that case were extreme in that the amalgamation was effected on the very day on which the application was made to prevent it, and in that the revocation order was made within hours of the amalgamation, we think that the dangers inherent in such an order outweigh the advantage of having it available for an extreme case, and s. 234(4) of the draft Act would accordingly make it clear that s. 234(3) would not confer the power. Our lawyer consultants agreed with that additoin to s. 234.

16. The purpose of s. 234(6) would be to require the directors to give effect to an order under s. 234(3)(c) amending the articles of incorporation or the by-laws. It would do so by requiring the directors to file articles of reorganization. It would follow CBCA s. 234(4)(a) in its effect though it is drafted differently.

17. The purpose of s. 234(5) would be to ensure that a corporation could not make nugatory an amendment under s. 234(3)(c) by a further amendment to its articles or by-laws. The subsection purports to entrench all of the articles against future amendment without the consent of the court, but we expect that the court would "otherwise order" so that only those articles affected by the order would be

entrenched against amendment.

18. Obviously an order designed to remedy oppression and made after consideration of all the circumstances should preclude the right to dissent and be bought out. S. 234(7) would so provide.

19. The relationship between the remedy of liquidation and the oppression remedy is somewhat complex. Firstly, CBCA s. 207(1) allows a shareholder to apply to the court for an order for the liquidation and dissolution of a corporation; he may do so on the same grounds of oppression or unfairness on which a complainant may apply for relief under CBCA s. 234, and on other grounds which are not relevent here. Secondly, under CBCA s. 234(3)(1), a complainant (a term which, as we have noted, includes a past or present director, shareholder or holder of a debt security of the corporation, any other proper person, and the Director of the Securities Commission) may apply for an order for the liquidation and dissolution of the corporation. Thirdly, CBCA s. 234(7) allows an applicant under the section (i.e., a "complainant") to apply in the alternative for an order under CBCA s. 207 (i.e., an order for liquidation and dissolution). There appears to us to be some duplication in all this. Our inclination would be to delete CBCA s. 234(7) and to amplify CBCA s. 234(3)(1) to read "an order for liquidation and dissolution under s. 207", so as to make it clear that the procedures and powers under Part 17 would be available; we think that, when read with s. 207(2) which empowers the court in an application under s. 207 to make an order under s. 234, the resulting provisions would ensure that an applicant under either s. 207 or 234 would have the maximum flexibility and would not fall between the stool of s. 207 and the stool of s. 234. However, in view of the importance which we attach to uniformity in the developing remedies for oppression, the draft Act follows the CBCA, except for changing s. 234(8) to allow for an alternative application only under s. 207(1)(a) in order to make it clearer that a s. 234 applicant could not apply under s. 207 for liquidation under the "just and equitable" grounds of jurisdiction. The reason why this restriction is important is that the "complainant" under s. 234 includes the other categories we have mentioned, while an application under s. 207 includes only a shareholder.

> 235.(1) An application made or an action brought or intervened in under this Part shall not be stayed or dismissed by reason only that it is shown that an alleged breach of a right or duty owed to the corporation or its subsidiary has been or may be approved by the shareholders of the corporation or the subsidiary, but evidence of approval by the shareholders may be taken into account by the Court in making an order under section 207, 233 or 234.
>
> (2) An application made or an action brought or intervened in under this Part

shall not be stayed, discontinued, settled or dismissed for want of prosecution without the approval of the Court given upon such terms as the Court thinks fit and, if the Court determines that the interests of any complainant may be substantially affected by the stay, discontinuance, settlement or dismissal, the Court may order any party to the application or action to give notice to the complainant.

(3) A complainant is not required to give security for costs in any application made or action brought or intervened in under this Part.

(4) In an application made or an action brought or intervened in under this Part, the Court may at any time order the corporation or its subsidiary to pay to the complainant interim costs, including legal fees and disbursements, but the complainant may be held accountable for the interim costs upon final disposition of the application or action.

NOTE: Court approval of stay, dismissal, discontinuance or settlement. CBCA s. 235.

Comment

1. Under the rule in Foss v. Harbottle, approval of an act by the shareholders, or even the possibility that the shareholders might approve it, is, with exceptions, a bar to an action by a shareholder alleging misconduct. S. 235(1) would abolish that part of the rule.

2. In place of the abolished rule, s. 235(1) would establish a different one, namely, that the court may take evidence of the shareholders' approval into account in deciding whether to grant leave under s. 232 or relief against oppression under s. 234 or s. 207.

3. Shareholders' approval would be relevant in an application for leave to bring, prosecute or defend an action on behalf of the corporation. S. 232(2) would require the court to consider whether the bringing, prosecution or defence appears to be in the interests of the corporation, and in an application for relief under s. 234, s. 234(2) would require the court to decide whether there has been oppression or unfairness. The drafters of the CBCA said (Proposals, p. 164):

> "If, for example, the alleged misconduct was ratified by majority shareholders who were also the directors whose conduct is attacked, evidence of shareholder ratification would carry little or no weight. If, however, the

> alleged misconduct was ratified by a majority of disinterested shareholders after full disclosure of the facts that evidence would carry much more weight indicating that the majority of disinterested shareholders condoned the act or dismissed it as a mere error of business judgment."

We agree with these examples, though the greater weight is likely to be given to ratification only if the complainant is a shareholder whose interests are affected in the same way as the interests of the approving shareholders.

4. The drafters of the CBCA go on to say (Proposals, p. 165) that "implicit in this policy is the premise that dominant shareholders, who are in a position to control management, owe a fiduciary duty to minority shareholders comparable to the duty that directors and officers owe to the corporation". We do not think that the provisions under consideration go quite as far as creating such a fiduciary duty. What we think those provisions do is to limit the power of the dominant shareholders so that if they have committed a wrong to the corporation they cannot use their voting power to deny a remedy to a minority shareholder or to another complainant, and so that they cannot use their voting powers to impose a measure which is oppressive to, or which unfairly disregards the rights of a minority shareholder or other complainant.

5. The drafters of the CBCA said (Proposals, p. 165):

> 488. Subsection (2) of section 19.05 complements the courts' power to supervise the commencement and conduct of a derivative action, providing for court supervision of any settlement or other disposition of the action before trial. Its object is to preclude "strike suits" to extort a financial settlement from the management of a corporation. One example is where directors, who have been demonstrably negligent in the administration of the corporation's affairs, settle an action to avoid undesirable publicity. A grosser case arises where the directors, sued in a derivative action alleging that they have diverted corporate profits to themselves, settle the action using corporate funds (or settle the action personally and then seek indemnity from the corporation), a practice that has been characterized and condemned as "double looting" in one reported case: New York Dock Co. v. McCollum 16 N.Y.S. 2d 844 (1939). The New York Business Corporation Law (s. 626), modelled after Rule 23.1 of the U.S. Federal Rules of Civil Procedure, like subsection (2), now prohibits the settlement of a derivative action without previous court approval.

We think that what this comes down to is that s. 235(2) is necessary in order to ensure that the complainant's right under s. 232 to bring, prosecute or defend an action is not taken away by a settlement effected by the corporation, and that the rights of others affected are not taken away by a settlement or dismissal agreed to by the complainant.

6. A requirement of security for costs would place a major obstacle in the way of a complainant. In the case of derivative action, where the question is more likely to arise, the court would screen out actions which should not be brought. S. 235(3) would therefore provide that the complainant need not put up security.

7. S. 235(4) would go further than s. 235(3) and would enable the court to require the corporation itself to put up the money to fight either a derivative action or personal action; that may be necessary in a particular case if an action which should be brought is to be maintained, and it would be subject to the court's discretion. The complainant would still have to reckon with the possibility of having to pay back the advances when the action is disposed of.

236.(1) If the name of a person is alleged to be or to have been wrongly entered or retained in, or wrongly deleted or omitted from, the registers or other records of a corporation, the corporation, a security holder of the corporation or any aggrieved person may apply to the Court for an order that the registers or records be rectified.

(2) If the corporation is a distributing corporation, an applicant under this section shall give the Director notice of the application and the Director is entitled to appear and be heard in person or by counsel.

(3) In connection with an application under this section, the Court may make any order it thinks fit including, without limiting the generality of the foregoing, any or all of the following:

(a) an order requiring the registers or other records of the corporation to be rectified;

(b) an order restraining the corporation from calling or holding a meeting of shareholders or paying a dividend before the rectification;

(c) an order determining the right of a party to the proceedings to have his name entered or retained in, or deleted or omitted from, the

registers or records of the corporation, whether the issue arises between two or more security holders or alleged security holders, or between the corporation and any security holders or alleged security holders;

(d) an order compensating a party who has incurred a loss.

NOTE: Court order to rectify records. CBCA s. 236 varied so as to confine the operation of subsection (2) to distributing corporations.

Comment

1. Under s. 47(1) a corporation would be entitled to treat the registered owner of a security as the person entitled to all the rights of ownership. In case of a wrongful registration it is necessary for the rightful owner to have the registration rectified, and s. 236 provides a summary machinery for rectification. The section also covers other registers and records.

2. In the case of a distributing corporation the notice to the Director of the Securities Commission which is required by s. 236(2) would give him an opportunity to decide whether there is a general interest of investors involved, and, if there is, to intervene to protect it. CBCA s. 236(2) is applicable to all CBCA corporations. It appears to us that in the case of smaller corporations, however, the question is likely to be one of particular private rights, and we do not see any reason for the Director's intervention. We therefore propose that CBCA s. 236(2) be varied by restricting it to distributing corporations.

3. S. 236(3)(b) would allow the court to prevent irrevocable action being taken on the strength of a register until it is decided that the register is correct or until it is made correct.

4. In the absence of s. 236(3)(c) and (d), the court would have power to order rectification of a register, but it would not have power in the same proceedings to determine the rights of the parties. We think that for convenience both powers should be exercisable in the same proceedings.

237. The Director or the Registrar may apply to the Court for directions in respect of any matter concerning his duties under this Act, and on the application the Court may give any directions and make any further order as it thinks fit.

NOTE: Court order for directions. CBCA s. 237, varied by

including a reference to the Registrar.

Comment

1. S. 237 would provide a summary machinery through which the Director and Registrar could obtain the direction of the court when in doubt as to what their legal duties are.

2. The proposed Act would divide between the Director and the Registrar the functions which under the CBCA are performed by the Director alone. S. 237 is therefore varied so as to refer to both officials.

> 238.(1) If the Registrar refuses to file any articles or other document required by this Act to be filed by him before the articles or other document become effective, he shall, within 20 days after its receipt by him or 20 days after he receives any approval that may be required under any other Act, whichever is the later, give written notice of his refusal to the person who sent the articles or document, giving reasons for his refusal.
>
> (2) If the Registrar does not file or give written notice of his refusal to file any articles or document within the time limited in subsection (1), he is deemed for the purposes of section 239 to have refused to file the articles or document.

NOTE: Refusal by Registrar to file. CBCA s. 238, varied to refer to the Registrar.

Comment

1. S. 238(1) would impose a duty upon the Registrar to give notice of refusal of a document within 20 days of receipt (or within 20 days of any approval required by another Act).

2. A failure by the Registrar to respond could be treated as a refusal to register so that the applicant could appeal under s. 239.

> 239.(1) A person who feels aggrieved by a decision of the Registrar
>
> (a) to refuse to file in the form submitted to him any articles or other document required by this Act to be filed by him,
>
> (b) to approve a name, to change, revoke or disapprove a name, or to

refuse to reserve, accept, change or revoke a name under section 12 or 269,

(c) to refuse under section 181(11) to permit a continued reference to shares having a nominal or par value,

(d) to refuse to issue a certificate of discontinuance under section 182,

(e) to refuse to revive a corporation under section 201,

(f) to dissolve a corporation under section 205, or

(g) to refuse an exemption under section 264(2),

(h) to cancel the registration of an extra-provincial corporation under section 272,

may apply to the Court for an order requiring the Registrar to change his decision, and upon the application the Court may so order and make any further order it thinks fit.

(2) A person who feels aggrieved by a decision of the Director to refuse to grant an exemption under section 3(3), 145(1), 150(2) or 165(3) may apply to the Court for an order requiring the Director to change his decision, and upon the application the Court may so order and make any further order it thinks fit.

NOTE: Appeal from decision of Registrar or Director. CBCA s. 239 varied to reflect the separate functions of the Registrar and the Director.

Comment:

S. 239 is intended to provide an appeal from all exercises of administrative discretionary authority of any importance granted by the proposed ABCA.

240. If a corporation or any shareholder, director, officer, employee, agent, auditor, trustee, receiver, receiver-manager or liquidator of a corporation does not comply with any provision of this Act, the regulations, the articles or by-laws or a unanimous shareholder agreement, a complainant or a

creditor of the corporation may, in addition to any other right he has, apply to the Court for an order directing that person to comply with, or restraining that person from acting in breach of, any of those provisions, and upon the application the Court may so order and make any further order it thinks fit.

NOTE: Compliance or restraining order. CBCA s. 240, varied to include shareholders.

Comment

1. S. 240 is important and desirable. It would confirm that the court has power to enjoin a contravention of the Act, the regulations, or a company's constitutional documents (though the court probably has that power anyway). It would go on to give the court power to order compliance, a power the existence of which would in many cases be doubtful.

2. We have varied CBCA s. 240 by adding "shareholder" to the list of those against whom an order might be made. It might well be important, we think, to ensure that a shareholder votes in accordance with the constitution of the corporation, and acts in accordance with the provisions of a unanimous shareholder agreement.

241. Where this Act states that a person may apply to the Court, the application may be made in a summary manner in accordance with the rules of the Court by originating notice, petition or otherwise as the rules provide, and subject to any order respecting notice to interested parties, or any other order the Court thinks fit.

NOTE: Summary application to Court. CBCA s. 241 varied.

Comment

S. 241 states what is obvious under the Alberta Rules of Court, but is included in the proposed Act for convenience and for the sake of uniformity.

242.(1) An appeal lies to the Court of Appeal from any order made by the Court of Queen's Bench under this Act.

(2) An appeal lies from an order of the Provincial Court of Alberta under section 245(1) to the Court of Queen's Bench.

NOTE: Appeals from Court orders. CBCA s. 242, with the addition of subsection (2).

243.(1) A person who makes or assists in making a report, return, notice or other document required by this Act or the regulations to be sent to the Registrar, the Director or any other person that

(a) contains an untrue statement of a material fact, or

(b) omits to state a material fact required in it or necessary to make a statement contained in it not misleading in the light of the circumstances in which it was made,

is guilty of an offence and liable on summary conviction to a fine of not more than $5000 or to imprisonment for a term of not more than 6 months or to both.

(2) If a body corporate contravenes subsection (1), then, whether or not the body corporate has been prosecuted or convicted in respect of the contravention, any director or officer of the body corporate who knowingly authorizes, permits or acquiesces in the contravention of subsection (1) is guilty of an offence and liable on summary conviction to a fine of not more than $5000 or to imprisonment for a term of not more than 6 months or to both.

(3) No person is guilty of an offence under subsection (1) or (2) if the untrue statement or omission was unknown to him and in the exercise of reasonable diligence could not have been known to him.

NOTE: Offences relating to reports, returns etc. CBCA s. 243.

Comment:

S. 243 would impose heavier sanctions for knowingly making a false or misleading report than s. 244 would impose for ordinary breaches of the proposed ABCA.

244. Every person who, without reasonable cause, contravenes a provision of this Act or the regulations for which no punishment is provided is guilty of an offence punishable on summary conviction.

NOTE: General offence. CBCA s. 244.

Comment:

S. 244 would provide a general sanction for breaches of the proposed ABCA. A number of sections throughout the draft Act would impose heavier sanctions.

245.(1) If a person is found guilty of an offence under this Act or the regulations, the Court in which proceedings in respect of the offence are taken may, in addition to any punishment it may impose, order that person to comply with the provisions of this Act or the regulations for the contravention of which he has been found guilty.

(2) A prosecution for an offence under this Act may be instituted at any time within 2 years from the time when the subject-matter of the complaint arose.

(3) No civil remedy for an act or omission is suspended or affected by reason that the Act or omission is an offence under this Act.

NOTE: Order to comply. CBCA s. 245 varied in subsection (1).

Comment:

1. S. 245(1) would give the court (including the Provincial Court where an offence is prosecuted there) power to order an offender to comply with the proposed Act or regulations This would be a useful way of ensuring compliance.

2. S. 245(3) would avoid a finding by the court that the imposition of a sanction by the Act precludes a civil action against the offender.

PART 20

GENERAL

246.(1) A notice or document required by this Act, the regulations, the articles or the by-laws to be sent to a shareholder or director of a corporation may be sent by mail addressed to, or may be delivered personally to,

(a) the shareholder at his latest address as shown in the records of the corporation or its transfer agent, and

(b) the director at his latest address as shown in the records of the corporation or in the last notice filed under section 101 or 108.

(2) For the purpose of the service of a notice or document, a director named in a notice sent by a corporation to the Registrar under section 101 or 108 and filed by the Registrar is presumed to be a director of the corporation referred to in the notice.

(3) A notice or document sent by mail in accordance with subsection (1) to a shareholder or director of a corporation is deemed to be received by him at the time it would be delivered in the ordinary course of mail unless there are reasonable grounds for believing that the shareholder or director did not receive the notice or document at the time or at all.

(4) If a corporation sends a notice or document to a shareholder in accordance with subsection (1) and the notice or document is returned on three consecutive occasions because the shareholder cannot be found, the corporation is not required to send any further notices or documents to the shareholder until he informs the corporation in writing of his new address.

NOTE: Sending of notices and documents to shareholders and directors. CBCA s. 246, varied in subsection (2).

Comment

1. S. 246 would provide for the giving of corporate notices and the sending of corporate documents to directors and shareholders. Under s. 246, these can be sent to the latest address shown in the records of the corporation. If they

are sent by mail they are deemed to be received at the time they would be delivered in the ordinary course of mail unless there are reasonable grounds for believing that the shareholder did not receive the notice or document at the time or at all. S. 129(2) would make special provision for notices of shareholders' meetings.

2. S. 246(4) would relieve the corporation from the obligation of sending repeated notices and documents if on three occasions one is returned because the shareholder cannot be found.

3. S. 246 also deals with notices or documents required by the Act and the regulations to be sent to shareholders and directors. In the case of a director, the notices or documents can be sent to the director's address in the last notice filed with the Registrar, as well as his latest address as shown in the records of the corporation.

4. S. 246(2) presumes the persons named in the last notice to be directors only for the purpose of service of documents, and not "for the purposes of this Act" as does its CBCA counterpart. Taken literally, the CBCA provision would mean that displaced directors would legally be the directors of the corporation until the new notice reaches the Registrar; while it is unlikely that it would be read that way we think that the subsection should in terms be restricted to its true purpose. S. 18 of the draft Act already protects outsiders dealing with the corporation where protection is appropriate.

247.(1) A notice or document required or permitted to be sent to or served upon a corporation may be

(a) delivered to its registered office, or

(b) sent by registered mail to

(i) its registered office, or

(ii) the post office box designated as its address for service by mail,

as shown in the last notice filed under section 19.

(2) A notice or document sent by registered mail to the corporation in accordance with subsection (1)(b) is deemed to be received or served at the time it would be delivered in the ordinary course of mail unless there are reasonable grounds for believing that the corporation did not receive the notice or document at that time or at all.

NOTE: Notice to and service upon a corporation. CBCA s. 247 varied to also allow for service by registered mail addressed to the post office box designated as its address for service under s. 19.

Comment

1. S. 247(1) would allow any person to serve a notice or document upon a corporation by delivering the notice or document to the registered office of the corporation. The section does not qualify the provision in any way, and we think that it would apply even during the 15 days which the draft Act would allow for the filing of a notice of a change of registered office (s. 19(5)).

2. S. 247(1) would also allow a notice or document required or permitted to be sent to or served upon a corporation to be sent by registered mail to its registered office or to its designated post office address. In the case of mailing, however, s. 247(2) provides only a rebuttable presumption that the notice or document is received or served at the time it would be delivered in the ordinary course of the mail. The problem of determining what is "the ordinary course of mail in Canada today", as Stevenson D.C.J. (as he then was) observed in Rizzie v. J.H. Lilley and Associates Ltd., [1976] 2 W.W.R. 97, is not easy; and even if it can be determined, the presumption is, as we have mentioned, rebuttable. The assistance which the section gives to persons trying to serve documents is not as great as it might be, and not as great as ACA s. 289 appears to give, as the ACA section says that the document may be served on a company by sending it by registered post to the registered office and does not say that there is only a rebuttable presumption of service. However, both Stevenson D.C.J. in the Rizzie case and Miller D.C.J. (as he then was) in Northside Electric Ltd., v. Brynko Construction Limited [1977] 1 Alta. L.R. (2d) 157 held that s. 18(4) of the Interpretation Act applies, and that subsection does allow a corporation to prove the contrary. S. 247 of the draft Act therefore appears to be consistent with the current law, and we do not think that, in fairness to corporations, the law should go further. It should be noted that in the Rizzie case Judge Stevenson held that service could not be taken to be effective upon the date of mailing of the registered letter, and Judge Miller in the Brynko case held that service could not be held to be effective if, before the default judgment was entered upon the strength of service of the statement of claim by registered mail, the registered envelope is returned undelivered.

248. If a notice or document is required by this Act or the regulations to be sent, the sending of the notice or document may be waived or the time for the notice or document may be waived or abridged at any time with the consent in writing of the person entitled thereto.

NOTE: Waiver of notice. CBCA s. 248.

249.(1) Where this Act requires or authorizes the Registrar to issue a certificate or to certify any fact, the certificate shall be signed by the Registrar or by an individual authorized by the Registrar.

(2) Except in a proceeding under section 206 to dissolve a corporation, a certificate referred to in subsection (1) or a certified copy of it, when introduced as evidence in any civil, criminal or administrative action or proceeding, is conclusive proof of the facts so certified without proof of the signature or official character of the person appearing to have signed the certificate.

NOTE: Certificate of Registrar and evidence. CBCA s. 249.

Comment

S. 249(2) would make the Registrar's certificate conclusive proof of the facts certified, without proof of signature, the only exception being a case in which dissolution of the corporation is sought under s. 206, where one of the grounds is that a certificate was procured by misrepresentation. S. 249(2) goes farther than the ACA, which attaches conclusiveness only to the certificate of incorporation. Since the Registrar's certificates would relate to what is filed with him, and to the results of filing (such as incorporation, amalgamation, or amendment of articles), it seems appropriate that the certificate should be made conclusive.

250.(1) A certificate issued on behalf of a corporation stating any fact that is set out in the articles, the by-laws, a unanimous shareholder agreement, the minutes of the meetings of the directors, a committee of directors or the shareholders, or in a trust indenture or other contract to which the corporation is a party, may be signed by a director, an officer or a transfer agent of the corporation.

(2) When introduced as evidence in any civil, criminal or administrative action or proceeding,

(a) a fact stated in a certificate

referred to in subsection (1),

(b) a certified extract from a securities register of a corporation, or

(c) a certified copy of minutes or extract from minutes of a meeting of shareholders, directors or a committee of directors of a corporation,

is, in the absence of evidence to the contrary, proof of the facts so certified without proof of the signature or official character of the person appearing to have signed the certificate.

(3) An entry in a securities register of, or a security certificate issued by, a corporation is, in the absence of evidence to the contrary, proof that the person in whose name the security is registered is owner of the securities described in the register or in the certificate.

NOTE: Certificate of corporation, proof, and security certificate. CBCA s. 250.

Comment

S. 250 would give to the corporate records required or authorized by the draft Act, the effect of prima facie evidence of facts recorded in them.

251. If a notice or document is required to be sent to the Director or Registrar under this Act, the Director or Registrar may accept a photostatic or photographic copy of the notice or document.

NOTE: Copies. CBCA s. 251.

252. The Registrar may require that a document or a fact stated in a document required by this Act or the regulations to be sent to him shall be verified under oath or by statutory declaration.

NOTE: Proof required by Registrar. CBCA s. 252.

253.(1) In accordance with The Public Service Act there may be appointed a

Registrar of Corporations and one or more Deputy Registrars of Corporations and any other employees as may be necessary to administer this Act.

(2) The Minister may prescribe a seal for use by the Registrar in the performance of his duties.

(3) A notice or document may be sent or served on the Registrar by leaving it at an office of the Registrar or by mailing it by registered mail addressed to the Registrar at an office of the Registrar and if sent by registered mail is deemed to be received or served at the time it would have been delivered in the ordinary course of mail unless there are reasonable grounds for believing that the Registrar did not receive the notice or document at that time or at all.

NOTE: Appointment of Registrar, Registrar's seal, and service upon Registrar. ACA ss. 278 and 282; Saskatchewan BCA s. 281.

Comment

S. 253 would provide for the Registrar of Corporations who is referred to throughout the Act as the "Registrar," and would make some incidental provisions.

253.1 The Registrar shall publish, at the times specified by the Minister but not less frequently than once a month, a periodical containing

(a) the information required by this Act or the regulations to be published in the Registrar's periodical, and

(b) any other information relating to the administration of this Act that the Registrar considers will be useful to the public.

NOTE: Registrar's publication. New.

Comment

1. The publication of certificates and notices in the Alberta Gazette imposes an administrative burden on the Registrar which appears to us to be unnecessary. S. 253.1 would require the Registrar, instead, to publish a periodical at

least monthly. The periodical should be available to anyone who wants to receive it and should be issued at a price reflecting administrative cost. We think that the information requirements of the public would be as well served by such a publication as by the inclusion of corporate materials in the Alberta Gazette.

2. We think also that steps should be taken to cut down on the unnecessary publication of unhelpful information. To take an extreme example, it is difficult to see what benefit will be conferred on anyone by the publication of the information that a company has been incorporated under the name of 200,000 Investments Ltd. On the other hand, we think that useful information can and should be published.

3. The draft Act would require the Registrar to include in his publication information which will clearly affect persons dealing with a corporation, or which will bring to the attention of the corporation and those interested in it certain proposed actions of the Registrar affecting it. That information is as follows:

   (1) Notice of a corporation's intention to liquidate and dissolve (s. 204(7)(b)(i).

   (2) Notice of revocation of corporation's intention to liquidate and dissolve (s. 204(10)).

   (3) Notice of intention to dissolve corporation under court order (s. 206(4)(b)).

   (4) Notice of appointment of a liquidator (s. 214(b)).

   (5) Notice of Registrar's intention to dissolve a corporation (s. 205(2)(b)).

   (6) Notice of Registrar's intention to cancel the registration of an extra-provincial corporation (s. 272(2)(b)).

   (7) Notice of commencement of liquidation proceedings of an extra-provincial corporation (s. 278(2)(a)).

   (8) Notice of proposed regulations (s. 254(2)).

4. We recommend that the regulations, but not the draft Act, require the Registrar to include in his publication the following information:

   (1) Notice of incorporations (other than the incorporation under a number).

   (2) Notice of change of a corporation's name.

   (3) Notice of amalgamation involving one or more ABCA corporations or one or more extra-provincial corporations.

   (4) Notice of continuance under the ABCA of a corporation incorporated elsewhere.

(5) Notice of continuation by an ABCA corporation under the laws of another jurisdiction.

(6) Notice of correction of a Registrar's certificate under s. 258.

5. We will set out our reasons for suggesting that the regulations rather than the statute provide for publication of the things listed in Comment 4. We think that that information should be published, but only if the public or interest groups find it of sufficient value to justify the imposition upon the Registrar of the cost and the administrative burden of publishing it. We do not know ourselves, and we doubt that anyone does, just what information is now found sufficiently valuable, or what information would be found sufficiently valuable. We think that the Registrar should publish the information for a time, that he should see who buys it, and that he should take additonal steps (e.g., inquiry from the legal and accounting professions, credit reporting agencies, credit granters, and government agencies) to see how much use it is to them. After a reasonable period, the Registrar should assess the perceived need for the publication of each kind of information and make recommendations for any changes in the regulations which appear appropriate; we think that representatives of the interested groups should be advised of any proposed deletion before a decision is made.

6. We think that publication of information about changes in the constitution of a corporation is not necessary, e.g. changes in capitalization or in restrictions on the businesses which the corporation may carry on. It appears to us that notices of meetings will effectively notify shareholders of proposed changes and that the publication of notices of changes is not an effective protection to outsiders. However, if it appears that users want that kind of information and will pay for it, it should be included in the Registrar's publication.

253.2(1) If he considers it appropriate to do so, the Registrar may enter into an agreement with a person under which the fees and other charges payable by that person to the Registrar under this Act or the regulations will be charged to the credit of that person on a continuing basis and upon the conditions that the Registrar considers necessary, and in that case the amounts so charged shall, except for the purposes of subsection (4), be deemed to have been paid in accordance with this Act or the regulations.

(2) If any amount charged to the credit of a person under subsection (1) is not paid within 15 days, or within any other period that the Registrar may require, of a request for payment by the Registrar, no further amounts may be charged to the account of that

person until all amounts owing are paid in full.

(3) The Registrar may terminate an agreement under subsection (1) with any person on 7 days' notice in writing sent by registered mail to the person at his last address known to the Registrar.

(4) Notwithstanding anything in this Act, if a person has not paid the fees required to be paid by this Act or the regulations and has been requested by the Registrar to do so, the Registrar shall not perform any service or issue any certificate or file any document at the request of or for the benefit of that person, unless, in the opinion of the Registrar, exceptional circumstances exist that warrant the performance of those services.

NOTE: Agreements regarding payment of fees. ACA ss. 287.1 and 287.2.

254.(1) Subject to subsection (2) and (3), the Lieutenant Governor in Council may make regulations

(a) prescribing any matter required or authorized by this Act to be prescribed;

(b) requiring the payment of a fee in respect of the filing, examination or copying of any document, or in respect of any action that the Registrar is required or authorized to take under this Act, and prescribing the amount of the fee;

(c) prescribing the format and contents of annual returns, notices and other documents required to be sent to the Registrar or to be issued by him;

(d) prescribing rules with respect to exemptions permitted by this Act;

(e) prescribing that, for the purpose of section 149(1)(a), the standards as they exist from time to time, of an accounting body named in the regulations shall be followed.

(2) Subject to subsection (3), the Minister shall publish in the Registrar's periodical at least 60 days before its

proposed effective date a copy of every regulation that the Lieutenant Governor in Council proposes to make under this Act and a reasonable opportunity shall be afforded to interested persons to make representations with respect to it.

(3) The Minister is not required to publish a proposed regulation if the proposed regulation

(a) grants an exemption or relieves a restriction,

(b) establishes or amends a fee,

(c) has been published pursuant to subsection (2) whether or not it has been amended as a result of representations made by interested persons as provided in that subsection, or

(d) makes no material substantive change in an existing regulation.

NOTE: Regulations, publication of proposed regulation, and exceptions. CBCA s. 254.

Comment

S. 254 would authorize the making of necessary regulations. S. 254(2) would require publication before adoption and would be novel in Alberta. However, CBCA s. 254(2) so provides, without apparent inconvenience, and it does not appear that regulations under a business corporations statute will be so urgent that the period of advance notice will have adverse effects.

255.(1) In this section, "statement" means a statement of intent to dissolve and a statement of revocation of intent to dissolve referred to in section 204.

(2) Where this Act requires that articles or a statement relating to a corporation shall be sent to the Registrar, unless otherwise specifically provided,

(a) 2 copies (in this section called "duplicate originals") of the articles or the statement shall be signed by a director or an officer of the corporation or, in the case of articles of incorporation, by an incorporator, and

(b) upon receiving duplicate originals of any articles or statement that conform to law, any other required documents and the prescribed fees, the Registrar shall

(i) endorse on each of the duplicate originals the word "Filed" and the date of the filing,

(ii) issue in duplicate the appropriate certificate and attach to each certificate one of the duplicate originals of the articles or statement,

(iii) file a copy of the certificate and attached articles or statement, and

(iv) send to the corporation or its representative the original certificate and attached articles or statement.

(3) A certificate referred to in subsection (2) issued by the Registrar may be dated as of the day he receives the articles, statement or Court order pursuant to which the certificate is issued or as of any later day specified by the Court or person who signed the articles or statement.

(4) A signature required on a certificate referred to in subsection (2) or section 256 may be printed or otherwise mechanically reproduced on the certificate.

(5) Notwithstanding subsection (3), a certificate of discontinuance may be dated as of the day a corporation is continued under the laws of another jurisdiction.

NOTE: "Statement" defined, execution and filing, date of certificate, signature, and date of certificate. CBCA s. 255.

Comment

S. 255 makes provision for procedure on the filing of documents. S. 255(3) would allow the Registrar to date his certificate back to the date of the receipt of the documents upon which it is based.

256.(1) Every corporation shall, on the prescribed date, send to the Registrar an

annual return in prescribed form and the Registrar shall file it.

(2) The Registrar may furnish any person with a certificate that a corporation has filed with the Registrar a document required to be sent to him under this Act.

(3) Upon the payment of the prescribed fee, the Registrar may issue a certificate stating that, according to his records, the body corporate named in the certificate

(a) is or is not an existing corporation on the date of issue of the certificate, or

(b) was or was not an existing corporation on the day or during the period specified in the certificate.

NOTE: Annual return, certificate of compliance, and certificate of status. CBCA s. 256 and ACA s. 286.2.

Comment

1. S. 256(1) would provide for the corporation's annual return. We would expect that the regulations would provide for the filing on or before the last day of the month immediately following its anniversary month, giving information as of the last day of the anniversary month. These provisions now appear in ACA s. 146.

2. S. 256(3) is not found in the CBCA. It would provide for a certificate of status and follows ACA s. 286.2.

257. The Registrar may alter a notice or document, other than an affidavit or statutory declaration, if so authorized in writing by the person who sent the document or by his representative.

NOTE: Alteration. CBCA s. 257.

Comment

S. 257 would recognize that alterations in a document are sometimes necessary, and that these could sometimes be conveniently effected by the Registrar under authority of the sender of the document.

258.(1) If a certificate containing an error is issued to a corporation by the

Registrar, the directors or shareholders of the corporation shall, upon the request of the Registrar, pass the resolutions and send to him the documents required to comply with this Act, and take any other steps the Registrar may reasonably require, and the Registrar may demand the surrender of the certificate and issue a corrected certificate.

(2) A certificate corrected under subsection (1) shall bear the date of the certificate it replaces.

(3) The issue of a corrected certificate under this section does not affect the rights of a person who acts in good faith and for value in reliance upon the certificate containing the error.

NOTE: Corrections, date of corrected certificate, and notice. CBCA s. 258, varied by subsection (3).

Comment

1. We find CBCA s. 258, which does not include any counterpart of s. 258(3) of the draft Act, somewhat difficult to interpret.

2. CBCA s. 258(1) may be restrictively interpreted so as to include only a case in which, on the face of the documents filed with him, the Registrar should have issued a certificate saying one thing and, by reason of an error in his office, he issued a certificate saying another; an example would be a certificate of amendment of articles of incorporation which attached only part of the articles of amendment which were filed by the Registrar. Even here we have some difficulty with the substitution of a new certificate bearing the same date as the old, and having conclusive effect under s. 249(2); there may be cases in which someone has acted upon the incorrect certificate, e.g., by buying shares on the strength of the incorrect certificate, and we have reservations about substituting conclusively and retroactively a set of facts different from that upon which the purchaser acted.

If CBCA s. 258(1) is to be considered so restrictively, we have difficulty in thinking of resolutions which the corporation could or should be required to pass; if all that is to be done is to allow the Registrar to correct his own error, it would seem to be sufficient that he get back his certificate and issue a new one. We are accordingly in some doubt as to whether s. 258(1) might be more broadly construed so as to include a case in which a certificate is issued in error (e.g., the Registrar issues a certificate of amalgamation under s. 179(4) without receiving the statutory declaration of solvency required by s. 179(2)) or even a case in which some of the procedural requirements have not

been carried out (e.g., one of the amalgamating corporations adopted the amalgamation agreement only by ordinary resolution and not by special resolution required by s. 177(5)). It is true that at each step it becomes more difficult to argue that the error is "contained in" the certificate, but we are concerned about the lengths to which the section may be taken.

4. We have inserted s. 258(3) in the draft Act so as to be sure that the issue of a corrected certificate under s. 258 would not affect rights of a person who acts in good faith and for value upon the certificate containing the error. With such rights being protected, we think that the section can be left to be interpreted by the Registrar and by corporations affected by it.

259.(1) A person who has paid the prescribed fee is entitled during usual business hours to examine a document required by this Act or the regulations to be sent to the Registrar, and to make copies of or extracts from that document.

(2) The Registrar shall furnish any person who has paid the prescribed fee with a copy or a certified copy of a document required by this Act or the regulations to be sent to the Registrar.

NOTE: Inspection and copies. CBCA s. 259.

Comment

1. CBCA s. 259(1) provides that the Director (the counterpart of the Registrar) may charge a prescribed fee to those who examine the documents, but CBCA s. 259(2) does not provide for a prescribed fee for the furnishing of copies. S. 259(2) of the draft Act would make such a provision.

2. S. 259 would make it clear that the Registrar's records are public documents. (The draft Act omits a reference to the confidentiality of an investigation report such as that which appears in CBCA s. 259(1), as such reports would not be filed with the Registrar under the draft Act.)

260.(1) Records required by this Act to be prepared and maintained by the Registrar may be in bound or loose-leaf form or in a photographic film form, or may be entered or recorded by any system of mechanical or electronic data processing or by any other information storage device that is capable of reproducing any required information in intelligible written form within a reasonable time.

(2) If records maintained by the Registrar are prepared and maintained other than in written form,

(a) the Registrar shall furnish any copy required to be furnished under section 259(2) in intelligible written form, and

(b) a reproduction of the text from those records, if it is certified by the Registrar, is admissible in evidence to the same extent as the original written records would have been.

NOTE: Records of Registrar, obligation to furnish and retention of records. CBCA s. 260 with the omission of subsection (3).

Comment

1. S. 260 would allow the Registrar to keep his records in any appropriate form, including electronic processing and storage. He would however be required to have records which could be reproduced in intelligible written form within a reasonable time.

2. The records so reproduced would be admissible in evidence under s. 260(2)(b) to the same extent as the original written records would have been.

3. CBCA s. 260(3) would relieve the Director (our Registrar) from the requirement of producing documents other than certificates and attached articles or statement after 6 years. The draft Act does not include a similar provision, as we are inclined to the view that the Registrar should be required to keep his records indefinitely, as he now does.

261.(1) In this section

(a) "Alberta company" does not include

(i) a not-for-profit company, or

(ii) a revived company;

(b) "anniversary month" with reference to an Alberta company means the month in each year that is the same as

(i) the month in which its certificate of incorporation was issued,

(ii) in the case of an amalgamated

Alberta company, the month in which its certificate of amalgamation was issued, or

(iii) in the case of an Alberta company in respect of which a certificate of registration is issued under section 157 of The Companies Act, the month in which it was incorporated in the jurisdiction other than Alberta;

(c) "not-for-profit company" means a body corporate registered under The Companies Act

(i) that does not have the word "limited" as part of its name by reason of a direction or authorization of the Registrar of Companies under Part 9 of that Act, or

(ii) that by its memorandum of association or articles of association prohibits the payment to its members of any dividend;

(d) "revived company" means a body corporate described in section 202(1) that is revived under that section for the purpose of enabling it to apply for continuance as a corporation under this section.

(2) An Alberta company shall apply to the Registrar for a certificate of continuance in accordance with this section.

(3) Section 181(3) to (5) and (7) to (12) applies with the necessary changes to an application for a certificate of continuance under this section as if the Alberta company were an extra-provincial corporation.

(4) The shareholders of the Alberta company entitled to vote at meetings of members

(a) shall adopt articles of continuance,

(b) shall authorize the directors to provide for

(i) the execution of the articles of continuance, and

(ii) the making of the application under this section,

and

(c) may adopt by-laws to become effective upon the issue of the certificate of continuance.

(5) By-laws under subsection (4)(c) may authorize the directors to require a member to surrender his share certificate for the purpose of having it cancelled and replaced by a new share certificate that complies with section 45.

(6) The shareholders of an Alberta company shall act under subsection (4)

(a) by a special resolution as defined in section 2(1) of The Companies Act, or

(b) if its memorandum of association provides that a special resolution to alter the articles of association must be passed by a majority greater than three-fourths of the votes cast in person or by proxy, by a resolution passed by that greater majority.

(7) Except with the written consent of all shareholders entitled to vote thereon under section 170(1), the articles of continuance shall not contain anything that would result in a change from the Alberta company's memorandum of association or articles of association, if the change is of a kind referred to in that subsection.

(8) A shareholder is not entitled to dissent under section 184 in respect of the adoption of articles of continuance under subsection (4).

(9) If, upon the application of a member of an Alberta company, the Court is satisfied that the articles of continuance adopted or proposed to be adopted would, if the company were continued as a corporation, effect a result that is oppressive or unfairly prejudicial to or unfairly disregards the interests of that member, the Court may

(a) restrain the Alberta company from adopting the proposed articles of continuance or proceeding with the application for a certificate of

continuance, and

(b) change the provisions of the articles of continuance before they are filed by the Registrar.

(10) If the required majority cannot be obtained under subsection (6), the Court may, upon application by the Alberta company or a member,

(a) settle the terms of the articles of continuance and the by-laws, and

(b) give directions respecting the application for a certificate of continuance.

(11) In exercising its powers under subsection (9)(b) or subsection (10)(a) with respect to an Alberta company with share capital, the Court shall make as little change as practicable in the rights of shareholders and in the relative rights of classes and series of shareholders.

(12) An application by an Alberta company for a certificate of continuance shall be made

(a) within 3 years after the last day of the anniversary month of the company first occuring after the commencement of this Act, or

(b) within any extension of that period granted under subsection (13).

(13) In case of hardship, the Court may, upon application by the company made within the period prescribed in subsection (12)(a) and with notice to the Registrar, extend that period for any additional period not exceeding one year.

(14) An Alberta company that obtains an order under subsection (13) shall send a copy of the order to the Registrar and the Registrar shall file it.

(15) An Alberta company that does not, within the time mentioned in subsection (12) make an application for a certificate of continuance that is sufficient to require the Registrar to issue the certificate, is dissolved upon the expiry of that time.

NOTE: Continuance of Alberta companies and revived companies as corporations under this Act. CBCA s. 261,

substantially varied.

Comment

1. This section would commence to give effect to our proposal that all Alberta business corporations should be required to file a new constitutional document to bring themselves under the proposed Act. See our Report, pp. 164-168.

2. Many of the principles which shape the law of business corporations are not relevant to corporate bodies which do not carry on business for the purpose of gain for their members. S. 261(1)(a) would therefore exclude them from the obligation (and the right) to continue under the proposed ABCA. S. 261(1)(c) would recognize two categories of not-for-profit company. The first (all the members of which may well be included in the second) is the category of companies which the Registrar has recognized as charitable or recreational companies under ACA Part 9. The second is the category of companies whose constitutions prohibit the payment of dividends. We think that the exclusions are broad enough to cover all companies which should be excluded. If a company which should be excluded does not have a prohibition against dividends in its memorandum or articles of association, it can add one; and if it doesn't want to add one, it is likely that it should be treated as a business corporation.

3. The definition of "Alberta company" in s. 261(1) would make s. 261 (and therefore the requirement of continuance under the proposed ABCA) applicable to all companies registered as Alberta companies except not-for-profit companies.

4. S. 261(2) and (3) would require each affected company to apply to the Registrar for a certificate of continuance. The provisions of s. 181 which are declared applicable would require the sending of articles of continuance in prescribed form together with notices of registered and record offices and of directors (s. 181(3)); would require the Registrar to issue a certificate of continuance (s. 181(4)); would provide that the company becomes a corporation under the proposed ABCA with the articles of continuance as its articles of incorporation and the certificate of continuance as the certificate of incorporation (s. 181(5)); and would provide generally that the corporation is continued with all the property, rights, liabilities and obligations which it has at the time of continuance (s. 181(7)). S. 261(3) departs from the wording of the CBCA which, instead of making specific subsections of s. 181 applicable with necessary changes, provides that the application is to be made under s. 181. We think it better to provide most of the procedure in s. 261.

5. S. 261(4) and (6) would require the shareholders, by a 3 to 1 special resolution, to adopt articles of continuance; and s. 261(4)(c) would empower them to adopt by-laws. Requiring the shareholders to adopt a new constitution for the continued corporation is a departure from the CBCA.

6. CBCA s. 261(1.1) does two things: it authorizes the shareholders by special resolution to authorize the directors to apply for continuance, and it authorizes the shareholders, by the same resolution, to make any amendent to the charter of the body corporate that a corporation incorporated under the CBCA may make to its articles. When considering the continuance of an Alberta memorandum and articles of association company as an ABCA articles of incorporation and by-laws corporation, we do not think it practical to suggest that the old constitution be amended; the difference in the division of constitutional provisions between the memorandum and articles of association, and the division between articles of incorporation, by-laws, and the proposed Act itself, is so great that we think it necessary for each company to write out a new constitution.

7. S. 261(5) is intended to allow the shareholders of a closely held company to adopt a by-law requiring all shareholders to surrender their share certificates for cancellation and re-issue in non-negotiable form, so that they would be able to avoid the effects of the adoption of the principle of negotiability. S. 240 would allow a person interested in the continued corporation to apply for a compliance order against a shareholder who does not bring in his shares. The subsection has no CBCA counterpart.

8. S. 261(7) would prohibit the corporation, without unanimous consent, from making a change of the kind referred to in s. 170(1), i.e., a change in the capital structure or relative rights of classes of shares. We think that any such change should be made either under the ACA before continuance (with the ACA safeguard of a court order in some cases) or under the proposed ABCA after continuance (with the voting protections and right to dissent which would be provided by the proposed ABCA), and not under a procedure which would not provide either protection. S. 261(7) has no CBCA counterpart.

9. S. 261(8) would follow CBCA s. 261(2) and would provide that a shareholder has no right of dissent in respect of the adoption of articles of continuance. The law should not require the corporation to continue and then as a result allow a shareholder compel the corporation to buy him out. Instead, s. 261(9) would allow a shareholder, in a case of oppression or unfair prejudice to his interests, to apply to the court for an order restraining the adoption of the articles of continuance, and an order changing them. We think that that is sufficient protection.

10. S. 261(10) is intended to prevent a minority from preventing an application for continuance by rejecting the necessary special resolution. If there is a disagreement which prevents the passage of a special resolution, the court would have power to settle the terms of the articles of continuance and by-laws. S. 261(10) has no CBCA counterpart.

11. S. 261(12) to (15) would require every Alberta company to apply for continuance under the proposed ABCA within 3 years of the last day of the anniversary month of a company first

occurring after the commencement of the Act, subject to the power of the Court to extend the period for one year, upon pain of dissolution. We think that this rather draconian sanction is necessary to ensure an orderly transition from the ACA to the proposed ABCA. Note that an Alberta company which is dissolved under s. 261(15) would be able to apply for revival under s. 202 of the draft Act. CBCA s. 261(3) requires a business corporation to apply for continuance within 5 years of the commencement of the Act.

262. A revived company may apply to the Registrar for a certificate of continuance and for that purpose

(a) section 181(3) to (5) and (7) to (12) applies to the application as if the revived company were an extra-provincial corporation, and

(b) section 261(4) to (11) apply to the application as if the revived company were an Alberta company.

NOTE: Continuance of revived Alberta companies. New.

Comment

Section 262 deals with the continuance of "revived companies", i.e., ACA companies revived under s. 202 of the draft Act for the purpose of enabling them to apply for continuance. The effect of clauses (a) and (b) of s. 262 would be to require those revived companies to follow the same procedures for continuance that apply to ACA companies. The subsection has no CBCA counterpart.

PART 21

EXTRA-PROVINCIAL CORPORATIONS

263. In this Part,

(a) "anniversary month", with reference to an extra-provincial corporation, means the month in each year that is the same as the month in which its certificate of registration was issued;

(b) "attorney for service" or "attorney" means, with reference to an extra-provincial corporation, the individual who, according to the Registrar's records, is appointed under this Part as that extra-provincial corporation's attorney for service;

(c) "charter" includes

(i) a statute, ordinance or other law incorporating an extra-provincial corporation, as amended from time to time

(ii) letters patent of incorporation and any letters patent supplementary to them,

(iii) a memorandum of association, as amended from time to time,

(iv) any other instrument of incorporation, as amended from time to time, and

(v) any certificate, licence or other instrument evidencing incorporation;

(d) "internal regulations" includes by-laws, articles of association, rules or regulations relating to the management of the business and affairs of an extra-provincial corporation, by whatever name they are called, if they are made by the members or a class of members of, or the board of directors, board of management or other governing body of, the extra-provincial corporation;

(e) "registered" means registered under this Part.

NOTE: Definitions for Part 21. See ACA s. 2(1) clauses 5 and 6 and s. 177(1).

264.(1) For the purposes of this Part, an extra-provincial corporation carries on business in Alberta if

(a) its name, or any name under which it carries on business, is listed in a telephone directory for any part of Alberta,

(b) its name, or any name under which it carries on business, appears or is announced in any advertisement in which an address in Alberta is given for the extra-provincial corporation,

(c) it has a resident agent or representative or a warehouse, office or place of business in Alberta,

(d) it solicits business in Alberta,

(e) it is the owner of any estate or interest in land in Alberta,

(f) it is licensed or registered or required to be licensed or registered under any Act of Alberta entitling it to do business,

(g) it is, in respect of a public vehicle as defined in The Motor Transport Act, the holder of a certificate of registration under The Motor Vehicle Administration Act, unless it neither picks up nor delivers goods or passengers in Alberta,

(h) it is the holder of a certificate issued by the Alberta Motor Transport Board, unless it neither picks up nor delivers goods or passengers in Alberta, or

(i) it otherwise carries on business in Alberta.

(2) The Registrar may exempt an extra-provincial corporation from the payment of fees under this Part if he is satisfied that it does not carry on business for the purpose of gain.

NOTE: What constitutes carrying on business in Alberta. New. As to subsection (2) see ACA s. 166(3).

Comment

1. For a general discussion of registration of extra-provincial corporations, see our Report pp. 169-171.

2. Section 264(1) is patterned after British Columbia's section 1(8), though items in the list are different. The intention is to list a number of circumstances under which it would be doubtful whether a company's activities fall under a general definition of carrying on business but in which it is desirable that the company register in the Province. Section 264(1)(i) would then include a company which would normally be said to be carrying on business in the Province.

3. ACA s. 165 reads as follows:

> 165. For the purposes of this Part, the expression,
>
> (a) "business" means such lawful objects and purposes for which an extra-provincial company is established as are within the legislative authority of the Province, and includes the sale of its shares or debentures by or on behalf of the company, but does not include the business of banking, the construction and operation of a railway;
>
> (b) to "carry on business" means to transact any of the ordinary business of an extra-provincial company whether by means of an employee or an agent and whether or not the company has a resident agent or representative or a warehouse, office or place of business in the Province.

We think that s. 264(1) covers the ground more thoroughly and clearly.

> 265.(1) This Part does not apply to
>
> (a) an extra-provincial corporation required to be licensed as an insurer under The Alberta Insurance Act,
>
> (b) an extra-provincial corporation required to be registered under The Trust Companies Act, or

(c) an extra-provincial association as defined in Part 2 of The Co-operative Associations Act.

(2) This Part does not apply to a Canada corporation so as to affect its right to carry on business in Alberta.

NOTE: Application of Part 21. ACA s. 182 and 176(3) varied.

Comment

1. The three Acts mentioned in s. 265(1) have separate registration systems for extra-provincial insurance companies, trust companies and co-operative associations respectively.

2. S. 265(2) is included to ensure the constitutional validity of the registration requirement insofar as it affects Canada corporations, though Part 21 does not purport to affect the right to do business in the province in any way.

Division 1

Registration

266.(1) Every extra-provincial corporation shall be registered under this Part before or within 30 days after it commences carrying on business in Alberta.

(2) An extra-provincial corporation registered under Part 8 of The Companies Act immediately before the coming into force of this Act is deemed to be registered under this Part.

NOTE: Requirement to register. ACA s. 166(1) and (2), varied.

Comment

1. S. 266(1), together with s. 267(1) would carry forward the ACA requirement that an extra-provincial company register no later than 30 days after it commences to carry on business in Alberta.

2. ACA s. 166(3) has not been carried forward as part of s. 266. It allows the Minister to exempt from registration an extra-provincial company that does not carry on business for gain. Instead, s. 264(2) would allow the Registrar to grant an exemption from paying fees.

267.(1) An extra-provincial corporation shall apply for registration by sending to the Registrar a statement in prescribed form.

(2) The statement shall be accompanied by

(a) a copy of the charter of the extra-provinical corporation verified in a manner satisfactory to the Registrar, and

(b) the appointment of its attorney for service, in prescribed form.

(3) If all or any part of the charter is not in the English language, the Registrar may require the submission to him of a translation of the charter or that part of the charter, verified in a manner satisfactory to him, before he registers the extra-provincial corporation.

NOTE: Application for registration. ACA s. 167, varied.

Comment

One of the principal purposes of registration of a an extra-provincial corporation is to enable a person dealing with it to obtain basic information about it. Section 267 is intended to achieve this purpose by prescribing the information which must be filed. "Charter" is defined in s. 263(c) and does not include articles of association or by-laws.

268. The Registrar may, upon request, reserve for 90 days a name for an extra-provincial corporation that

(a) intends to become registered,

(b) is about to change its name, or

(c) is intended to result from an amalgamation of 2 or more bodies corporate.

NOTE: Reservation of name. New.

Comment

S. 268 would allow for reservations of names for extra-provincial corporations in much the same way that s. 11(1) of the draft Act would provide for the reservation of names for ABCA corporations.

269.(1) An extra-provincial corporation shall not be registered with or, within Alberta, have, carry on business under or identify itself by, a name that is

(a) prohibited by the regulations,

(b) identical to the name of a body corporate incorporated under the laws of Alberta,

(c) reserved for an intended corporation or a corporation under section 11(1),

(d) reserved for an extra-provincial corporation or an intended extra-provincial corporation under section 268, or

(e) disapproved by the Registrar pursuant to subsection (2).

(2) The Registrar may disapprove the name of an extra-provincial corporation if, in his opinion, the name

(a) is objectionable,

(b) is likely to mislead or confuse, or

(c) is similar to the name of any other body corporate or to the name of any association, partnership or firm known to the Registrar, if the use of that name would be likely to mislead or confuse, unless the body corporate, association, partnership or firm consents in writing to the use of that name in whole or in part, and, if required by the Registrar, undertakes to dissolve or change its name to a dissimilar name within 6 months after the date of registration of the extra-provincial corporation under this Part.

(3) If

(a) through inadvertence or otherwise, an extra-provincial corporation is registered with or later acquires a name that contravenes subsection (1), or

(b) the Registrar disapproves an extra-provincial corporation's name after it is registered under this Part,

the Registrar may, by notice in writing, giving his reasons, direct the extra-provincial corporation to change its name to one that he approves within 90 days after the date of the notice.

(4) The Registrar may give a notice under subsection (3) on his own initiative or at the request of a person who feels aggrieved by the name that contravenes subsection (1).

(5) This section does not apply to a Canada corporation.

NOTE: Name of extra-provincial corporation. ACA s. 11, varied extensively.

Comment

1. S. 269 would apply to extra-provincial corporations much the same rules regarding names as s. 12 of the draft Act would apply to ABCA corporations.

2. If the Registrar were to disapprove a name under s. 269(2) the situation of the extra-provincial corporation might be very difficult. The name might have very substantial good will in a large number of jurisdictions so that it would not make economic good sense to change it; or the corporation might be incorporated by special statute and unable to control its own name. The corporation might therefore be effectively barred from Alberta by the name requirements. S. 269 and s. 270 attempt to balance the desirability of preserving the scheme of corporate names against that difficulty.

3. S. 269(3) would allow the Registrar to require an extra-provincial corporation (other than a Canada corporation: see s. 269(5)) to change its name on pain of cancellation of its Alberta registration. In so doing the subsection goes farther than does the ACA, but the absence of the power would enable the extra-provincial corporation to carry on business under a name the use of which would be prohibited by the statute.

4. S. 270. would give some relief against the requirements of 269.

270.(1) Nothwithstanding section 269, an extra-provincial corporation the name of which contravenes section 269 may, with approval of the Registrar

(a) be registered with its own name, and

(b) carry on business in Alberta under

an assumed name the use of which is approved by the Registrar and which does not contravene section 269.

(2) The extra-provincial corporation

(a) shall acquire all property and rights in Alberta under its assumed name, and

(b) is entitled to all property and rights acquired, and subject to all obligations and liabilities incurred, under its assumed name as if the same had been acquired and incurred under its own name.

(3) The extra-provincial corporation may sue or be sued in its own name, its assumed name, or both.

NOTE Registration by pseudonym. New.

Comment

1. As we point out at p. 169 of our Report and in our comments on s. 269, that section, if rigidly enforced, would require an extra-provincial corporation the name of which would contravene s. 269 to change its name in order to do business in Alberta. The corporation might not legally be able to do so, or it might lose substantial goodwill or incur substantial cost in order to do so; in other words, legal or practical considerations might preclude it from registering. S. 270. is intended to give it some relief.

2. S. 270. would allow the corporation to register under its own name but to carry on business and acquire property and rights in Alberta under an assumed name; the registration and the assumed name would have to be approved by the Registrar and the assumed name would have to comply with s. 269.

3. The evil to be guarded against is the doing of business under an objectionable name. The name in which an action is brought or defended does not give rise to that evil, and the corporation should be capable of suing or being sued under both names. There is also no reason why it should not conduct its dealings with the Registrar under either name.

4. The purpose of registration is tc make information available to those who have legitimate use for it. The Registrar should therefore maintain his records so that a person searching either the corporation's own name or its assumed name will be able to locate the Registrar's file.

5. The regulations should prescribe a special form of certificate of registration saying that X Ltd. (the corporation's own name) is registered and is entitled and obliged to carry on business in Alberta as Y Ltd. (its

assumed name).

271.(1) Subject to section 269, upon receipt of the statement and other documents required by section 267 and of the prescribed fees, the Registrar shall

(a) file the statement and documents,

(b) register the extra-provincial corporation, and

(c) issue a certificate of registration in prescribed form in accordance with section 255.

(2) A certificate of registration issued under this section to an extra-provincial corporation is conclusive proof for the purposes of this Act and for all other purposes that the provisions of this Act in respect of registration of the extra-provincial corporation and all requirements precedent and incidental to registration have been complied with, and that the extra-provincial corporation has been registered under this Part as of the date shown in the certificate of registration.

NOTE: Certificate of registration. ACA s. 168 and 169, varied.

Comment

1. ACA s. 168(1) provides that "the Registrar may, in his discretion, register the company...". It does not lay down any rules about the exercise of the discretion which those words appear to confer upon the Registrar. It may be that the discretion is intended to preclude the registration of extra-provincial corporations which have engaged in criminal or otherwise unworthy activities. It appears to us that if such corporations are to be prevented from doing business in Alberta, that objective should not be accomplished indirectly by a provision requiring registration and by another provision allowing an administrative official an untrammeled discretion to refuse registration. Further, it appears to us that the corporation is likely to do business anyway, and that those dealing with it will be deprived of the information and place for service which are to be provided under the registration provisions. Finally, the corporation could simply incorporate an Alberta subsidiary and do its business that way. For all these reasons we recommend dropping the discretion, and s. 269 of the draft Act is mandatory, subject to the Registrar's discretion about corporate names, and subject to compliance with the requirements of the Act and regulations.

2. ACA section 168(1)(b) goes on to make elaborate provision for the contents of the certificate of registration for a specially limited extra-provincial company. We think that the essence of the information to be conveyed is that the liability of shareholders is limited, and, apart from the rarity of specially limited companies, we think that no further statement is needed in order to put on their guard those who deal with such companies.

3. As to subsection (2), conclusiveness of the certificate of registration is stated in the same terms as for a certificate of incorporation: see s. 9(2) of the draft Act.

272.(1) Subject to subsection (2), the Registrar may cancel the registration of an extra-provincial corporation if

(a) the extra-provincial corporation is in default for a period of one year in sending to the Registrar any fee, notice or document required by this Part,

(b) the extra-provincial corporation has sent a notice to the Registrar under subsection (4) or the Registrar has reasonable grounds to believe that the extra-provincial corporation has ceased to carry on business in Alberta,

(c) the extra-provincial corporation is dissolved,

(d) the extra-provincial corporation does not carry out an undertaking given under section 269(2)(c),

(e) the extra-provincial corporation does not comply with a direction of the Registrar under section 269(3), or

(f) the extra-provincial corporation has otherwise contravened this Part.

(2) The Registrar shall not cancel the registration of an extra-provincial corporation under subsection (1) until

(a) he has given at least 90 days notice of the proposed cancellation with his reasons for it,

(i) to the extra-provincial corporation by registered mail addressed to its head office, and

(ii) to its attorney for service in accordance with section 275,

(b) he has published a notice of the proposed cancellation in the Registrar's periodical, and

(c) either no appeal is commenced under section 239 or, if an appeal has been commenced, it has been discontinued or the Registrar's decision is confirmed on the appeal.

(3) The Registrar may reinstate the registration of an extra-provincial corporation that was cancelled under subsection (1)(a) upon the receipt by the Registrar of the fees, notices and documents required to be sent to him and of the prescribed reinstatement fee.

(4) An extra-provincial corporation that ceases to carry on business in Alberta shall send a notice to that effect to the Registrar.

NOTE: Cancellation of registration on Registrar's initiative. ACA s. 170, 171 and 188 varied. See also Saskatchewan BCA s. 290.

Comment

1. ACA s. 170(1) vests the power of suspension or revocation of registration in the Lieutenant Governor in the Council "for good cause or for failure to comply with any requirement of this Part". Such an untrammelled discretionary power seems to us to be inappropriate. Our proposal is that where there is a demonstrable failure to comply with Part 21 (e.g., by failing to file annual returns) the Registrar should have the power to cancel the registration, and that is all.

2. ACA s. 171(1) gives the Registrar a discretion to cancel the registration of an extra-provincial corporation both in the case in which it has ceased to carry on business in Alberta and the case in which it has ceased to exist.

273.(1) Subject to section 269, upon the reinstatement of the registration of an extra-provincial corporation pursuant to section 272(3), the Registrar shall issue a new certificate of registration in prescribed form.

(2) The cancellation of the registration of an extra-provincial corporation does not affect its liability for

its obligations.

NOTE: New certificate of registration; effect of termination of suspension and reinstatement. ACA s. 170(2) varied, and s. 171(2) in part. See also CBCA s. 202(4).

Comment

ACA section 170(2) provides that no suspension or revocation affects the rights of any creditor. We have used somewhat broader language in s. 273(2) of the draft Act. The wording of section 273(2) is taken from CBCA section 202(4) though without reference to rights of other persons acquired during that period of revocation.

Division 2

Information

274. An extra-provincial corporation shall set out its name in legible characters in or on all contracts, invoices, negotiable instruments, orders for goods or services issued or made by or on behalf of the extra-provincial corporation in the course of carrying on business in Alberta.

NOTE: Use of corporate name. ACA s. 173 varied to conform with ss. 10(8) of the draft Act which apply to Alberta corporations.

Comment

S. 274 would impose a duty upon an extra-provincial corporation to display its name in cases much like those in which an Alberta corporation would be obliged to do so.

275.(1) If an attorney of an extra-provincial corporation dies or resigns or his appointment is revoked, the extra-provincial corporation shall forthwith send to the Registrar an appointment in prescribed form of an individual as its attorney for service and the Registrar shall file the appointment.

(2) An extra-provincial corporation may in prescribed form appoint an individual as its alternative attorney if that individual is

(a) a member of a partnership of which

the attorney is also a member, or

(b) an assistant manager of the extra-provincial corporation and the attorney is the manager for Alberta of the extra-provincial corporation.

(3) The extra-provincial corporation shall send to the Registrar

(a) each appointment by it of an alternative attorney, and

(b) if the alternative attorney dies or resigns or his appointment is revoked, a notice to that effect,

and the Registrar shall file the appointment or notice, as the case may be.

(4) An attorney for an extra-provincial corporation who intends to resign shall

(a) give not less than 60 days notice to the extra-provincial corporation at its head office, and

(b) send a copy of the notice to the Registrar who shall file it.

(5) An attorney shall forthwith send the Registrar a notice in prescribed form of any change of the attorney's address and the Registrar shall file the notice.

(6) The extra-provincial corporation shall ensure that the address of its attorney is an office which is

(a) accessible to the public during normal business hours, and

(b) readily identifiable from the address or other description given in the notice referred to in subsection (5) or the appointment referred to in section 267(2)(b).

(7) A notice or document required or permitted by law to be sent or served in Alberta upon an extra-provincial corporation may be

(a) delivered to its attorney or to an individual who is its alternative attorney according to the Registrar's records,

(b) delivered to the address, according

to the Registrar's records, of its attorney, or

(c) sent by registered mail to that address.

(8) A notice or document sent by registered mail to the attorney's address in accordance with subsection (7)(c) shall be deemed to be received or served at the time it would be delivered in the ordinary course of mail, unless there are reasonable grounds for believing that the attorney did not receive the notice or document at that time or at all.

(9) An individual whose appointment as an attorney or alternative attorney of an extra-provincial corporation is filed with the Registrar of Companies immediately before the commencement of this Act is deemed to be its attorney or an alternative attorney, as the case may be, upon the commencement of this Act.

NOTE: Attorney for service of an extra-provincial corporation. ACA s. 174 substantially varied. See also s. 247 of the draft Act regarding service on Alberta corporations.

Comment

1. S. 275(7)(a) would preserve the existing right to serve the attorney of an extra-provincial corporation. S. 275(7)(b) and (c) would go further and permit service by delivery or mail upon the attorney's office in the samy way as s. 247 of the draft Act would permit service upon the registered office of an ABCA corporation.

2. S. 275 also deals with the replacement and resignation of an attorney, with the accessibility of the attorney's office, and with alternative attorneys.

276.(1) A registered extra-provincial corporation shall send to the Registrar

(a) a copy of each amendment to its charter within one month after the effective date of the amendment, verified in a manner satisfactory to the Registrar, and

(b) a notice in prescribed form of any change in

(i) the address of its head office in or outside Alberta, or

(ii) the membership of its board of directors, board of management or other governing body,

within one month after the effective date of the change,

and the Registrar shall file the copy or the notice, as the case may be.

(2) A notice sent to the Registrar pursuant to subsection (1)(b)(ii) shall contain the address and occupation of each new member of the board of directors or governing body.

(3) An extra-provincial corporation is not required to send a notice under subsecton (1)(b) if

(a) the effective date of the change occurs in its anniversary month or the month following, and

(b) the change is reflected in the annual return required to be filed under section 279(1).

(4) If the amendment to its charter effects a change in the name of an extra-provincial corporation under which it is registered, the Registrar, upon filing the copy of the amendment under subsection (1)(a), shall issue a new certificate of amendment of registration in prescribed form and change his records accordingly.

NOTE: Filing of amendments to charter and notice of changes in head offices or directors. ACA s. 175(1) and (3) varied. Subsections (1)(b), (2) and (3) are new.

Comment

1. S. 276(1)(a) follows ACA s. 175(1) with two exceptions. Firstly, by reason of the definition of "charter" in s. 263(c), amendments to internal regulations would no longer be required to be filed. Secondly, the copies would have to be verified to the Registrar's satisfaction. S. 276(1) would go on to require that amendments be verified in a manner satisfactory to the Registrar and to require notice of changes in head offices and in the membership of governing bodies to be in prescribed form.

2. The requirement in s. 276(1)(b) to file notice of changes in address or directors is new.

3. S. 276(4) is a recasting of ACA s. 175(3) but confined to amendments to the charter that effect a change of corporate

name. We do not see the need for a new certificate of registration in any other circumstances except in cases of amalgamation which are dealt with separately in s. 277.

277.(1) A registered extra-provincial corporation shall send to the Registrar

(a) a copy of any instrument effecting an amalgamation of the extra-provincial corporation with one or more other extra-provincial corporations,

(b) a copy of the amalgamation agreement, if any, and

(c) a statement in prescribed form relating to the amalgamated extra-provincial corporation and the documents referred to in section 267(2),

within one month after the effective date of the amalgamation.

(2) Upon receiving the documents referred to in subsection (1), the Registrar shall file them and issue a new certificate of registration of the amalgamated extra-provincial corporation.

NOTE: Filing of instrument of amalgamation. New.

Comment

This provision is new to Alberta but an equivalent provision is found in the British Columbia BCA. A change so significant as an amalgamation should be reflected in the Registrar's records at an early date.

278.(1) If liquidation proceedings are commenced in respect of a registered extra-provincial corporation, the extra-provincial corporation, or, if a liquidator is appointed, the liquidator,

(a) shall send to the Registrar forthwith after the commencment of those proceedings a notice showing that the proceedings have commenced and the address of the liquidator if one is appointed, and

(b) shall send to the Registrar forthwith after the completion of those proceedings a return relating

to the liquidation.

(2) The Registrar shall

(a) upon receiving a notice under subsection (1)(a), file it and publish a notice respecting the liquidation in the Registrar's periodical, and

(b) upon receiving a return under subsection (1)(b), file it and cancel the registration of the extra-provincial corporation forthwith after the expiration of 3 months following the date of filing of the return.

(3) The liquidator of a registered extra-provincial corporation shall send to the Registrar a notice of any change in his address within one month after the effective date of the change, and the Registrar shall file the notice.

NOTE: Notices and returns respecting liquidation. New.

Comment

BCCA ss. 341 and 342 require the liquidator of an extra-provincial corporation to file a notice of his appointment and copies of his accounts. It appears to us that the information so provided would be of value, and section 278(1)(b) therefore makes provision for it.

279.(1) A registered extra-provincial corporation shall, in each year on or before the last day of the month immediately following its anniversary month, send to the Registrar a return in prescribed form and the Registrar shall file it.

(2) A registered extra-provincial corporation shall, at the request of the Registrar, send to the Registrar a return containing any further or other information that the Registrar may reasonably require.

NOTE: Annual and other returns. ACA s. 177 varied.

Comment

1. This section carries forward the existing requirement for annual returns, unchanged in substance but requiring the annual return to be in prescribed form, as is the case with annual returns for Alberta corporations under s. 256(1) of

the draft Act.

2. ACA s.177(4), which makes it an offence for an extra-provincial company to fail to register or file an annual return has not been carried forward here. S. 284 of the draft Act would apply.

280.(1) The Registrar may furnish any person with a certificate that an extra-provincial corporation has sent to the Registrar a document required to be sent to him under this Act.

(2) A certificate purporting to be signed by the Registrar and stating that a named extra-provincial corporation was or was not registered on a specified day or during a specified period, is admissible in evidence as prima facie proof of the facts stated in it without proof of the Registrar's appointment or signature.

NOTE: Certificate of compliance. New.

Comment

The proposed s. 280(1) is the counterpart of s. 256(2)of respecting Alberta corporations. S. 280(2) would provide for a certificate of status or of "good standing" as it is sometimes referred to and is the counterpart of s. 256(3).

Division 3

Capacity, Disabilities and Penalties

281. No act of an extra-provincial corporation, including any transfer of property to or by an extra-provincial corporation, is invalid by reason only

(a) that the act or transfer is contrary to or not authorized by its charter or internal regulations or any law of the jurisdiction in which it is incorporated, or

(b) that the extra-provincial corporation was not then registered.

NOTE: Validity of acts. New.

Comment

1. ACA s. 172 provides that a registered extra-provincial company "may within the Province carry on business in accordance with its certificate of registration, and for that purpose exercise the powers contained in its charter and regulations". ACA s. 181 provides that "subject to the provisions of its charter and regulations and of this Act, every extra-provincial company registered under this Act may exercise all the rights and powers and privileges by this Act granted to and conferred upon companies". It appears to us that the combined effect of these provisions is to allow an extra-provincial company to rely upon the doctrine of ultra vires if that doctrine is part of its basic corporation law. It may be that, even if both sections were merely carried forward verbatim into the proposed ABCA, the result would be quite different, because the "rights and powers and privileges by the Act granted to and conferred upon companies" would presumably include "the rights, powers and privileges of a natural person" which s. 15(1) of the proposed ABCA declares a corporation to have. Such a significant change in policy should not, we think, pass unnoticed; and we think also that something should be done to ensure that there will be no doubt what is intended; there might be doubt about the effectiveness of what might look like an attempt to confer capacity upon an extra-provincial corporation. We think that s. 281 would have the desired effects.

2. We now turn to question whether the law of Alberta should or should not recognize a limitation upon the corporate powers of extra-provincial corporations that do business in Alberta. We are of the opinion that it should not. The law of Alberta obviously cannot confer upon an extra-provincial corporation a capacity which its basic corporation law does not give it, but we think that the law of Alberta can and should make binding upon an extra-provincial corporation all acts done, or purported to be done, by it, to which the law of Alberta applies. When a corporation is doing business in Alberta we think that all the reasons which lead us to propose the abolition of the doctrine of ultra vires in relation to Alberta corporations apply in relation to it.

3. S. 281 is intended to give effect to these views by providing that no act of an extra-provincial corporation is invalid merely because it is not authorized by the basic law of the corporation.

> 282.(1) An extra-provincial corporation while unregistered is not capable of commencing or maintaining any action or other proceeding in any court in Alberta in respect of any contract made in the course of carrying on business in Alberta while it was unregistered.
>
> (2) If an extra-provincial corporation was not registered at the time it commenced an action or proceeding referred to in

subsection (1) but becomes registered afterward, the action or proceeding may be maintained as if it had been registered before the commencement of the action or proceeding.

NOTE: Capacity to commence and maintain legal proceedings. ACA s. 179 varied and with the addition of subsection (2).

Comment

1. S. 282(1) would carry forward the existing policy of ACA s. 179.

2. S. 282(2) has been added to declare what is really the existing law.

283. A person who fails to comply with this Part is guilty of an offence and liable on summary conviction to a fine of not more than $5,000.

NOTE: General penalty. New.

PART 22

CONSEQUENTIAL AND COMMENCEMENT

284.(1) The Companies Act is amended by this section.

(2) The following section is added after section 2:

2.1. Notwithstanding anything in this Act, upon the coming into force of The Alberta Business Corporations Act, no company shall be incorporated, registered or continued into or out of Alberta, under this Act unless it complies with Part 9.

(3) The following section is added after section 3:

3.1 This Act does not apply to a corporation as defined in The Alberta Business Corporations Act.

(4) Section 16(2) is amended by striking out "if the company is incorporated, or its name is changed, as the case may be," and substituting "if its name is changed".

(5) The following section is added after section 50:

50.1 If at the coming into force of The Alberta Business Corporations Act a company by its memorandum or articles prohibits the payment of dividends to its members, no amendment may thereafter be made to the memorandum or articles to remove or qualify that prohibition.

(6) Sections 97 to 102 and 104 to 106 are repealed.

(7) Notwithstanding subsection (6) the priority of a mortgage registered before or within 60 days after commencement of this Act is determined by sections 97 and 98 of the Companies Act.

(8) Section 157 is amended by repealing subsections (2) and (3) and by substituting the following:

(2) No application may be made under this section after the coming into force of The Alberta Business Corporations Act.

(9) Part 8 is repealed.

(10) The following section is added after section 185:

185.1 The Registrar shall not revoke any direction or authorization given by him under section 183, 184 or 185.

NOTE: Consequential amendments to The Companies Act, chapter 60 of The Revised Statutes of Alberta 1970.

Comment

The amendments to The Companies Act would be primarily aimed at achieving the following:

(a) preventing any further incorporations under it except for not-for-profit companies that come within Part 9 entitled "Provisions Applying to Companies with Objects Other than the Acquisition of Gain",

(b) preventing extra-provincial corporations from continuing under that Act, since they may continue under the ABCA,

(c) repealing Part 8 so that extra-provincial corporations will register under Part 21 of the ABCA instead,

(d) preventing not-for-profit companies from converting to a "business company" status, especially after the time limit for continuance under ABCA s. 261(15) has expired. Not-for-profit companies would remain under the ACA until the ACA is itself replaced by new legislation covering not-for-profit corporations,

(e) bringing the registration of all corporate mortgages and debentures under the proposed Act instead of the ACA, and

(f) giving effect to the deletion of the prohibition in ACA s. 7 against the carrying on of business by large unincorporated associatons.

There may well be other minor amendments that could also be made to The Companies Act but those set out in our section 285 are the main ones that we see as being necessary.

286. [Consequential amendments to other Acts.]

NOTE: Consequential amendments to other Acts.

Comment

1. As a consequence of the way in which the draft Act deals with the subjects of Insider Trading and Take-over Bids it will be necessary to ensure that the Securities Act or its successor:

   (1) applies its take-over bid provisions without regard to the address or location of a corporation's shareholders, i.e., whether or not the shareholders are residents of Alberta;

   (2) applies its insider trading provisions to corporations without regard to the incorporating jurisdiction, i.e., whether or not the incorporating jurisdiction is Alberta.

2. The Statutes of Alberta have numerous provisions that refer to The Companies Act. As our draft contemplates a transitional period during which business companies under the ACA may continue under the ABCA, many of those provisions will need to be amended to add a reference to the ABCA or to corporations under the ABCA, rather than replacing one with the other. The following is a list of statutory provisions that refer to The Companies Act or to specific sections of that Act:

   The Cemeteries Act, ss. 20(1) and (3), 22 and 61(1)
   The Cemetery Companies Act, s. 4(4)
   The Chartered Accountants Act, ss. 53(3)(c) and 55(1)
   The Collection Practices Act, s. 3(1)(b)
   The Condominium Property Act, s. 14(4)
   The Co-operative Associations Act, ss. 12(1)(e) and 14
   The Credit Union Act, ss. 19(3)(b), 64.1 and 80(1)(b)
   The Crowsnest Pass Municipal Unification Act, s. 8(a)
   The Dental Association Act, s. 70(3)(c) and 72
   The Department of Government Services Act, s.11(4)(d)
   The Department of Housing and Public Works Act, s. 12(3)(c)(iv)
   The Alberta Energy Company Act, ss. 1(1)(d), 2, 3(1), 5(1), 8(4), 10(2), 12(5), 14(1) and (2), 17(a), 21(2) and 23(1)
   The Franchises Act, ss. 46(1) and 54(5)
   The Alberta Gas Trunk Line Company Act, ss. 13(1)(i), 27(a) and 31(1)
   The Alberta Hospital Association Act, s. 17
   The Hydro and Electric Energy Act, s. 18(a)
   The Alberta Insurance Act, ss. 73(2), 177, 179, 180(3), 181(1), (3) and (4), 183(1), 184(2)(a)(iii), 185(1) and 188(1)(d)
   The Land Titles Act, s. 30(1)(a) and (2)(a)
   The Landlord and Tenant Act, 1978, s. 42(6)
   The Legal Profession Act, s. 113(3)(c) and 115(1)
   The Liquor Licensing Act, s. 17(1)(a)
   The Medical Profession Act, 1975, ss. 87(3)(c) and 89(1)
   The Mines and Minerals Act, ss. 44(1)(a), 48.1 and 192(b)
   The Mortgage Brokers Regulation Act, ss. 14 and 20(1)
   The Motor Vehicle Administration Act, s. 36(3)(b)(i)
   The Alberta Municipal Financing Corporation Act, s. 45
   The Municipal Government Act, ss. 128.2(1) and (4) and

244(f)
The Names of Homes Act, s. 10.1(1)(a)
The Oil and Gas Conservation Act, s. 27(a)
The Partnership Act, s. 50(3)
The Pipeline Act, 1975, s. 27(1)(a)
The Religious Societies' Lands Act, ss. 26, 27(1) and (3)(b) and 28
The Rent Decontrol Act, s. 31(2)
The Securities Act, ss. 3(4)(a), 19(1), 26(1), 133(3) and 148(5)
The Societies' Act, ss. 5, 33, 34, 35 and 37
The Temporary Rent Regulation Measures Act, s. 31(2)
The Trust Companies Act, ss. 3(1) and (2), 139(13)(c), 145(a), 181, 182, 183(1) and 184(b)

3. The Statutes of Alberta also contain a multitude of references to "company", "private company" and "public company" that will need to be located by a electronic search of the text of the statutes which is for the most part now stored in the Government's computers. In most cases it is likely that "company" can be changed to "corporation" without more, but the decisions on how to change the references to "private company" and "public company" may present some difficulty as those categories are not carried forward in the ABCA. It may be that references to "public company" can readily be changed to "distributing corporation" but it should be kept in mind that while there is some similarity between them, they are not the same.

4. The draft Act does not include a counterpart of ACA s. 13, which provides that no company shall be formed under the ACA, and that no ACA company has power, to carry on a banking, railway, insurance, telgraph or telephone business, to operate a stock exchange, or to execute the office of trustee, etc. We included a counterpart section in the draft Act which we circulated with our Draft Report, but have not carried it forward to this draft Act. We will give our reasons.

The argument in favour of inclusion of ACA s. 13 in the draft Act is the section would serve as a warning to the unwary that, although incorporation under the ABCA would clothe a corporation with the powers of a natural person, there are certain businesses which the corporation is prohibited from carrying on. The contrary arguments are that prohibitions against carrying on a business should be left to legislation regulating that business; that there is no public policy of Alberta that would preclude an Alberta corporation from carrying on one of the prohibited businesses elsewhere; that the doctrine of ultra vires should not be brought in by the back door; that the ABCA could not list all the things which corporations and others are prohibited from doing and should not list some of them; and that any legislation like ACA s. 13 is likely to raise difficulties in the way of legitimate business transactions such as the difficulties which ACA s. 13(1)(d) raises, which we will now discuss.

Upon occasions, the parties to a transaction want a company

of their own to act as trustee for them, and we see no reason for the law to prohibit such an arrangement. ACA s. 13(1)(d), however, casts doubt upon the validity of any trust undertaken by an Alberta company, and some lawyers advise their clients not to enter into a transaction involving one. The subsection thus interferes with legitimate business transactions, and we do not see any sufficient policy reason for it to do so. We had drafted alternative provisions which would alleviate the problems, created by ACA s. 13(1)(d), but have ultimately concluded that any such provision would create problems for the wary which would outweigh the value of the protection which it would give to the unwary.

There are of course valid reasons for the regulation of the business of undertaking and executing trusts, and the Trust Companies Act provides for such regulation. We think that that Act, and not a business corporations statute, is the appropriate place for any provision against unauthorized trust businesses, whether carried on by individuals or corporations. We recommend that the Trust Companies Act be examined to see whether it should be amended upon the disappearance of ACA s. 13(1)(d).

5. The draft Act circulated with our Draft Report would have carried forward ACA s. 25.1 which requires the incorporators to file information required by regulations under The Agricultural and Recreational Land Ownership Act and s. 33 of the Citizenship Act (Canada). It was strongly suggested to us that that provision causes additional paper work for the incorporators and administrative work for the Registrar to no avail; the policing of The Agricultural and Recreational Land Act takes place of The Land Titles Office, not the Companies Branch. Upon inquiry from the government, we were told that the information in the incorporating documents is of little or no value. We therefore deleted the relevant subsection from the draft Act, and we recommend that s. 23 of Alberta Reg. 160/79 be amended to delete the information requirements upon incorporation of Alberta corporations and the registration of extra-provincial corporations. (Indeed, we see no reason why the section should not be repealed in its entirely).

287. This Act comes into force on a date to be fixed by Proclamation.

NOTE: Commencement of Act.