Institute of Law Research and Reform

Company Law Project

SECURITY CERTIFICATES, REGISTERS AND TRANSFERS

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PART VI

SECURITY CERTIFICATES, REGISTERS AND TRANSFERS

44(1)

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

Note: 1. By virtue of the definition of "security" in sec. 44(2), this Part applies to normally traded share certificates and evidences of obligation of corporations. See notes about definition of "security" under sec. 44(2).

(2) Definitions.—In this Part,

"adverse claim".—"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;

"bearer".—"bearer" means the person in possession of a security payable to bearer or endorsed in blank;

"*bona fide* purchaser".—"*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 of a security in registered form issued to him or endorsed to him or endorsed in blank;

"broker".—"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;

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"delivery".—"delivery" means voluntary transfer of possession;

"fiduciary".—"fiduciary" means a trustee, guardian, committee, curator, tutor, executor, administrator or representative of a deceased person, or any other person acting in a fiduciary capacity;

"fungible".—"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;

"genuine".—"genuine" means free of forgery or counterfeiting;

"good faith".—"good faith" means honesty in fact in the conduct of the transaction concerned;

"holder".—"holder" means a person in possession of a security issued or endorsed to him or to bearer or in blank;

"issuer".—"issuer" includes a corporation

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

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

"overissue".—"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;

"purchaser".—"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;

"security".—"security" or "security certificate" means an instrument issued by a corporation that is

(a) in bearer or registered form,

(b) 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,

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

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

"transfer".—"transfer" includes transmission by operation of law;

"trust indenture".—"trust indenture" means a trust indenture as defined in section 77;

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

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

Notes to sec. 44(2)

1. "Purchaser" and bona fide purchaser." These are important, as a "bona fide purchaser" is given substantial protection against adverse claims by by the Part. A donee is a "purchaser," but "bona fide purchaser" excludes donees. The "bona fide purchaser" must give "value," be without notice of an adverse claim, and receive an instrument in proper form: he resembles a holder in due course. So far as validity goes, it is the purchaser for value

without notice who is protected: "bona fide purchaser" is saved for the contest between persons asserting ownership. The notes to sec. 68 suggest that if the contest is about an ineffective endorsement and is between the immediate parties it is only a bona fide purchaser who has registered who is protected.

2. "Security."

(1) This is fundamental to the Part, as it defines the application of the Part under sec. 44(1).

(2) It "means an instrument." This suggests that it is the share certificate or bond, not the share or the obligation. It seems to me that the usage in the Part does not rigorously recognize the consequences of that distinction. E.g., the part obviously intends to deal with more than the instrument itself. For example, under sec. 56 the bona fide purchaser acquires the "security" free from any adverse claim. This must mean that he acquires the share or obligation, not merely the instrument.

(3) "Security" is defined for the Act in sec. 2 as meaning the share or debt obligation or the certificat Is it good drafting to deal with it that way? I think there is a verbal conflict. The CBCA should be checked to see whether it says anywhere that the holder of the instrument is entitled to enforce the rights embodied in the share or the obligation (cf. Bills of Exchange Act, where the obligations are to the holders of the instrument). Even in

the absence of such provisions, it seems likely that the Courts would not perpetrate the absurdity of holding that A is the owner of the instrument and B the owner of the rights of which it is evidence, but the point should be borne in mind for the moment.

(4) At first blush I wonder whether a private company's share (assuming we continue to have something like a private company) is within the definition. Viewed in one way, a common share is a common share, and the type of shares "dealt in upon securities exchanges or markets" is common shares. Viewed in another way, however, "shares upon the free transfer of which restrictions are imposed" is not a type of share dealt in upon securities exchange or markets, or recognized as a medium of investment. It may be that any doubt is removed by sec. 45(8), which contemplates the existence of security certificates subject to restrictions on transfer. Probably this is all right (though I will later question the desirability of 45(8) in relation to private companies).

(5) I think there is some carelessness with the word "holder." It is definied as "a person in possession of a security issued or endorsed to him or to bearer or in blank," but I note in 47(7) that some persons are entitled to become "registered holders" which doesn't seem to make sense, and in sec. 47(2), (8) and (9) "holder" is used as "owner." In sec. 47(6) there is a reference to "persons to whom the security was issued as joint holders," and the corporation is entitled to treat as <u>owner</u> the survivor of joint <u>holders</u>.

Am I right? (I haven't looked to see where the word is used, and if it hasn't been checked by the computer it would be useful to have this done).

(3) Negotiable instruments.--Except where its transfer is restricted and noted on a security in accordance with subsection 45(8), a security is a negotiable instrument.

Notes:

1. The provision that the Part overrides the Bills of Exchange Act will of course have to be deleted.

2. What is covered by sec. 92 of the B.N.A. Act is "bills of exchange and promissory notes." That does not seem to preclude the province from making negotiable securities which are not bills of exchange or promissory notes, but the point should be checked.

3. Should this Part exclude securities which are bills or notes? The constitution would presumably do that anyway, but there are two possible reasons for doing it explicitly:

   (a) it will tell people what the law is, and

   (b) conceivably, though I don't think so, a court might strike the Part down on the grounds that it purports to cover securities whether or not they are bills or notes.

(4) Registered form.--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.

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

(6) Guarantor for issuer.--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: 1. Whether (6) is desirable or necessary I do not know.

2. I don't really understand (4).

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

Notes: 1. The option in sec. 45(1) is desirable from the security holder's point of view. Is it likely to cause an undue administrative burden for the issuer?

2. There are no formalities prescribed for the "non-transferable written acknowledgement." Nor are there any prescriptions as to the procedure for exchanging it for a certificate. Probably that doesn't matter.

(2) Fee for certificate.--A corporation may charge a fee or not more than three dollars for a security certificate issued in respect of a transfer.

Notes: 1. Alberta sec. 62(1) provides for share certificates without payment. Do we wish to allow a charge for a share certificate? Bond or debenture?

2. Alberta sec. 62(2) requires the company to deliver certificate within 2 months. That seems unnecessary.

(3) (3) **Joint holders.**—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) Signatures.—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 thereon.

(5) **No manual signature required.**—Notwithstanding subsection (4), a manual signature is not required on a certificate representing a fractional share, an option or a right to acquire a security or on a scrip certificate.

(6) **Continuation of signature.**—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.

Note: Sec. 45(3) to 45(6) look reasonable and might as well be there in the interest of uniform practice.

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

(a) the name of the corporation; Alberta

(b) the words "Incorporated under the ~~*Canada*~~ *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.

Note: This seems all right.

(8) Restrictions.--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,

(b) a lien in favour of the corporation,

(c) a unanimous shareholder agreement, or

(d) an endorsement under subsection 184(10),

such restriction, lien, agreement or endorsement is ineffective against a transferee of the security who has no actual knowledge of it, unless it or a reference to it is noted conspicuously on the security certificate.

Notes:

1. CBCA 45(8) excepts "a restraint under sec. 168." Sec. 168 deals with constrained shares, and I think there is no Alberta equivalent and have dropped the reference. Is that right?

2. I am concerned about the effect of sec. 45(8) on a private company or its further counterpart. Many private companies are far from businesslike, and if they forget (and most will forget) to put a note of the restriction on the certificate, so that a shareholder may pull a fast one and sell. The countervailing danger is that if the reference isn't there, an unsuspecting purchaser may buy and then find that he is fixed with an unsuspected restriction. Which danger is the worst? It seems to me on the whole that private company shares do not get out in circulation so as to trap the unwary buyer, and my inclination would be to say that 45(8)(a) does not apply to our private company category, but I am far from sure of this. It may be that we should provide alternatives and leave the point wide open. What should be done?

(9) Transitional.--If a body corporate continued under this Act has outstanding security certificates, and if the words "private company" appear on the certificates, those words are deemed to be a notice of a restriction, lien, agreement or endorsement for the purpose of subsection (8).

Notes: 1. It seems to me that this will make all existing private company shares negotiable, and a company, even if advised of the new law (which it may not be for some time) may not be able to get its certificates in and mark them "private company."

2. This does not seem too appropriate for debt securities: if there are restrictions on transfer they are not likely to be based on the private/public company dichotomy? Or are they?

(10) (10) Particulars of class.—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; or

(b) that the class or series of shares that it represents has rights, privileges, restrictions or conditions attached thereto 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 the same 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) Duty.—Where a share certificate issued by a corporation contains the statement mentioned in paragraph (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 the same have been fixed by the directors; and

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

Note: CBCA 45(10) and (11) seem all right, though if everyone asked for all this in a major company there would be a good deal of paper involved.

(12) Fractional share.—A corporation may issue a certificate for a fractional share or may issue in place thereof scrip certificates in bearer form that entitle the holder to receive a certificate for a full share by exchanging scrip certificates aggregating a full share.

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

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

(b) any shares for which such 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.

Note: If everyone but me knows what "scrip certificates" are, there is no problem.

(14) Holder of fractional share.—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) Holder of scrip certificate.—A holder of a scrip certificate is not entitled to exercise voting rights or to receive a dividend in respect of the scrip certificate.

46. (1) Securities records.—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) Central and branch registers.—A corporation may appoint an agent to maintain a central securities register and branch securities registers.

(3) Place of register.—A central securities register shall be maintained by a corporation at its registered office or at any other place in Alberta designated by the directors, and any branch securities registers may be kept at any place in or out of ~~Canada~~ Alberta designated by the directors.

(4) Effect of registration.—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.

(5) **Branch register.**—A branch securities register shall only contain particulars of securities issued or transferred at that branch.

(6) **Central register.**—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.

(7) **Destruction of certificates.**—A corporation or its agent is not required to produce

(a) a cancelled security certificate six years after the date of its cancellation; or

(b) an instrument referred to in subsection 29(1) [instruments involving rights to acquire securities] or a like instrument after the date of its expiry.

Notes re sec. 46:

1. We will have to be sure that nothing we say about the securities register in the registered office part conflicts with what is done here. We were talking about carrying forward the Alberta provision allowing the register to be kept in a trust company's office.

2. Note that sec. 46(7) allows destruction of instruments after 6 years. (I am not sure that there is a positive obligation under the Act to keep a cancelled instrument at all).

3. The section appears all right and should be adopted for uniformity of practise.

47. (1) **Dealings with registered holder.**—Before the presentment for registration of transfer of a security in registered form, a corporation or a trustee under a trust indenture may, subject to subsection 72(7), treat as absolute owner of the security the person in whose name the security is registered in a securities register, as if that person had full legal capacity and authority to exercise all rights of ownership, irrespective of

(a) any knowledge or notice to the contrary; or

(b) any description in its records or on the security certificate indicating

(i) a pledge, a representative or a fiduciary relationship,

(ii) a reference to any other instrument, or

(iii) the rights of any other person.

(2) **Constructive registered holder.**—Notwithstanding subsection (1), 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 subsection [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) **Permissible registered holder.**—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 such person as entitled to exercise those rights or privileges.

(4) **Immunity of corporation.**—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 thereof.

Notes:

1. 47(1) protects the company against any claims except those in the register. Note that it may not only ignore trusts, etc., but knowledge of lack of ownership or capacity. Note particularly that the provision appears discretionary.

2. Sec. 72(7) fixes the company with notice of things contained in excess documentation required by it on a security transfer.

3. Should the "heir" be in 47(2)? Since the law of other jurisdictions may apply, I suppose it should be.

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

Notes:

1. If 46(5) means what it says it is pretty strong. I am not sure what a judge would do if faced with a share transfer signed by a child of tender years. I suppose that I agree.

2. I am also in some doubt about saying that no repudiation or avoidance is effective only against the corporation. If an infant transfers shares he will lose the shares as against a bona fide purchaser who registers, and it looks as though he will lose against the issuer because of this section. Is that correct? Is it just?

(6) Joint holders.—A corporation may treat as owner of a security the survivors of persons to whom the security was issued as joint holders, if it receives proof satisfactory to it of the death of any such joint holder.

(7) Transmission of securities.—Subject to any applicable law relating to the collection of taxes, a person referred to in paragraph (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 thereof 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 paragraph (2) (a), or

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

together with

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

(d) the security certificate that was owned by the deceased holder
   (i) in case of a transfer to a person referred to in paragraph (2) (a), with or without the endorsement of that person, and
   (ii) in 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) Excepted transmissions.—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) Right of corporation.—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 paragraph (2) (a) or to such person as the person referred to in that paragraph may designate and, thereafter, to treat the person who thus becomes a registered holder as the owner of those securities.

Notes: 1. Sec. 47(6) appears to give the company a discretion to recognize the survivor of joint holders. I have some qualms. Does "joint holders" mean the same as "joint tenants"? If two names appear without more, are the two "joint" holders with right of survivorship? I would think there should at least be a presumption the other way. What should we do?

2. Sec. 47(7) to 47(9) deal with transmissions and real estate transfers. They appear to me to be reasonable and in accordance with business practise.

48. (1) **Overissue.**—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) **Retroactive validation.**—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) **Payment not a purchase or redemption.**—A purchase or payment by an issuer under subsection (1) is not a purchase or payment to which section [32, 33, 34 or 37 dealing with acquisition of its own shares] applies.

Notes: 1. This is a sensible provision for the over-issue situation. If the company can buy in a security, it can be compelled to do so. If not, it can be made to pay the amount of the last purchase price.

2. I am not sure about 48(1)(b). Suppose replacement shares are not reasonably available, and the shareholder has been deprived by theft and a forged transfer of shares which he bought in 1945 at a small fraction of current value. It seems that 48(1)(b) would give him only the low original price. (The reverse, a crash in value might also cause trouble, but it is unlikely that the company could not buy in at a price within reason.) Why is it not the value, rather than the last price? Am I missing something?

3. Sec. 48(2) seems very wise. It may cost the company something to proceed under sec. 48(1)(a), and sec. 48(2) will then give it another way out. I see one problem, however. Suppose the company pays under 48(1)(b) and neglects to have the shareholder sign over the invalid security and later increases the shares it can issue, it seems that the shareholder now has the money he received plus valid shares. Should 48(2) either except that situation or give the company a lien on the shares for what it paid?

49. Burden of proof.—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 a defence or defect going to the validity of the security, the plaintiff has the burden of establishing that the defence or defect is ineffective against him or some person under whom he claims.

Notes:

1. I am not sure why it is necessary to have a signature both admitted (Sec. 49(a)) and presumed (sec. 49(b)). A denial in the pleadings will at once negative the admission under sec. 49(a) and shift the burden under 49(b).

2. In connection with the signatures authenticating the security, the relationship between sec. 49 and sec. 18 is somewhat tortuous. Sec 49(a) and 49(b) give positive effect to a denial and a putting in issue, while 18 precludes them. Presumably sec. 18 overrides.

3. However, the result seems to be:

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

   (b) The company is precluded from repudiating its officials' signature under the circumstances covered by sec. 18.

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

   (d) When the burden under (c) is satisfied, the burden of showing a defence going to the validity of the security shifts to the defendant.

   (e) When the defendant satisfies that burden, the burden of showing it inapplicable (e.g., because the plaintiff is a bona fide purchaser) shifts to the plaintiff.

4. I don't see enough trouble to justify re-drafting.

50. **Securities fungible.**—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: Sec. 50 seems sensible enough. I would have thought it would not be necessary to say all this, but I don't see any harm in it and uniformity suggests its inclusion.

51. (1) **Notice of defect.**—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 therein 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) **Purchaser for value.**—A security is valid in the hands of a purchaser for value without notice of any defect going to its validity.

(3) **Lack of genuineness.**—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) **Ineffective defences.**—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.

Notes: 1. The first part of sec. 51(1) seems clear enough: the terms on which a security is held include those stated on its face and those incorporated by reference. Certainly a holder cannot complain about being bound by the terms of the deal as set out in the instrument itself. It seems reasonable also that terms incorporated by reference are binding, as the reference gives notice which will enable a purchaser to protect himself, and a requirement that the whole trust deed must be on the bond would be unworkable. The exception of inconsistent terms incorporated by reference protects the purchaser who accepts the terms stated on the instrument without checking everything.

2. I don't understand the last part. Surely no security will incorporate a statement that the security is invalid.

> 52. **Staleness as notice of defect.**—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 two years after the date set for surrender or presentation or the date on which such performance became due.

Notes: 1. The purchaser is not able to set up his lack of notice of invalidity under certain circumstances. Firstly, there must either be (a) an event that creates a right to immediate performance or (b) an event that sets a date on or after which the security is to be presented for redemption or exchange. Then there must be the lapse of one year if the issuer had made provision for the funds or securities needed for the redemption or exchange, or two years if it had not. The basic premise appears reasonable: as the security becomes stale there must come a point at which the appearance of regularity no longer exists so that a purchaser can no longer rely on it.

2. I am not sure about the drafting. I suppose that "an event that creates a right to immediate performance is understandable enough, e.g., a default or something of that kind, though "events" really don't "create" rights. However, an "event" that "sets a date" is more strained: it may mean "an event the occurrence of which causes a date to be set," and that is a notion which can be

comprehended, e.g., the giving of notice for redemption of a share issue, and I am not sure as a matter of language that that is what is meant. I am the more uneasy because it seems to me that on that interpretation the clearest and most obvious cause of staleness is not covered at all, namely, the maturity in accordance with its terms of the whole issue. By way of comparison, one of the principal requirements of a holder in due course under sec. 56(1) of the Bills of Exchange Act is that he take it "before it was overdue." I would accordingly appreciate some discussion of this.

3. See notes to sec. 58.

53. Unauthorized signature.—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 paragraph (a) who in the ordinary course of his duties handles the security.

Notes: 1. This ties in with sec. 51 and seems all right.

2. Consider whether there is any problem in its relationship to sec. 18. Presumably it is open to a person claiming that a security is valid under this part to bring the circumstances under 18(d) or (e) (in which case the company is precluded from asserting lack of authority of an individual or lack of validity or genuineness of the instrument) or alternatively to bring them under this section (in which case the signature is effective).

54. (1) Completion or alteration.—Where 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 such incorrectness.

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

Notes:

1. Sec. 54(1) protects a purchaser for value without notice from an allegation that a security has been improperly completed. It assumes a security that has been signed.

2. The section adds to negotiability and is reasonable if the basic policy is negotiability.

55. (1) Warranties of agents.—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) **Limitation of liability.**—Unless otherwise agreed, a person referred to in subsection (1) does not assume any further liability for the validity of a security.

Notes:

1. Under existing law a person who authenticates a security presumably warrants his authority to do so. How much else he warrants I do not know. This is a fairly extensive obligation.

2. Presumably this doesn't apply to someone whose signature is mechanically reproduced, or does it?

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

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

Notes:

1. The effect of the first part of sec. 56(1) is that there must be endorsement plus delivery in order to confer all the rights of A, the owner, upon B, the purchaser. (Under sec. 62, endorsement without delivery does not transfer the instrument. Under sec. 60, delivery transfers the instrument as against the transferor but does not make him a bona fide purchaser.) It seems to be in order and gives effect to commercial practise.

2. The last part of sec. 56(1) answers a question which is of philosophic, if not very often of practical importance. If A, who knew of an adverse claim, sells to B, a bona fide purchaser, and if A later buys from B or a later bona fide purchaser, A's position is not improved. It also fixes a purchaser with his own fraud or illegality. This of course detracts from B's market, and the provision is somewhat debatable, but it might as well stand.

3. Sec 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 sec. 44(2), i.e., if

   (a) he is a purchaser as defined in sec. 44(2). This is a broad definition: it appears to

include anyone upon who "takes" an interest by any form of voluntary transaction.

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

(c) he acts in good faith. This means "honesty in fact in the conduct of the transaction concerned" (sec. 44(2)).

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

(e) he must take delivery. This means "voluntary transfer of possession" (sec. 44(2)).

(f) the security must be in bearer form, registered in the purchaser's name, or endorsed to the purchaser or in blank.

Subject to one query, this conforms to the standard tests for negotiability and, assuming that the policy decision has been made, appears in order.

4. My one query relates to the forged endorsement. In the case of a bill, note or cheque, my recollection of the law is that a forged or unauthorized endorsement is and always remains a void in the chain of title, so that a later purchaser never becomes a holder as against parties prior to the forged or unauthorized endorsement, though he does have rights

against subsequent endorsers. My impression, which I would like to have tested, is that sec. 56 would protect a purchaser even against the forgery of an endorsement to him or to an earlier purchaser in the chain. This impression is reinforced by sec. 64, which does not appear to allow the owner to assert the "ineffectiveness" of an endorsement against a purchaser who falls within a class which inclues those "bona fide purchasers" who have achieved registration, and sec. 68 which also contemplates that ineffectiveness of endorsement cannot be asserted against purchasers referred to in sec. 64(1). It is also reinforced by the definition of "adverse claim" in sec. 44(2), as that includes a claim that a transfer is wrongful or that someone else is the owner of the security. A contrary argument might be made that no one "takes" under a forged endorsement and that therefore no one can become a "purchaser," but that seems to me rather insubstantial.

What should the situation be? Is the interest in facility of transfer so strong as to overcome the interest in the security of ownership if an owner who has taken the precaution of having his ownership registered and who has done nothing to divest himself of ownership or to lead anyone else to think he has done so? The answer is the case of other negotiable instruments transferable by endorsement and delivery has, I think, been no. The answer in the case of land has clearly been yes in favour of a bona fide purchaser for value from a registered owner whose registration resulted from a forgery, and it may be yes in favour of a bona fide purchaser whose registration resulted from a forgery. How far are we prepared to go? (Note that the owner would have recourse

against the company under sec. 64(2) and anyone whom the general law would let him sue for fraud). (See the summary in note 2 to sec. 68, which changes these conclusions. This note should be omitted in later drafts).

5. There is one other question I would raise: should full negotiability be extended to the shares of private companies or their continuing counterparts? There is no custom of negotiability; indeed, the requirement of a restriction on transfer is a requirement of non-negotiability based on the much closer and more confidential relationship among a small group of shareholders. Nor is there any particular public interest in negotiability. I would venture the guess that if we were looking only at private companies (i.e. 95%, or whatever it is) of all Alberta companies we probably would not make company shares more negotiable than partnership interests. The only real arguments for negotiability here are the difficulty of segregating companies with negotiable share certificates from those without, and the legal complexity and possible traps created by having two categories. Two possibilities might usefully be considered:

   (a) that sec. 56(2) and related provisions be made inapplicable to a private company category.

   (b) that a company be permitted to stamp its share certificates "non-negotiable," and that the negotiability provisions not apply.

(Note that this talks only of shares. There is less need for negotiability of debt obligations in small companies than in large issuers, but there is a stronger residual argument).

57. (1) Deemed notice of adverse claim.—A purchaser of a security, or any broker for a seller or purchaser, is deemed to have notice of an adverse claim 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) Notice of fiduciary duty.—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.

Notes:

1. The circumstances set out in sec. 57(1) certainly seem to justify depriving the purchaser of the advantages of negotiability.

2. The effect of sec. 57(2) is that in the absence of anything to the contrary the purchaser is entitled to assume that the fiduciary can transfer. There are two points that I would mention:

   (a) I think that I am correct in saying that if the beneficiary notifies the prospective purchaser that the fiduciary has no authority, a court would hold (assuming the statement to be true) that the purchaser "knows" that the transaction is in breach of the fiduciary's duty.

   (b) I am puzzled by the fact that <u>any</u> purchaser, even a donee is protected. Should it not be restricted to one who gives value and is otherwise bona fide?

58. Staleness as notice of adverse claim.—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 six 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.

Notes:

1. Sec. 58 deprives a purchaser of defences against an adverse claimant in somewhat the same way as sec. 52 deprives him to defences against the issuer in connection with validity.

2. I am not clear as to whether "an event that creates a right to immediate performance" can bring about staleness under sec. 58. The general statement that the event is not notice of an adverse claim

applies to it, but both exceptions depend upon "any date set," and I doubt that it can be said that there is a "date set" if, e.g., a default triggers an acceleration clause. It may be fair enough that an event which may be unknown to the purchaser should affect his rights, but I am not sure that there is a material difference for this purpose between a sec. 58 situation and a sec. 52 situation.

3. I actually think these exceptions are good enough, subject to a reservation similar to that in Note 2 to sec. 52, namely, that I am not sure that either exception would apply to the maturity of the security in accordance with its terms, and it seems to me that it should.

4. I don't see why there should be different periods for staleness vis-à-vis the issuer and vis-à-vis an adverse claimant. Aren't we setting up a somewhat arbitrary standard to decide whether a purchaser should be able to treat appearances as reflecting realty? If so, and if it is the bona fide purchaser who is the subject of our concern, why should he have to bear in mind two different sets of rules to decide whether his state of mind is legally acceptable in relation to two different aspects of what is to him the same thing?

59. (1) Warranties to issuer.—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, re-issued or re-registered security on registration of transfer warrants only that he has no knowledge of any unauthorized signature in a necessary endorsement.

Notes: 1. Once the purchaser for value without notice is registered, the only remaining warranty he gives is that he has no knowledge of an unauthorized signature. (If he had knowledge, I don't see how he could be "without notice.")

2. The subsection seems all right.

(2) Warranties to purchaser.—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.

Notes: 1. It seems reasonable that a transferor should be taken to warrant the validity of what he transfers for value.

2. I am not sure what is added by sec. 59(2)(c) but I don't see any harm in it.

(3) Warranties of intermediary.—Where 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.

Notes: 1. I can accept this on faith. It does not seem to apply if the security is endorsed to the intermediary; presumably sec. 59(2) would apply.

(4) Warranties of pledgee.—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) Warranties of broker.—A broker gives to his customer, to the issuer and to a purchaser, as the case may be, the warranties provided in this section and has the rights and privileges of a purchaser under this section; and those warranties of and in favour of the broker acting as an agent are in addition to warranties given by his customer and warranties given in favour of his customer.

Notes:

1. Sec. 59(5) is somewhat hard to read in one respect. It starts by saying that a broker gives the warranties provided in the section, which I find somewhat confusing as there are different sets. It is probably fairly clear ultimately that he gives a transferor's warranties or a transferee's warranties when he acts as such or where he acts as someone's agent he appears to give and receive warranties as agent.

2. These two subsections look all right.

60. Right to compel endorsement.—When 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.

Notes:

1. It certainly seems right that the purchaser who has received the security should have a right to an endorsement.

2. I am not clear about the situation if, after delivery and before endorsement, the purchaser receives notice of an adverse claim, or the security becomes stale, between the time of delivery and the time of endorsement. I think that he must fulfill the definition of bona fide

purchaser when he becomes one, i.e., at the time of endorsement, but I am not sure. What should we do?

61. (1) "Appropriate person" defined.—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 paragraph (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 paragraph (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 paragraph (a) is an individual and is without capacity to act by reason of death, incompetence, infancy, minority or otherwise, his fiduciary;

(e) if the security or endorsement mentioned in paragraph (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 paragraphs (a) to (f) may act through an agent, his authorized agent.

(2) Determining "appropriate person".—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.

Notes:

1. The definition of "appropriate person" is for the purposes of sec. 64(3) and provisions relating to registration.

2. I am somewhat puzzled by sec. 61(1)(b). It seems to say that a fiduciary can sign forever, even after he ceases to be fiduciary. If it is only intended to cover the situation in which a fiduciary signs and then ceases to be fiduciary, it is covered by sec. 64(2), so it may be that it is intended that the issuer, on seeing that the person signing was once a fiduciary, may rely on his signature without having to investigate as to its date. It may relate in some way to the requirement in sec. 72(4) that a

copy of an order appointing a fiduciary must be no more than 60 days old, but I don't quite see it. Why don't we suggest omitting 62(1)(b) and letting someone show us why it should go in?

3. The two subsections seem sensible.

> (3) **Endorsement.**—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) **Special or blank.**—An endorsement may be special or in blank.
>
> (5) **Blank endorsement.**—An endorsement in blank includes an endorsement to bearer.
>
> (6) **Special endorsement.**—A special endorsement specifies the person to whom the security is to be transferred, or who has power to transfer it.
>
> (7) **Right of holder.**—A holder may convert an endorsement in blank into a special endorsement.

Notes: 1. Does signing an ordinary power of attorney giving authority to transfer constitute an endorsement? Sec. 64(3) seems to say so. That is probably because issuers will accept a power of attorney form rather than a transfer form. Why, if I leave my solicitor a power of attorney which he doesn't exercise, should all the consequences of endorsement follow? Shouldn't there have to be an endorsement under the power? Maybe we should ask transfer agents whether they sign an endorsement when they get a power. I wouldn't want to get in the way of business being done, but the consequences of saying there is an endorsement can be serious.

2. It is going quite a way to say that a simple signature on the back of a share certificate is an endorsement, but I suppose that that plus delivery is a reasonable form of transfer. Note that transfer agents may be surprised to find that they must accept it under sec. 71(1). Is this in order?

3. Otherwise these subsections follow usual negotiability practise and seem all right.

(8) **Immunity of endorser.**—Unless otherwise agreed, the endorser by his endorsement assumes no obligation that the security will be honoured by the issuer.

Notes: 1. An endorser of a bill, note or cheque, undertakes with the holder if my memory serves me, that it will be paid on due presentation. If so, there is an important departure here from the usual incidents of negotiability. As between the parties, the warranty under sec. 59(2) amount to warranties that the purchaser will be entitled to to have the issuer honour the security in accorance with its terms, but that falls short of an undertaking that the issuer will honour it, and there are no warranties or obligations at all here between owners other than between immediate parties. Probably it is in order not to leave one who has signed off with residual liability.

(9) **Partial endorsement.**—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 fiduciary to comply.**—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.

Notes: 1. Sec. 61(9) hardly needs to be said but does no harm.

2. Sec. 62(10) confirms that the purchaser need not inquire into the regularity of a fiduciary's signature.

62. Effect of endorsement without delivery.—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 t heendorsement is on a separate document, until delivery of both the security and that document.

Notes: 1. This section confirms the need for delivery.

2. Note that delivery means the "voluntary transfer of possession." (Sec. 44(2). Do the usual contract rules apply? There may be a conflict between the requirement of delivery, on the one hand, and the definition of a bona fide purchaser on the other: is it clear whether or not the purchaser will acquire good title if the transferor's agent delivers the instrument against the transferor's instructions? I can see the following opposing arguments:

(a) Against the purchaser. Sec. 62 says there is no transfer without delivery (at least where endorsement is needed: is CBCA clear that delivery constitutes transfer if it is not?) Probably, and that means no transfer without voluntary transfer of possession. A transfer against the wishes of the transferor is not voluntary (the relevant volition can hardly be that of the agent). A purchaser is not a bona fide purchaser under sec. 56(2) unless he falls within the definition in sec. 44(2), and "takes delivery," i.e., takes a voluntary transfer of possession.

(b) For the purchaser. The principal purpose of the Part is to ensure that a purchaser in good faith and for value obtains good title, and it is enough to constitute him a bona fide purchaser

that the certificate be voluntarily delivered to him by someone. The transferor's claim is an adverse claim from which sec. 56(2) frees the purchaser.

Is the provision clear? What does it mean; and what should it mean?

63. Endorsement in bearer form.—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.

Notes: 1. There is no reason why a mere endorsement should affect the holder's right to registration, so the section appears all right.

2. To give notice under sec. 57 it would have to be specifically endorsed for a purpose not involving transfer.

64. (1) Effect of unauthorized endorsement.—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.

(2) Liability of issuer.—An issuer who registers the transfer of a security upon an unauthorized endorsement is liable for improper registration.

Note: See notes under sec. 68.

65. (1) Warranties of guarantor of signature.—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) **Limitation of liability.**—A person who guarantees a signature of an endorser does not otherwise warrant the rightfulness of the particular transfer.

(3) **Warranties of guarantor of endorsement.**—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) **Extent of liability.**—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 such person for any loss resulting from breach of warranty.

Notes:

1. Sec. 65(1) imposes upon the guarantor of the signature the obligation of identifying the signer with the person named, and of ascertaining the truth of any other facts which make the signer an "appropriate person" under Sec. 61. I suppose the obligation is there now, but if guarantors were to take the steps necessary to assure themselves of these facts in any meaningful way, business might come to a halt.

2. I don't see that the endorser guarantees the authority of agents who sign. Genuineness under Sec. 65(1)(a) merely means that there is no forgery or counterfeiting, and legal capacity under Sec. 65(1) (c) seems to go to capacity of the endorser since it is the endorser's signature that the section refers to.

3. The obligation of the guarantor of the endorsement goes much further, since it extends to the "rightfulness of the transfer in all respects."

Since a right-thinking transfer agent would no doubt dearly love to get guarantors to undertake this liability, Sec. 65(3) very properly prevents him from doing so.

66. (1) Constructive delivery of a security.—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) Constructive ownership.—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 paragraphs (1)(b) and (c).

(3) Ownership of part of fungible bulk.—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 to broker.—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.

Notes:

1. Sec. 66(1) deals with some specific cases in which it might be doubtful whether delivery has occurred, and seems to be in order.

2. I find sec. 66(2) difficult. It suggests that a broker (who acts or sells to the purchaser - Sec. 44(2)) may sometimes hold a security for a purchaser, who is then the owner, without holding it under the circumstances set out in sec. 66(1)(b) and (c) so as to make the purchaser a holder. I suppose that this contemplates a purchase by the broker for the purchaser but in the name of the broker or of some other person.

It may also contemplate a purchase of a certificate endorsed in blank which either has been identified in the broker's records without notification to the purchaser, or which is identifiable in some way by extrinsic evidence as having been bought for the purchaser. (I have not checked the Act to determine the significance of being a holder, or of being an owner who is not a holder. I note, e.g., in Sec. 61(7) that a holder may convert an endorsement in blank into a special endorsement.)

3. Sec. 66(3) seems intended to improve the position of customers whose broker becomes insolvent. Presumably, the earmarking of a security under Sec. 66(1)(c) would take the security out of the "tangible bulk", but if the customer could show that he ever acquired an interest in a security which went into the "tangible bulk" he would at least have an interest in the "tangible bulk" which would come ahead of the interests of general creditors.

4. Sec. 66(4) on the face of it is sensible. It is presumably needed to cover the period between the acquisition of the security and its registration in the purchaser's name or its earmarking for him: in its absence he might lose his position as bona fide purchaser. It is also sensible, though possibly harsh on the broker, to allow the customer to decline buying a lawsuit by demanding shares not subject to an adverse claim. (I don't think that on an "exclusio àl terius" basis it can be suggested that where there is no broker involved,

a notice to the purchaser after delivery would have any effect).

67. (1) Delivery of security.—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 he delivers the security to the selling broker or to a person designated by the selling broker or causes an acknowledgement to be made to the selling broker that it is held for him; and

(b) the selling broker, including a correspondent broker, acting for a selling customer fulfils his duty to deliver by delivering the security or a like security to the buying broker or to a person designated by the buying broker or by effecting clearance of the sale in accordance with the rules of the exchange on which the transaction took place.

(2) **Duty to deliver.**—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 delivers the security in negotiable form to a purchaser or to a person designated by the purchaser, or causes an acknowledgement to be made to the purchaser that the security is held for him.

(3) **Delivery to broker.**—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.

Notes:

1. This section appears unexceptionable. The seller must deliver a security "in negotiable form" to the purchaser or someone designated by the purchaser, or to his broker if the purchase was through a broker. The selling broker can then deliver that security "or a like security" to the buying broker.

2. I am not sure that the words "in negotiable form" are defined anywhere in the Act. They are probably clear enough, but I am not sure whether a security specifically endorsed to the purchaser is in negotiable form. Is anyone?

3. Is it clear that an acknowledgment under Sec. 67(1) or Sec. 67(2) must be one which effectively allows the person to whom it is made to get a security in negotiable form? (Probably Sec. 69 is the answer - a transferor must on demand supply a purchaser with any requisite necessary to obtain registration).

> 68. (1) **Right to reclaim possession.**—A person against whom the transfer of a security is wrongful for any reason, including his incapacity, 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) **Recovery if unauthorized endorsement.**—If the transfer of a security is wrongful by reason of an unauthorized endorsement, the owner may reclaim possession of the security or a new security even from a *bona fide* purchaser if the ineffectiveness of the purported endorsement may be asserted against such purchaser under section[64.]
>
> (3) **Remedies.**—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.

Notes:

1. Sec. 68(1) seems clear enough. Except as against a bona fide purchaser. The wronged owner can do one of two things: either reclaim the security or obtain possession of its replacement, or claim damages. However, it would be necessary to be sure that the cause of action for damages is established elsewhere in the Act: a right to claim damages against "anyone" cannot mean "anyone in the world", but must mean "anyone against whom a cause of action exists," e.g. The issuer, whom Sec. 64(2) makes liable if it registers a transfer on an unauthorized endorsement.

   I would think that the plaintiff could sue for both

the property and damages, but would have to elect for one or the other before judgment. Is that right, and is it clear?

2(1) Sec. 68(2) goes on to say that the owner may get back the security, or a substitute security, even from a bona fide purchaser, if the effectiveness of the purported endorsement may be asserted under Sec. 64, which makes it necessary to go back to that section.

(2) The protection under Sec. 64 against the assertion of an ineffective endorsement is given to

(a) a purchaser (i.e., one who takes an interest under a voluntary transaction - Sec. 44(2)

(b) for value (i.e., presumably he must give valuable consideration under contract law)

(c) without notice of an adverse claim (i.e., a claim that a transfer is wrongful or that a particular adverse person is the owner of or has an interest in the security (sec. 44(2)).

(d) who has in good faith (i.e., with honesty in fact)

(e) received a new, reissued or re-registered security on registration of transfer ("received" is not defined).

(3) This cumulative list makes the protected purchaser sound like a "bona fide" purchaser, but, even if the use of differently phrased criteria did not put the reader on guard (which it might well fail to do), Sec. 68 makes it clear that there may be a

"bona fide purchaser" who does not fall within the class protected under Sec. 64. If so, who is a bona fide purchaser who is not included? The analysis isn't made overly easy.

(4) A "bona fide purchaser" (sec. 44(2)) must be a purchaser (See (a), above) and he must have given value (see (b) above). He must also do something in good faith and without notice, but it is a different something. What the "bona fide purchaser" must do in good faith and without notice is to take delivery of a security in bearer form or of a security in registered form issued to him or endorsed to him or in blank. What the purchaser under Sec. 64(1) must do in good faith and without notice is to "receive a new, reissued or re-registered security on registration of transfer." It therefore appears that the "bona fide purchaser" who is not protected under Sec. 64 is the one who has not procured the registration of the transfer, i.e., the one who holds it endorsed in blank or specifically endorsed to him.

(5) The result appears to be, then, that the owner can get back his security at any time until the transfer is accepted by the issuer and a new security issued and received by the purchaser. At that point the owner can no longer get back the security, but he can sue the issuer under Sec. 64(2). The issuer is precluded from suing the person who presented the transfer unless the latter knew that the signature was unauthorized.

(6) The effect of Sections 56, 64 and 68 appears to be as follows:

(a) Sec. 56(1) confers on every purchaser the rights of his transferor unless he is party to fraud or illegality or as a prior holder had notice of an adverse claim.)

(b) In addition Sec. 56(2) confers the security upon a"bona fide purchaser" "free from any adverse claim". This by itself is open to conflicting interpretations. "Adverse claim" includes a claim that a "transfer" is "wrongful". Does it include a claim that a "transfer" is based upon an ineffective signature? The argument for the affirmative would be that an instrument in the form of a transfer is included in the word "transfer" whether it is effective or not. The argument for the negative would be that a transfer based upon an ineffective signature is ineffective and is therefore no transfer at all. The relationship between secs. 64(2), 73 and 74 bears on the argument. Sec. 64(2) appears to impose an absolute liability upon an issu who accepts an ineffective endorsement. Sec. 73 imposes a duty of inquiry into "adverse claims" only if the issuer has notice and goes on to provide a way in which it may discharge the duty; if a claim based upon an ineffective endorsement is an "adverse claim" the two provisions are in conflict. Sec. 74 exonerates an issuer from liability to an owner who incurs a loss as a result of the registration of the transfer of a security if the necessary "endorsements" were there and the issuer had no duty to inquire into "adverse claims" or discharged the duty; this

does not clearly bear on the question under discussion but does appear to form part of the code dealing with "adverse claims" and (since it exonerates an issuer who relies upon an "endorsement") can be reconciled with sec. 64(2) only if an ineffective endorsement (the acceptance of which imposes liability under sec. 64(2)) is not an "endorsement" the presence of which exonerates the issuer, a circumstance which suggests that there are two mutually exclusive codes in CBCA, one (sec. 56, sec. 73, sec. 74) dealing with "adverse claims" and the other (sec. 64, sec. 68) dealing with ineffective endorsements.

(c) As stated above, sec. 64(1) and sec. 68 appear to provide a complete code for the effect of the ineffectiveness of a signature insofar as ownership is concerned. They appear to say that the owner has the right to claim title against

(i) a purchaser who is not a "bona fide purchaser", and
(ii) a "bona fide purchaser" who has not received a new, reissued or re-registered security on registration of the transfer.

but not against a "bona fide purchaser" who has received such a new, reissued or re-registered security.

(d) It seems to me that a good deal of clarification could be provided by including in the definition of "adverse claim" a statement that it does not include claim that a transfer is ineffective

(though the use of the phrase throughout the Part would have to be checked first) or alternatively by saying that Sec. 56 itself does not protect a bona fide purchaser against a claim that a signature is ineffective (though that might be tantamount to saying that "adverse claim" otherwise includes a claim based upon an ineffective signature).

(e) Upon registration, the owner's right to the security is lost, and instead he has a new right of action in damages agains the issuer, as well as any which the general law gives him for, e.g. fraud.

(f) "Ineffective" is not defined. Presumably an "ineffective" signature is one which is forged or signed without authority or without capacity. Presumably a signature obtained by fraud is effective where the general law would give effect to it. (But note that under sec. 47(5) lack of capacity of an infant appears to be cured vis-a-vis the corporation but not otherwise).

(g) If B, a bona fide purchaser, achieves registration on the strength of a purported endorsement by the registered owner, A, which is ineffective, he can clearly give good title to another purchaser, D, whether D is a bona fide purchaser or not, so long as D was not a party to fraud or illegality.

(h) I am not entirely clear about the continued effect of a missing link in the chain of title. Suppose A's unendorsed certificate is inadvertently

included in a number of certificates sent to be transferred to B, a broker, so that A's certificate is cancelled and a new one issued to B. Suppose B then sells to C, a bona fide purchaser. There is no ineffective signature, and probably A has nothing but an adverse claim against which C is protected by CBCA sec. 56(2).

69. (1) Right to requisites for registration.—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) Rescission of transfer.—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:

1. This is a "further assurances" provision and seems quite appropriate.

2. Does sec. 69(2) suggest that rejection or rescission is the only remedy? There should be a right to sue, and there probably is. Should it be made clearer?

70. Seizure of security.—No seizure of a security or other interest evidenced thereby is effective until the person making the seizure obtains possession of the security.

Note:

1. This is a useful aid to negotiability.

2. What is the meaning of "other interest evidence thereby"? Other than what? Shouldn't it be "any interest" if we intend to go that far?

71. (1) Duty to register transfer.—Where a security in registered form is presented for 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 subsection[45(2)] has been paid.

(2) **Liability for delay.**—Where 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:

1. Sec. 64(2) makes the issuer responsible for registering a security upon an ineffective endorsement. Sec. 71(1) makes him responsible for delaying or refusing the registration of a proper transfer. Following sections define his rights and duties somewhat further, but it seems fair to say that the issuer is required to follow business practises which leave open the possibility of fraud and mistake, and to assume financial responsibility for the fraud or mistake if those practises prove inadequate to protect it. Considering the interests of investors as a whole, and the fact that the system is intended for the benefit of investors and the companies in which they invest, it seems reasonable that the companies, as the collective vehicle for those interests, should bear the loss which accompanies the benefit.

72. (1) Assurance that endorsement effective.—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 authority to sign;

(b) if the endorsement is by a fiduciary, evidence of 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) "Guarantee of the signature" defined.—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 responsible.

(3) Standards.—An issuer may adopt reasonable standards to determine responsible persons for the purpose of subsection (2).

(4) "Evidence of appointment or incumbency" defined.—"Evidence of appointment or incumbency" in paragraph (1)(b) means

(a) in the case of a fiduciary appointed by a court, a copy of the order certified in accordance with subsection 47(7), and dated not earlier than sixty 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) Standards.—An issuer may adopt reasonable standards with respect to evidence for the purposes of paragraph (4)(b).

(6) No notice to issuer.—An issuer is deemed not 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) Notice from excess documentation.—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, bylaw or similar document, the issuer is deemed to have notice of all matters contained therein affecting the transfer.

Note:

In some cases this section limits by specific reference what the issuer can require, and in others imposes the standard of reasonableness. If the issuer goes further he will be liable in damages for failure to register, and if the evidence it gets proves false it will be liable if it accepts an ineffective signature. It will also be fixed with knowledge of anything it gets in excess documentation, which is an additional inducement to be reasonable.

73. (1) Limited duty of inquiry.—An issuer to whom a security is presented for registration 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 subsection[72(7).]

(2) Discharge of duty.—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 registration of transfer by a named person, and that the transfer will be registered unless within thirty days from the date of mailing the notice either

(a) the issuer is served with a restraining order or other order of a 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) Inquiry into adverse claims.—Unless an issuer is deemed to have notice of an adverse claim from a document that it obtained under subsection[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 newly registered owner continues to be the fiduciary until the issuer receives written notice that the fiduciary is no longer acting as such with respect to the particular security;

(b) an issuer registering 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 deemed not 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) Duration of notice.—A written notice of adverse claim received by an issuer is effective for twelve months from the date when it was received unless the notice is renewed in writing.

Notes:

1. Sec. 73 gives some protection to the issuer by
   (1) limiting his duty of inquiry to claims of which it has notice,
   (2) giving him reasonable ways of discharging its duty of inquiring into adverse claims,
   (3) protecting him against certain adverse claims if he acts properly.

74. (1) Limitation of issuer's liability.—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) Duty of issuer in default.—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 subsection [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]

Notes:

1. Sec. 74(1) goes on to protect the issuer against claims by the owner of which the issuer has no notice.

2. Sec. 74(3) requires the issuer to issue a substitute security unless everything was apparently in order, the owner was precluded from demanding it by failure to notify the issuer, or the substitution would result in an overissue.

3. See note 6(b) to sec. 68: Do secs. 73 and 74 protect the issuer if an endorsement is ineffective?

75. (1) Notice of lost or stolen security.—Where 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 if 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) Duty of issuer to issue a new security.—Where 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;

(b) furnishes the issuer with a sufficient indemnity bond; and

(c) satisfies any other reasonable requirements imposed by the issuer.

(3) Duty to register transfer.—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) Right of issuer to recover.—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: This governs lost and destroyed certificates. It appears to be unobjectionable or in accordance with good business practise.

76. (1) **Agent's duties, rights, etc.**—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 agent.**—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:

This imposes duties upon transfer agents which seem entirely proper, and permit notice of loss to go to them.

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