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SECURITY CERTIFICATES, REGISTERS AND TRANSFERSS

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SECURITY CERTIFICATES, REGISTERS AND TRANSFERS[1]

I. Introduction

The focus of this paper will be the congeries of obsolete common law and statutory rules which govern the issues and transfer of share certificates in this province as well as others. Congeries is definied as "a collection of several particles or bodies in one mass or aggregate; an aggregate; a combination" (2), and this word neatly describes the law as it is with respect to security certificates, registers and transfers. The law is applied in a truly eclectic fashion. It is not the intention of this writer to confuse, nor to abstract the problem, but rather to reveal throughout the course of this exposition various sources from which the courts have drawn principles to apply in resolving problems arising from this unique area of commercial law. As a further consequence of this review, the wide divergence between legal theory and commercial practice will become more apparent, as will the need for bringing the former up to date with the latter by adoption of innovative and contemporary reform presently being effected in other Canadian jurisdictions.

II. Background

A. Economic Function of Securities

The classification "investment securities" as distinct from "commercial paper" is reasonably well understood in the business community. Commercial paper will include promisory notes, cheques, drafts, warehouse receipts, these interests being of a short term nature. Investment securities would include bonds, debentures, certificates representing both common and preferred shares. While both are forms of investment paper and function as such there is a definite functional distinction between them. Commercial paper is used within the more place, more to finance the manufacture or marketing of goods or rendition of services,

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[1]Please refer to the end of this paper for all footnotes.

i.e. for a specific transaction, or series of transactions. On the other hand, investment securities are used to finance the enterprise as such, providing capital without which the business could not successfully function.

Categorized on another basis, commercial paper will be expressed as payable to "bearer" or to the "order" of a specified person; thus transferable in the former case by delivery of the instrument, and in the latter by delivery of the instrument bearing the endorsement of the named payee or endorsee. Debt securities though commonly payable to "bearer" may also express the issuer's obligtation to a named payee or "registered assigns." Equity securities are usually issued in "registered form" as evidence of the rights and interest of a named holder. Securities in "registered form" are stated to be transferable only by delivery of the instrument "appropriately endorsed." A surrender of the endorsed instrument to the issuer or its "transfer agent" or "registrar" against delivery of a new security registered in the name of the transferee, is contemplated here (3).

B. Basic Categories

Commercial paper divides into two major classifications; (a) a promise and (b) an order; in each case to pay money in discharge or on account of a specific obligation of the maker or obligor.

Similarly, securities divide into two major categories; (a) securities reflecting the obligation of the issuer to pay a specified sum (a bond or a debenture), or to deliver a specific item such as another security upon presentation (an interim receipt or script certificate), or upon compliance with a condition (a warrant or option); and (b) equity securities (such as preferred or common shares), which is "any document constituting evidence of title to or interest in the capital,

assets, property, profits, earnings or royalities of any person or company." (3a)

C. Negotiability

A facet of both commercial paper and investment securities is their ability to pass from hand to hand in the market place in the course of one form of transaction or another. For example, the pledge of a security certificate to obtain a loan, the issuing of a warehouse receipt for goods being stored and bought. It therefore follows that these instruments must be "negotiable" in the full legal sense.

Negotiability in the legal sense means that: "(a) the obligor or issuer cannot assert against a purchaser of the instrument in good faith and for value any 'defence' to the holders claim to the benefit of the obligations expressed or inherent in the instument, 'except' a claim that the paper is not genuine, for example, that his signature was forged or otherwise placed upon without his authority. Specifically, the obligor cannot raise against the good faith purchaser any defect rising from the transaction financed by issuance of the instrument, as distinct from the instrument itself.

(b) Similarly, a purchaser in good faith for value and without notice that the rights of any prior holder have been in any way infringed takes a negotiable instrument in all respects free of any claim by or through any prior holder. Colloquially expressed, even the thieft who has no legal right or claim to the instrument or the rights and interests which it represents can in many instances give the bona fide purchaser a "perfect title." (4)

D. Negotiability of Commercial Paper

Commercial paper in order to be fully negotiable must satisfy the following requirements: (a) it must be in

writing and signed by maker or drawer; (b) it must contain an unconditional promise or order to pay a sum certain in money; (c) it must be payable on demand, or at a fixed or determinable future time; (d) it must be payable to order or to bearer; and (e) where the instrument is addressed to a drawee, he must be named or otherwise indicated therein with reasonable certainty.

It becomes quite obvious on a comparison of these requirements with the more common form of investment security that the latter does not fit within the former requirements save and except in only one situation, the bearer bond or debenture embodying the unconditional obligation of the issuer to pay principle and interest at stated maturity dates. In addition, a share certificate is not payable to order or to bearer, nor indeed payable to anyone in the ordinary commercial sense.

E. Negotiability and Securities; Functional Requirements

The development of markets in which business enterprises could raise capital whether in debt or in equity form brought with it a demand that claims against or interests in the enterprise be represented by instruments fully readily transferable in terms of both aspects of the definition of negotiability as set o above. The problems arising as to transfer of debt securities are similar if not identifical to those arising with respect to equity shares. This is so, as the bond or debenture is usually payable not "to order" or "to bearer" but to "Harry Blogs" or registered assigns. Such an instrument must depend for its negotiability either upon a contract embodied in the terms of the instrument itself or in an underlying trust indenture, or upon a more modern formulation.

With equity securities, the original concept of share participation in a corporate enterprise was one of a membership relation between the member and his corporation and thus could be transferred only with the consent of the corporation

evidenced by a change in the name listed on the register. The share certificate came into being as a practical means of transferring that interest (evidenced by the fact of having made) i.e., a financial investment in the corporation, when membership came no longer to connote active participation in the enterprise, but solely financial participation.

The transfer was affected by endorsing the registered form that usually recited on the reverse side

> "Harry Blogs" is the owner of (100) shares of the capital stock of (XYZ Widget Company Limited), transferable only on the books of the corporation maintained for that purpose by the holder hereof in person or by attorney in fact thereon to duly authorized upon the surrender of this certificate properly endorsed."(5)

Legal theory evolved to the effect that the shares were an intangible right to a participation in the capital and surplus of the corporation and were distinct from the share certificate which was considered only to be documentary evidence of title thereto. This was contrary to the practical effects in the market place, where a properly endorsed certificate passed freely from hand to hand as though fully negotiable, and was in fact "thought to be" (5A) fully negotiable. This dichomotomy between legal theory and business practice produced some rather bizzare results when disputes arose over ownership to either the shares or the share certificate, some examples of which follow.

III. Common Law Development: Brief History

A. Conceptual Background

The concept of a registered interest in a company, evidenced by a transferable certificate was first introduced into commercial circles by the Dutch East India Company in 1608 (6). Though a novel idea it was not utilized by the

English trading companies until the closing years of the 18th century. (7) Prior to this in England, shares in a company were transferred by deed in the same manner as an interest in land, thereby necessitating a search of title back through the chain of deeds upon each transfer, a cumbersome and time consuming process. Thus the share certificate revolutionized the market place expediting the time in which transfers could be effected.

A share certificate, now issued by a company to its registered share holder for X amount of shares, bore the following: "these shares are transferable in person or by attorney on the books of the company only on the surrender and cancellation of this certificate, by an endorsement thereof hereon, and in the form and manner which may at the time be required by the transfer regulations of the company." (8)

Endorsement on a certificate was in the form of a transfer for value received, blank in the name of the transferor and transferee. When the endorsed transfer has been duly executed by the registered owner of the shares, (registered on the books of the company) the name of the transferee being left blank delivery of the certificate by him, or by his authority, "was thought" to transmit his title to the shares both legal and equitable. (There will be a further discussion of this practice in the section dealing with negotiability at common law). The person to whom it was delivered could effectually transfer his interest by handing the certificate to another, and the document could then pass from hand to hand within the market place until it came into the possession of a holder who though fit to insert his own name as transferee, and to present the document to the company or its transfer agent for the purpose of having his name entered in the register of shareholders and thereby obtain a new certificate in his own favour. (8A) Once the practical aspects were recognized by the law merchants, the share certificate came into wide spread use. The theory evolved that the transfer

had to be completed by registration on the books of the company. As indicated above this had little effect as regards the practice in the market place where the endorsed certificate passed as freely as though it were negotiable, and at the least quasi negotiable. It came to be thought that the registration on the books was an integral part of the transfer which was neither borne out in practice or theory. A transfer is something you and I effect between ourselves it being completed when I receive consideration for that which I give up, and the registration on the books is merely an administrative or clerical acknowledgment by the company of our deal.) Granted, the company was only bound to serve those registered on its books with notice of meetings and to make payment of dividends, a transferor could be held accountable for any benefit derived by virtue of his being on the register until such time as the transferee was able to have his name entered. (9)

B. Problems

Although the share certificate was functional and served a very practical purpose within the market place, from the outset its conceptual framework had not been completely worked through and lacking a clear definition when problems arose over the share certificate and register, the common law courts were called upon to make decisions without the guidance of a body of legal principles dealing specifically with this new creature. This legal vacuum allowed the court to resolve conflicting claims by application of legal principles developed in relation to other forms of property, and while this led to some just results, it also led to some very peculiar and contradictory decisions.

For years the courts "struggled to determine whether a share in a corporation was a movable or an immovable, whether a share certificate was simply evidence of ownership of a share

in a corporation or instead the embodiment of the title to that share like a negotiable instrument in bearer form or whether a share certificate was a unique institution" (10).

Judicial and legislative attempts to define the nature of a share in a corporation and the function of the share certificate has created more smoke rather than cleared the air. (11) Equally perplexing was the manner in which the courts characterized the share and the share certificate when called upon to resolve some dispute, either to ownership of the shares or the share certificate. The following cases illustrate the tortured definition of a share and share certificat that a court would arrive at in order to justify a conclusion it wanted to reach.

In the case of Townsend v. Ash (12) the court held that the shares of the New River Company Realty, were immovables because the company held immovables. Shares were held to be goods in the case of Evans v. Davies (13) arising out of a fact situation where the defendant had defaulted on a promisory note given for the purchase of shares. In Rene T. Leclerc Inc. v. Periault ecosse (14) bearer bonds were stolen and the court held them to be "personal property or a movable in the sense of being tangible property." A decision coming from the Exchequer Court, Hunt v. Regina (15), Jacket P. characterized a share of a corporation "as a bundle of legal rights distinct from a share certificate" (16). In addition to the various definitions of a share, the court has characterized the share certificate as a chattel, in Gray v. Gray (17); as evidence of title to the shares, in McKenzie v. Monarch Life Assurance Co. (18) and Copland v. Copland (19) and in contrast, as a negotiable instrument, in Patrick v. Royal Bank (20) and Bank of Montreal v. Isbell (21).

In an attempt to clear up some of the confusion, legislative enactments have declared that shares were personal property or movables. (22) This resolved an immediate problem,

but confused the issue somewhat by assuming that the basic problem was the distinction between immovables and movables. "In fact the problem was considerably more complicated for in order to resolve the issue clearly it was necessary in addition, to determine two other questions implicit in the cases referred to above:

(1) If a movable, was a share a tangible movable or a chose in action?

(2) If it was a chose in action, was it simply an assignable document or was it a negotiable instrument? (23)

As Professor Gower has pointed out, the question, what is the nature of a share in a corporation and what is the role of the share certificate, is more easily asked than answered. (24) The concept of a share has been refined somewhat, but historical development compels us to explain it by indirection, pointing out what a share is not rather than what it is. It is not an immovable, and certainly not a contract, (25), contrary to the case of Rene T. Leclerc Inc. v. Periault et le bank de la na vall ecosse, it is not a tangible movable (26) and the Sale of Goods Act (27) specifically precludes "chose in action" from the application of its provisions. To this end, a share of a corporation does not fit into any existing conceptual framework: it is neither property nor contract but is in fact a unique institution, reflecting aspects of both property and contract, and having free transferability as a traditional attribute. (28).

In conclusion, a share in a corporation as evidenced by a share certificate may be said to represent three distinct interests.

(1) The control of management

(2) A rateable share of earnings that are distributed as dividends.

(3) A rateable share of the proceeds arising from liquidation of the assets of the corporation either before or at the time of its dissolution. (29)

COMMON LAW BACKGROUND

1. Custom and Usage--Negotiability

There are two criteria of negotiability, first, that there is an instrument transferable from hand to hand by delivery; and, secondly, that the instrument is of such a character that the full benefit of the property or contract of which it is the symbol vests at once in the transferee as fully as it was in the transferor.

It can generally be said, both as to commercial and investment paper, that, for the most part, instruments have come to be recognized as negotiable through the gradual accretion of customs which eventually have been accepted by the courts as binding, or, if (as in some instances) rejected by the courts, have later been validated by statute. Some examples, which are indicative of this judicial receptiveness to view certain investment securities as negotiable are found in the decisions which held the following to be negotiable: non-English government bonds actively trading in England; (30) script entitling the holder to definitive bonds of the issuer; (31) script entitling the bearer to become a registered shareholder in an English corporation; (32) and finally, English (33) and non-English (34) corporate debentures. It should be pointed out that the English Bills of Exchange Act (35) did not include investment creditor securities, thereby allowing the judiciary a wide area in which to exercise discretion to either accept or reject evolution in extention of the common law by custom.

An illustrative case is that of Goodwin v. Roberts in which the negotiability of underwriters script for definitive bonds which were to be issued subsequently by the Russian

government was upheld by two English courts. A broker who held plaintiff's script wrongfully pledged it to secure a loan from defendants, who were bona fide purchasers without notice of plaintiff's interest. By all traditional documents of commercial paper, the script was non-negotiable because of the following facts:

(1) It was payable not in money but in definitive bonds;

(2) The underwriters obligated themselves only to transmit definitive bonds when they were received;

(3) Although the script was in form the obligation of the underwriters, it was viewed by the court as a direct obligation of the issuer; and

(4) Traditional promissory words were lacking, although the script stated that "the bearer will be entitled to receive a definitive bond or bonds." (37)

In sustaining the pledgee's rights over those of the original owner, the court rested negotiability upon a finding of a more than fifty year old custom by which script for foreign government obligations had passed solely by delivery.

Repudiating any concept of the law merchant as "fixed and stereotyped and incapable of being expanded and enlarged" (38) the court broadly affirmed the continuing vitality of the "process" by which "what before was usage only, unsanctioned by legal decision, has become engrafted upon, or incorporated into, the common law," and stressed the policy objectives of facilitating the ready transfer of securities rather than "requiring some more

cumbersome record of assignment" that would "materially hamper the transactions of the money market...and cause great public inconvenience."

Another situation illustrative of this trend is seen in the English case of Edelstein v. Schuler & Co. (40), here the court was concerned with debenture bonds, some issued by an English company in England and others by foreign companies abroad, and expressed to be payable to bearer, and not being promissory notes, were stolen from the plaintiff by his clerk. For the purpose of selling the bonds, the clerk employed a broker at Bradford, who instructed the defendants, brokers on the London Stock Exchange. The defendants, acting in good faith, entered into contracts for the sale of the bonds to jobbers. The bonds were sent by the broker to the defendants, who handed them to the jobbers and remitted the price received to the broker. In an action by the plaintiff against the defendants for conversion of the bonds, it was proved that, by the usage of the mercantile world and of the stock exchange, bonds of the kind in question are treated as negotiable instruments transferable by mere delivery and it was further held that the bonds payable to bearer were negotiable.

Conditions set out in the body of the debenture allowed for transfer by delivery while unregistered, and further that the holder could apply to the company to have himself or his nominee registered as the holder, thereby suspending the transfer by mere delivery, but, provision was also made for the cancellation of this registration and thereupon the debenture became transferable again by mere delivery. Again, similar to the Roberts' case, traditional promissory words were lacking.

When overruling the arguments raised against the negotiability of the debenture, Bigham J. stated "therefore the comparatively recent origin of this class of securities in my

view creates no difficulty in the way of holding that they are neogitable by virtue of the law merchant; they are dealt in as negotiable instruments in every minuted of a working day, and to the extent of many thousands of pounds. It is also to be remembered that the law merchant is not fixed and stereotyped..." and he then went on to quote Cokburn C.J. in Goodwin v. Roberts (42) with approval and further underscored the value of easy transferability of such bonds in international trade markets and the resulting benefits to the investor.

However, the judiciary, as time moved on became more reluctant to use "custom and usage" as authority for extending company law principals in their application to resolving new problems with share certificates.

2. Negotiability: Equity Shares

An analysis of existing commercial legal rules will reveal that legal concepts have not always kept pace with developments in the commercial field and how inadequate traditional legal concepts and documents may be when a real attempt is made to make them correspond with the customs and practices of the market place.

In a number of leading cases the courts declined the opportunity to extend the cloak of negotiability (and therefore legality) to the share certificate as it was accorded by custom and practice within the market place. Though some cases have supported negotiability (43), many more cases have held against negotiability for numerous reasons. The House of Lors decision, in Colonial Bank v. Cady (44) draws together the opposing arguments on manner of transfer and negotiability of share certificates. Within the judgments of Lord Halsbury L.C., Watson and Herschell certain principles are acknowledged, and certain tests are established which have had an influence on this subject for the past 88 years. For the most part application of the principles and tests set down in this case have brought about many just results but,

contrarily, application has in certain situations wrought injustice upon the most innocent of the individuals involved.

The facts giving rise to the action are simple and on an narrow base. Upon the demise of the registered owner of shares in an American company the executors in order to get themselves registered in the books of the company entrusted the possession of the share certificates to a broker, who in fraud of the trust reposed in him pledged the certificates to raise money for his firm with the banks. Upon the bankruptcy of the broker's firm his fraud became public and the executors moved to establish a title to the shares, reclaim possession of the share certificates and restrain the banks from dealing with the share certificates held by them.

The shares were "transferable in person or by attorney on the books of the company only on the surrender and cancellation of the certificate by an indorsement thereon and in the form and manner required by the transfer regulations of the company" (45) which regulations and procedures for registering the change of ownership of the shares of the company are within the power set out in the company's charter, or letters patent. Evidence was led to show that the principles in American law did not differ in any material respect, from those by which the English court would be guided in similar circumstances.

The custom or usage which had developed within the market place was acknowledged by the entire bench, that, "when the endorsed transfer has been duly executed by the registered owner of the shares, the name of the transferee being left blank, delivery of the certificate in that condition by him or by his authority, transmits his title to the shares both legal and equitable. The person to whom it is delivered can effectually transfer his interest by handing his certificate to another and the document may thus pass from hand to hand until it comes into possession of a holder who thinks fit to insert his own

name as transferee, and to present the document to the company for the purpose of having his name entered in the register of shareholders and obtaining a new certificate in his own favor." (46).

Lord Watson, in commenting on the practice described above both as to endorsement, presentation for registration and custom of transfer within the market place, stated that "the system thus adopted has the merit of inseparably connecting the certificate with the transfer, and so preventing the dishonest creation of the legal right by transfer to one person, and a competing equitable right by deposit of this certificate with another." (47) And with respect to delivery (transfer) within the market place and the question of whether "property" is passed His Lordship said, "it would, therefore, be more accurate to say that such delivery passes, not the property of the shares, but a title, legal and equitable, which will enable the holder to vest himself with the shares without risk of his right being defeated by any other person deriving title from the registered owner." (48)

The position taken by the company was that until such time as a transferee (purchaser) presents the certificate and transfer for cancellation and issue of a new certificate in his favor, "the original transferor, who is entered as owner in the certificate and registered, continues to be the only shareholder recognized by the company as entitled to vote and draw dividends in respect of the shares", (49) but subsequent cases have held that though the transfer is incomplete until the register has been changed, the transferor is a trustee of the transferee and must therefore account for all dividends received during the interim, whilst registration is being completed. (50)

Now, with respect to the question, whether "property" or "ownership" passes upon receipt of the share certificate in

the market place, Lord Herschell, in a very succinct manner, discussed the possibilities according to the law of England and said, "there are only two ways in which a good title can be acquired under such circumstances; if the instruments of title be negotiable instruments, a person taking them for value without notice of any infirmity in the title would have a right to hold them, even as against a prior owner who had never intended to part with the property in them. Or, again, such an owner may have so acted as to be estopped from setting up a claim as against a person who has bona fide and for value taken the instruments by way of sale or pledge." (51)

Here then are the principles (rules or tests) to determine the validity of each party's claim to ownership of the shares and right to possession of the share certificate. While acknowledging the commercial fact that certificates such as these, properly endorsed, move within the market place from hand to hand as though negotiable or quasi negotiable, Lord Herschell stated that "the mere delivery of them with the endorsed blank transfer and power of attorney signed, irrespective of any act or intend on the part of the owner of the shares, is not of itself sufficient to pass the title to them" (52). If, however, "delivered by or with the authority of the owner with intent to transfer them, such delivery will suffice for the purpose" (53). But "if there has been no intent on the part of the owner to transfer them, a good title can only be obtained as against him if he has so acted as to preclude himself from setting up a claim to them" (54).

Returning to the question of negotiability, and the accepted form of the drafting of the instrument. As the transfer of title and ownership of a negotiable instrument are achieved upon "delivery of the instrument" the words used must make the promise to pay "unconditional". Transfer of share certificates required "cancellation and registration of the new owner on the books of the company" before the transfer was complete, and this element was very foreign to recognized negotiable instruments.

As the executors had only given authority to their broker to effect registration of the share certificates in their names for the purpose of forming part of the executory estate, and had no intention of parting with the property, they had not done any act or omission which would serve as a foundation for estoppel and thereby bar their claim.

Several facts peculiar to this case were to the benefit of the executors; they and not the registered owner had endorsed the transfer on the certificate which the court held should have put the banks on notice and caused them to enquire as to the broker's authority to pledge them. Secondly, there was not "an extract of the probate and attestation of the genuineness of the executor's signatures" accompanying the certificate which by evidence led as to the custom prevailing within commercial circles was absolutely necessary in order to receive them for sale, pledge, transfer, or assignment, so that this point served as a further notice to the banks and further support for raising estoppel to bar their claims.

Vaughan Williams L.J. in Fry v. Smellie (54) quotes with authority the observations of Lords Watson and Herschell in Colonial Bank v. Cady and applies those principles and tests of that case in his judgment (based on similar fact situations) of the question, whether or not it is an application of the law of estoppel. He states, "it is really an instance of the application of the rule that when one of two innocent persons will suffer, the person who renders it possible for the wrongdoer to do the wrong, by reason of the trust he reposed in the wrongdoer, should suffer, rather than the person who suffers from the agent having that authority" and in conjunction with the foregoing he said, "the question arises when the owner of the shares has authorized such dealing with them as is corroborated by possession of the indicia of title. If no authority at all has in fact been given, it is quite immaterial whether one subsequently purchasing or lending money theron makes inquiries and is given an untrue answer or does not inquire at all, in

either case he loses his money" (55). This it is submitted would be characterized as a rather rigid application of the Cady case.

So that in a situation where the registered owner executes the transfer in blank and conveys the certificate to his broker, should his broker breach this trust and fraudulently deal with the certificate, then the registered owner should bear the loss and not the bona fide purchaser. In a great number of fact situations, where the evidence supports this application, there could be no serious argument against this application by the owner or individual who was the author of his own misfortune.

In our own courts, Smith v. Rogers (56) the decision of a divisional court in Ontario some 9 years after Colonial Bank v. Cady, the plaintiff had executed the transfer and deposited the certificates with her broker with instructions to sell when the specific price was reached and to obtain other shares with the proceeds. The broker in defiance of his instructions pledged the certificates with his banker, who received them in the ordinary course of business without any notice of the owner's rights. The court decided the action on the basis of Colonial Bank v. Cady holding in effect that the plaintiff by cloaking the broker with authority to deal with the certificates had taken an action which precluded her from setting up a claim for the certificates.

In McLeod v. Brazilian Traction Light and Power Co. Ltd. (57) in a fact situation very similar to Smith v. Rogers, the plaintiff brought his action against the company, its registrar of transfer and another company, the transferee of some of its shares; for a declaration that the plaintiff was still the owner of the shares and for a further order to recover their value. The court held against the plaintiff on the basis of his actions, cloaking the broker with authority to deal with the certificates which precluded him from establishing his claim.

Principles drawn from Colonial Bank v. Cady; Smith v. Rogers; and Fry v. Smellie, were considered and applied.

An interesting point was made by Grant J. with his reference to section 64 of the Companies Act (58) which reads as follows: "provided that, as to the stock of any company listed and dealt with on any recognized stock exchange by means of script, commonly in use endorsed in blank and transferrable by delivery, such endorsation and delivery shall, except for the purpose of voting at meetings of the company, constitute a valid transfer", whereupon Grant J. went on to say, "I am of the opinion that the provision is sufficient to serve as protection for the defendants in this action, but by reason of the fact that it has been questioned whether it is applicable to a case in which the certificate for shares was not actually sold on a stock exchange, I have deemed it expedient that I should deal with the legal position apart from the language of the statute." (59) So that on the basis of common law, Grant J. was able to establish from the facts and evidence led, that the plaintiff had acted in such a manner, cloaking the broker with authority to deal with the certificates, and thereby raised estoppel to bar his claim. With respect to the statutory provision, this provision has been included within each Canada Corporations Act since 1906 up to the present day, and as Grant J. had deemed it expedient to resolve the issue he had done so on the basis of common law. Therefore, there is little in the way of judicial comment on the application and effect of this particular provision on certificates trades on or within the stock exchange.

The problem facing Grant J., i.e. the question of whether the share certificates (script) had or had not been traded on an exchange, was a problem not envisioned by the House of Lords in deciding Colonial Bank v. Cady. This question of script (share certificates), and their status depending on whether or not they were traded on a public exchange, arose in several subsequent

cases, which produced some very interesting but peculiar and contradictory results.

LOST, STOLEN AND DESTROYED CERTIFICATES

The following discussion centers upon "street certificates or script" which fall within the general category of "share certificates but which are distinguishable by the manner in which they are execute registered and handled in the market place.

A "street certificate or script" is a certificate issued by a corporation and registered either in the name of an officer of its transfer agent or in the name of a member broker of the stock exchang This individual then executes the assignment on the reverse side in blank, with the name of the transferee omitted, thereby obviating the necessity of completing the transfer (on the books of the company) until such time that a holder desires that the stock be registered in his name.

A rule of the exchange allows that where registered in the name of and endorsed by a member of the exchange, no quarantee of signatur is necessary, if otherwise endorsed, then a guarantee is necessary. Therefore, in all legal respects the officer or exchange member is the legal owner on the Register of the issuing corporation.

When referring to this particular practice developed by the stock exchange, Isreals and Gutman state that the individual in whose name the shares are registered "a 'nominee' is generally an individual or a partnership whose appearance as the registered owner without reference to capacity or to beneficial interest is designed to facilitate the transferability of record ownership of securites without regard to whatever beneficial ownership or interest in fact exist. °61 (emphasis mine)

In addition, there was also legislation (mentioned earlier) which on a fair interpretation would serve to cloak this practice with legality. This provision which first appeared in the Dominion Companies Act of 1906 (61) and which has been maintained within Federal legislation up to the present Canada Corporations Act, reads: "transfer not valid until entry of such transfer is duly made in the Register of Transfers: provided that, as to the stock of any company listed and dealt on any recongnized stock exchange by means of script commonly in use, endorsed in blank and transfer-

able by delivery, such endorsation and delivery shall, excepting for the purpose of voting at meetings of the company, constitute a valid transfer."

"Transfer by Delivery", an aspect necessary to obtaining negotiable status for commercial paper was therefore provided by this provision. However, a review of case law reveals that first, this provision was often ignored by the Courts; secondly, as the provision goes no further than allowing for the practice and does not spell out the obligations, responsibilities, and duties placed upon; issuer, transfer agent, broker, owner and purchaser, the Courts not wishing to make new law fell back upon the common law with all of its attendant difficulties and problems. Simply put, negotiability was not forthcoming, ease of transferability, but not negotiability, though from all appearances this was thought to be the case but judicial interpretation of the practice led to much confusion and uncertainty amongst those involved in the process.

Whitehead v. Bridger, Havernor & Company et al (62) a case from the Ontario Court of Appeal, is illustrative of the problems arising out of this confusion. Here the plaintiff received a street certficate properly endorsed by "S. P. Smyth, an officer of the company's transfer agent" and entirely acceptable upon the exchange. The plaintiff upon learning that his certificate had been mislaid or stolen, immediately communicated this information to the company's transfer agent who in turn notified the stock exchange to place a stop order against that transfer certificate.

The exchange had adopted a"clearing house system" and therefore all transactions had to go through a clearing agent. By this system, the selling broker would lodge with the clearing agent certificates respresenting the shares sold, and the clearing agent would deliver to the purchasing brokers certificates for the number of shares purchased by them, but, not necessarily the same certificates lodged with the clearing house agent by the selling broker.

One defendant, Trust and Gaurantee Company Limited, was both the clearing house agent and the transfer agent for the company whose shares the plaintiff had purchased and therefore had notice of the

plaintiff's loss and stop order twice, i.e. once as transfer agent and a second time as clearing house agent.

The defendants, Bridger, Havernor & Company Limited, brokers, upon purchasing shares for a client received from the clearing house agent the certificate in question, and this client was subsequently refused cancellation and registration of this certificate into his name because of the stop order.

The defendant brokers in their defense to the claim for return of the certificate argued traditional negotiable instrument law in that they were bona fide holders in due course without notice. In addition, they were relying upon the provision in the Companies Act quoted earlier and claiming transfer had been completed by delivery.

Barton Co. Ct. J. in giving judgment for the plaintiff stated that "ordinarily a document such as a transfer of shares, is not valid until completed by the insertion of the names of the parties, or at least the transferee, and the only purpose of this provision in the act was no doubt to validate an assignment that would otherwise be invalid, in order that the shares might be readily dealt with among brokers. It does not tend to make the document negotiable but it obviates the necessity of having a transfer completed and registered on the books of the company each time a sale is made." (64

His judgment goes on, referring to, but dismissing McLeod v. Brazilian Traction Light and Power Company (65) as no authority in any form had been given by the plaintiff to deal with the certificate, and there was no collateral behaviour estopping his claim, he should therefore succeed. Though of highly questionable application in Canada, the judge raises the rule of "market overt, i.e. no man can aquire a title to a chattel personal from anyone who has himself no title to it, except only by sale in market overt." (66) Again, the application of this rule of law is highly questionable in Canada and is certainly not a rule of law that one would want to resort to resolving litigious matters concering shares or any other transferable interests of a corporation.

Finally, Barton J. felt that the endorsement by the individual who found or stole the certificate to S. A. Smyth, who was the very officer of the company's transfer agent in whose name the certificate

was registered should have put the brokers on notice and inquiries to the transfer agent by the brokers would have given them sufficien answers as to the defective nature of the certificate.

Several questions which come to mind, and go unanswered in this judgment, emphasize a need for definitively laying out the duties, obligations, and responsibilities of those parties involved in this process. Was not the passing of the defective certificate from the clearing house agent to the broker negligent in light of the stop order against it? Should the broker assume something other than that the certificate is in order having received it from the clearing house agent? Are the clearing house and its agents not placed in a supervisory capacity by virtue of their position in the transfer process? Is there not a case for further reliance in light of the fact that the certificate came from both the clearing house agent and the transfer agent for the very company which subsequently refused cancellation and registration in the broker's client's name?

Granted, the defendant brokers could have maintained an action over against the transfer agent and clearing house agent, but must a claimant, when faced with a fact situation such as this, have to rely upon procedural law to obtain indemnity when such guidelines, prerequisites and procedure for all parties involved can be adequately codified within the Company Law field.

Aitken v. Gardiner et al (67) is a case very similar in facts to the Whitehead case, with some interesting wrinkles. The plaintif street certificates were lost, mislaid or stolen for approximately a year and one half to two years before the plaintiff realized their absence. During this time, some certificates had been cancelled and registered in the names of their purchasers.

When a client of the defendants could not obtain registration of a certificate, because of a stop order being placed against it; the defendant purchased a new certificate in the market place, and made a claim through its insurance policy for this expense, at which time their involvement with these certificates came to light.

In answer to the plaintiff's claim for return of the certificat and a declaration that the plaintiff was the true owner, the defendar

argued that the certificate was negotialbe, and that they could receive them and sell them (being holders in due course for value and without notice) free of any claim bv the registered owner or any subsequent owner.

Spence J., in giving judgment for the plaintiff, based his decision on the non-negotiability of the certificates, as expressed in the following reasoning; "the situation in reference to such street certificates has been dealt with in a series of cases..... including Colonial Bank v. Cady, Smith v. Rogers," i.e. as the plaintiff has done nothing to preclude herself for advancing a claim of ownership to these street certificates and as they are not negotiable by virtue of Colonial Bank v. Cady, therefore the defendants cannot establish themselves as holders in due course free from all infirmities and must therefore return the certificates in their possession to the plaintiff.

Again, there were several questions which went unanswered. How long does a true owner have in which to make a claim for return of certificates? When does this time begin to run? How is a broker, transfer agent, clearing house agent, supposed to ascertain whether the certificate he is dealing with is proper, now and in the near future? Should there not be some cut-off period, something definite, and not arbitrary as is developed when a stop order is placed against a lost or mislaid certificate? Should there also be some definite time span within which a stop order must be placed on a register against the certificate question?

Discussion of the two remaining cases in this section will amplify problems raised in earlier cases, but in addition, by the contradiction of results obtained by the litigants, emphasis will be placed on the need to implement legislative guidelines for achieving greater clarity in the field.

The first case to be considered is that of Guaranteed Trust Company and Dennison Mines Limited v. James Richardson and Sons (68) which arose out of dispute between a transfer agent (trust company) for Dennison Mines Limited and the defendant brokerage firm. A third party mislaid or had stolen two properly endorsed

street certificates for 50 and 400 shares respectively in the plaintiff Dennison Mines Limited. Immediate notice was given to the transfer agent verbally by telephone and by follow-up letter, and a declaration given within a year from the date of loss. In spite of this notice being on the records of the plaintiff transfer agent, when the defendant brokerage firm subsequently presented for transfer, first the certificate for 50 shares and sometime subsequent to this, the certificate for 400 shares; the plaintiff transfer agent accepted them both, neglecting or overlooking the references to the stop order in their files.

Upon the plaintiff transfer agent realizing its mistake, it purchased an equal amount of shares in the market place in the name of the third party and sued the defendant brokerage firm for the replacement costs.

The Court held against the defendant brokerage firm on the following "well-settled law that if one person requests another to carry out an act imposed by statute or by common law and in consequence of the doing of the act the latter is subject to liability or suffers loss, he is entitled to be indemnified by the person who made the request unless the act is in itself manifestly tortious or apparently illegal to the knowledge of the person doing it." (69) So that here the Court was of the opinion that the grounds for inferr a contract of indemnity had been established. The transfer agent, of course, having the duty imposed upon him to affect transfers of shares by the governoring Corporations Act.

In discussing the plaintiff transfer agents neglect or oversight in not observing the stop order in its files, the Court held that this was not conduct which was "manifestly tortious"; this was not negligence and was not a default such as to dis-entitle it (the transfer agent) to indemnity. On a second ground, the Court held against the defendant brokerage firm for breach of a warranty on the simple basis that by tendering the certificates for transfer the defendant brokerage firm impliedly vouched for its right to do so and its title to the shares.

While acknowledging the fact that the plaintiff transfer agent kept stop order records with the register of the company, the Court indicated that these were for its own purposes (with no discussion

as to what these purposes might be) and its failure to investigate a accordingly was not a breach of any obligation owed to the defendant.

As the street certificate was in proper order there was nothing on its face to arouse the suspicions of the defendant brokerage firm either as to its defective nature or to the stop order placed against it in the files of the plaintiff transfer agent; and it seems unfair that the plaintiff transfer agent could obtain an indemnity from the brokerage firm even though (1) it had notice of the theft, loss, or destruction of the certificate (2) it had notice on its records, (3) the transfer of the certificates was affected not once but twice by its employees and (4) even though its loss was caused by its employees mistakes it was still able to obtain redress from a party more innocent than itself.

Juxtaposed to the proceeding is the case of Chartered Trust and Executor Company et al v. Pagon et al (72) in which the defendant after losing her street certificate requested a new one and upon posting the usual indemnity bond was issued a new certificate. Sometime subsequent, the lost certificate was submitted for transfer and the plaintiff trust company cancelled it and issued a new one in the transferee's name, overlooking the stop order in its records. The plaintiff trust company upon discovering its mistake commenced an action to recover on the bond for the amount it had expended.

Both defendants, (Mrs. Pagon and the indemnity company) decline to pay and the Court upheld their position. In so holding, the Court stated that the loss suffered by the plaintiff did not arise from the issuing of the duplicate certificate but by reason of the negligent acceptance of the original stolen certificate from one whom the plaintiffs should have known had no right to deal with it. With respect to the indemnity bond the Court was of the view that to force them to indemnify the plaintiff would do violence to the terms of the bond and transform it into an insurance policy against the negligence of the plaintiff's servants.

It is submitted that the decision in this last case is approach from a more practical view point than the former with the result that some guidance, however meager, is given to individuals working in this field. Additionally, the more innocent of the two parties is recognized as such and the party who ultimately had the greatest

opportunity to protect itself through proper supervision and such supervision being found wanton was barred from seeking indemnity.

In summary, the preceeding cases demonstrate in numerous instances that the legal relationships between transferors and transferees, between brokers and transfer agents and between the company and third parties should be clarified. In an honest effort to arrive at equitable solutions in particular factual situations concerning share transfers where one or more innocent parties are usually involved, Courts have failed to develop adequate judicial guidelines in determining the questions of legal relationships among the various parties to the share transfer.

UNAUTHORIZED CERTIFICATES AND FORGERY

The cases discussed following are illustrative of problems experienced in the market place by individuals and commercial entities when dealing with share certificates whose validity and authenticity are questionable. This situation occurs most frequently where an officer or employee of a corporation fraudulently alters a share certificate, which certificate is then sold, assigned or pledged to some unwitting third party, with subsequent dire results. Again, as shown before the party with the greatest opportunity to protect itself by use of an adequate supervision system, will somehow escape liability when its inadequate system allows individuals to pass off worthless certificates as good ones

To begin, a leading case in this area, Ruben v. Great Fingall Consolidated (73) was a decision of the House of Lords concerning a secretary of the defendant corporation who had issued a share certificate to which he had affixed the company's seal and forged the signatures of the directors in whose presence it purported to be affixed. The certificate was in the name of the plaintiff to secure a loan by the secretary, and not for or on behalf of or for the benefit of the defendant company, but solely for the benefit of the secretary for his own private purposes and advantage.

Upon the fraud being discovered, the plaintiff repaid the bank and claimed damages from the defendant corporation on the basis that the company was estopped from denying the truth of the certificate. Additionally it was admitted that the secretary was a proper person to deliver certificates on behalf of the company.

It was held that the document was a forgery and that therefore it could not bind the company unless some official acting within his authority had warranted that it was genuine. Even assuming that the secretary might be taken to have

impliedly warranted this, he had no colour of authority, actual, usual, or apparent, to do so and therefore the company was not bound.

Lord Loreburn by way of dictum stated that "the share certificate is a pure nullity. It is quite true that persons dealing with limited liability companies are not bound to inquire into their indoor management and will not be affected by irregularities of which they have no notice. But this doctrine, which is well established applies only to irregularities that otherwise might affect a genuine transaction. It cannot apply to a forgery." (74)

However, in a subsequent decision Lloyd v. Grace, Smith and Company (75) the House of Lords held that acts might be within the scope of authority of an agent or servant notwithstanding that they were done fraudulently and for his own benefit and not for that of his principal or master.

Following this case, the Court of Appeal in Kreditbank Cassel v. Schenkers (76) expressed some difficulty reconciling the dictum of Lord Loreburn in the Ruben case with the holding of the Lloyd case. It was however, adopted as an alternative ground of their decision.

In South London Greyhound Racecourses v. Wake (77) the court held that a share certificate, to which the company's seal had been fraudulently affixed in the presence of a director and the secretary, was a forgery since there had been no resolution of the board authorizing the sealing. The articles provided that in favour of a purchaser or person dealing bona fide with the company such signatures should be conclusive of the fact that the seal had been properly affixed. However, the court ruled that this article could not be relyed upon by the defendant as he had no knowledge of it.

The common thread within the preceding discussion in the

court's view, was that the rule in Turquand's Case had no application where forgery was involved. Professor Gower when commenting on this said "the truth seems to be that there are no reasons why the fact that there is a forgery should exclude the Turquand Rule. All the decisions can be explained on the ground either that the forged document was not put forward as genuine by an official acting within his usual or apparent authority, or that the outsider was put on inquiry." (78)

Returning to the Ruben case for a moment, a second agreement raised by the plaintiff, was that as the certificate had been delivered by the secretary in the course of his employment, that delivery imported a representation or warranty that the certificate was genuine. The court held that the secretary had not, nor was he held out as having authority to make any such representation or to give any such warranty. "And certainly no such authority arose from the simple fact that he held the office of secretary and was a proper person to deliver certificates." (78a)

Shaw v. The Port Phillip and Colonial Gold Mining Company Limited (79) was one of numerous cases cited in the Ruben Case, but the only one discussed by the House of Lords as being to the point, but distinguished upon other grounds. Here the secretary was responsible for procuring the execution of share certificates with all requisite and prescribed formalities and then to issue them to those entitled to receive them.

A resolution by the directors provided that share certificates should be signed by one director, the secretary and the accountant.

The secretary executed a deed, which purported to transfer shares to a third party purchaser stating that he was now the registered owner, all things having been signed sealed and delivered. This third party purchaser in turn pledged the shares for monies advanced from the plaintiffs and

eventually endorsed the share certificate in their favour. When an attempt was made to register the shares in their names the plaintiffs were refused, as there were no such shares standing in the borrowers name (third party purchaser) on the defendant's r

The court held for the plaintiffs, first on the basis of estoppel in that their secretary had been afforded the opportunity to perpetrate the fraud by virtue of the prescribed formalities to be adhered to and in the delegation of responsibility to the secretary for the preparation, execution and delivery of share certificates to those entitled to receive them. Steven J. when rendering his judgment said "is the transferee of shares bound to ascertain that the seal has been affixed in the presence of the directors, and that the signature of the director is genuine? How in the ordinary course of business would this be practical?" (80) As the company had authorized the secretary, and made it his official duty to act in such a way that his acts amounted to a warranty by them of the genuiness of the certificate issued, the sword of estoppel was raised against them.

The distinguishing feature between the Ruben Case and Shaw Case, in the view of the House of Lords, was that in the Shaw Case the directors had appeared to authorize the secretary to perform in this manner thereby impliedly warranting the genuiness of a certificate issued by him. Whereas in the Ruben Case the House of Lords felt that the company had not authorized such a wide range of duties for the secretary and had therefore not implicitly or explicitly warranted the genuiness of any share certificate delivered by the secretary.

The final case in this discussion is Toronto Dominion Bank v. Consolidated Paper Corporation Limited (81) a decision coming from the Quebec Court of Queen's Bench, Appeal Side, concerning as before, forged share certificates. Here the defendant operated its own transfer and registration departments. An employee in defendant's transfer department had over several

years pilfered blank presigned share certificates, forged the necessary counter signatures of the transfer officer and of the registrar, and then proceeded to pledge them for loans obtained at various branches of the plaintiff, to the sum of $73,000.

The plaintiff based its case upon the defendant's negligence in allowing to its employee, undue freedom of access to pre-signed certificates and imputed to it the consequences of his fraud.

The defendant countered that there was no causal connection between the culpable conduct and the damages defendant was being called on to make good, because the negligent conduct was too remote and indirect to suffice as a faute (Faute translated to fault, used under Quebec Code for non contractual fault i.e. tort liability).

The court in ruling for the defendant, held that the plaintiff had not succeeded in showing that the defendant was guilty of a faute of omission by failing in its duty of foreseeability and moreover it had not made out a causal connection.

Some comments by Montgomery J. by way of obiter were to the effect that perhaps the defendant had not taken all the normal precautions in safeguarding its printed forms of share certificates and perhaps this constituted negligence on its part but, "this negligence was not the immediate cause of damages suffered by the appellant bank because its representative had, subsequent to any such negligence, an effective chance of preventing the damage. It would appear that any enquiry made to respondent, mentioning the number of any one of the certificates offered as security, would have elicited the information that no certificate bearing that number had been validly issued." (82)

While recognizing that business efficacy would not allow a check on each share certificate offered as security, his Honour felt the fact that the shares were traded over the counter and not on the exchange, and that the employee was not a regular customer at the branches he approached to obtain loans, should have put the plaintiff's representatives on notice.

While the preceding cases have been reconcilable with principle, there have been some subtle distinctions made in the findings of fact by the various tribunals involved. From the practical point of view the decisions are hardly justified in light of current market practices where the purchaser, assignee, pledgee will seldom know the authority of the signing party or even the names of the authorized parties. A more just solution would be to place the loss upon the issuer, his agent or authenticating trustee through its contract with the issuer, as the party most capable of preventing employee frauds. The unauthorized and incorrect completion of a share certificate can only occur with the negligence of the issuer or the dishonesty or negligence of an employee of the issuer to its agents. Where the forged and unauthorized share certificate comes into the hands of a bona fide purchaser for value without notice, the issuer should bear the brunt of the loss, either directly from its operating funds or by use of a bond, placed upon employees working in these areas, or by some other insurance scheme. Lastly, the finding of liability for forgery committed by an employee, should not, it is respectfully submitted be saddled upon the victim by application of tort law and the forseeability doctrine. Rather, there should be clear straight forward provision for such occurances within the company law field.

DELIVERY, WHEN COMPLETED?

Share certificates provide that the interest represented may be transferable only on the books of the corporation. A transferee is at the mercy of the creditors of the transferor until he becomes the registered holder. Accordingly, until registered on the books of the corporation, the validity of a transfer is questionable. This is one of numerous reasons for making share certificates negotiable, which can be accomplished by fusing the "intangible interest" (shares) with the documentary evidence of its existence and ownership (the share certificate).

Legislation provides for transfer to be achieved by delivery when the transaction occurs on a recognized exchange (as discussed earlier). The following brief discussion will serve to highlight some of the difficulties that arise in definitively determining when delivery has in fact occured.

The case of Re C.A. Macdonald and Company Limited is a decision of the Court of Appeal of Alberta who were concerned with determining when the title to shares passed as between a broker and client. The stock transaction in question involved a sale of shares by a broker from his own personal holdings to his client, to which the law o- vendor and purchaser applies; and which is distinguishable from the situation where a broker is in possession of shares purchased for a client on the exchange, and to which the law of agency applies.

There was no evidence placed before the court that transfers of these shares were ever made and no share certificates were ever issued to the purchaser. Therefore the question before the court was: Did the payment of the purchase money, coupled with the entries in the bankrupts (broker) records, pass any proprietary interest in the shares to the purchaser?

The court discussed the Sale of Goods Act, R.S.A. 1955, c. 295, as it concerned chattels and the rules for ascertaining

the intention of the parties as to the time at which the property in the goods passes to the buyer. Here, where the goods (shares) were unascertained the Act provided that property in the goods will pass when the goods in a deliverable state are unconditionally appropriated to the contract.

As the relationship between the broker and client was that of vendor and purchaser, whether there were sufficient shares on hand to cover all purchases made was irrelevant. As no shares were set apart or appropriated to the contract, consequently no property in the vendor's shares ever passed to the purchaser.

The court acknowledged some difficulty in applying the rules contained in the Sale of Goods Act, in that because of their nature shares probably did not come within the Act. Shares considered apart from their share certificates are incapable of actual possession. Another reason is that shares are said to be chose in action and "things in action" are excluded from the Sale of Goods Act.

After a discussion of several cases, Societe Generale de Paris v. Tramways Union Company (85); Colonial Bank v. Whinney (86); and Macaura v. Northern Ass'ce Company to the effect that shares were not choses in action, the court stated that "shares represent a type of property which only a very wide definition of choses in action would include" (86). As the manner and procedure for transferring shares was provided for within the Companies Act, R.S.A. 1955 c. 53, i.e. transferable in a manner provided by the articles, this would require some form of written transfer, and subsequent delivery of the endorsed share certificate.

Since the purchase money had been paid to the broker, the co canvassed the possibility that an equitable interest might have been acquired by the purchaser in the unappropriated shares to which a Court of Equity would give protection or

recognition. Analysis of the facts and the decision of Re Wait (87) led the court to apply the ratio of this landmark case to the effect that "because the Sale of Goods Act says that unless a different intention appears, the property shall not pass unless there is an appropriation of the goods to the contract, equity will not recognize any interest which would not be recognized under the statute." (89)

Therefore the same rule should apply to the purchase of a part of a larger number of shares. Additionally as book entries on the ledgers of the broker were not sufficient to appropriate the shares to the contract no title or proprietary interest passed to the purchaser.

A similar case, Re Stobie-Forlong-Matthews Limited (90) is on all fours with the facts as above and the rule is more stringently applied, for in this case there were several purchasers claiming portions of the whole and a fact very much in their favour was that the pool of shares upon which they were claiming was more than sufficient to satisfy all of their claims, with a surplus, but relief was denied on the application of the principles contained in Re Wait (90a).

It is interesting to note that in both cases sale notes were given to the purchasers which had been recorded in the respective brokers' ledgers indicating price, time of purchase and amount, which one would assume to be useful information for tracing acquisition and title. Put another way, if the purchaser denied the transaction upon a request for payment, would not records of this nature be admitted as evidence of the fact. Further to this point, where a block of shares is owned by a broker and the exact amount can be ascertained on a specific day (shares and share certificates are after all somewhat different and more identifiable than kernels of corn) including the day upon which a purchaser pays for a portion of that whole surely within commercial circles the mechanics of tracing the money to the acquisition of a portion of the shares can be achieved without too much difficulty. After

all the time is not far off when transactions such as these will be single blip on a magnetic tape stored in some central depository s

ISSUE: DIFFERENT PROBLEMS

Cooper v. Cayzor Athabasca Mines Limited (91) briefly discussed below is an excellent example of the many problems that can beset a bona fide purchaser of shares along the path to obtaining registration in his name. Here, the plaintiff had agreed to accept an assignment of 63,200 shares of the defendant company from a third party, described in the transfer as "standing in my name on the books of" the defendant company. After inspecting the minute book and share register to confirm the third party's holdings, the plaintiff delivered to the defendant company the transfer documents, and was advised that upon becoming active, the transfer agent would forward a share certificate to the plaintiff.

Several years later, after the defendant company had changed its name, become active, issued the shares to the third party who in turn had assigned them to another, the plaintiff enquired about the registration of his transfer and upon receiving an answer in the negative commenced this action. In his claim he requested the court make a declaration that he was owner of the 63,200 shares, for a certificate, and to have the share register rectified accordingly.

The defendant company in defence of the claim argued that there had been no allotment or issue to the third party prior to his transfer to the plaintiff; that at the time of the assignment the third party had only a right in equity to compel the allotment; that the rights of the third party were chose in action and therefore an assignee of this interest could not maintain an action without the assignor third party also being a party to the action; that if the assignment was valid and sufficient the defendant company had not had sufficient notice; that the defendant company was not obliged to see to the execution of any trust, whether expressed,

implied or constructive; that the claim should be dismissed due to laches on the part of the plaintiff and the action and enforcement of rights was statute barred.

The Court of Appeal of Ontario held, that in consideration for obtaining the mining rights of the third party the defendant company had agreed and by resolution, duly passed, allotted 450,000 shares to the third party. As the authority of the proper officers to perform the ministerial acts of recording the names of allottees and to issue certificates to them can be implied in the circumstances, therefore the allotees including the third party obtained at this time the full status of de facto share holders. Any omission by the officers of the company to perform these ministerial acts could not deprive them of that status and the rights arising therefrom. It therefore follows that one of these rights was the ability to assign a portion of shares to a bona fide purchaser.

As the plaintiff had delivered the executed assignment to the defendant company and had been advised that a share certificate would be forthcoming upon becoming active, and as the defendant company had not denied at the time that 450,000 shares of the capital stock of the company were standing in the name of the third party on the books, and the minutes of the company, therefore they were estopped from denying the claim of the plaintiff.

The agreement and resolution named only the third party as the sole individual entitled to the allotment and issue of shares. Laches on the part of the plaintiff could not be supported as there had not been any activity on the part of the company, the name of the company had been changed, and no transfer agent appointed for a long time, which explained satisfactorily any delay on the part of the plaintiff in asserting his rights.

On the authority of Smith v. Gowganda Mines Limited (92) the company was not capable of accepting a surrender of issued shares and reallotting them.

What had essentially been a situation involving a simple transfer procedure, had because of the various parties and paucity of statutory guidelines, become a litigious matter, eventually requiring examination by the Court of Appeal, before an equitable resolution could be obtained. Practically speaking, the plaintiff should only have had to serve the required notice upon the company of his interest in the holdings of the third party and thereafter any dealing by the company with those holdings would be subject to the interest of the plaintiff.

The preceding discussion has indirectly emphasized the lack of legislative guidelines, procedures, and declarations setting out the rights, duties and obligations between the various parties involved with securities and their movement within the market place.

PRESENT STATUTORY PROVISIONS

The provisions of the Alberta Companies Act dealing with transfers of shares are largely derived from the United Kingdom Companies Acts and can fairly be said to constitute a "book stock" system of transfer roughly comparable to a land registration system. The shares of the company are the property of the share holders and share certificates are mere evidentary documents showing that the person in whose name the certificate is registered is a shareholder of the company.

The Act provides for application for transfer by the transferor as though the transferee made the application, in a manner provided by the articles of the company. However, until the transfer is registered on the books of a company, the transfer is not effective, and therefore the transferee has a title to the share certificate and has the right to be registered on the books as a shareholder which right can be defeated by others claiming through the transferor.

Securities are defined to mean notes, bonds, debentures or other evidences of indebtedness issued by a corporation, whether secured or unsecured. While most securities are considered to be negotiable there are certain unique distinctions which raise questions as to the specific document being a negotiable instrument. For example, bonds, the proceeds of which are to be paid from a specifically indicated fund, ora debenture which is subject to review under a trust indenture, neither of which fall within the rules pertaining to negotiability of commercial paper.

Share means a share in the share capital of the company, and includes stock, except where a distinction between stock and shares is expressed or implied. Ownership of shares confers certain general rights; for example the right to duly declared dividends, usually the right to vote unless specifically

restricted, rights on winding up to participate in the distribution of assets. Certain individual rights are attached to the ownership of shares such as, right of shareholder to a share certificate in respect of the shares held by him, the right to receive notice of meetings of shareholders, the right to receive financial statements, to inspect minutes of meetings of shareholders and certain documents and registers required to be maintained pursuant to the Act.

A private company is, by statutory definition, a company which restricts or prohibits any transfer of the interest of a member in the company. A public company means a company that is not a private company. To a great extent then, the preceding and following discussions relate mainly to the problems experienced by those dealing with shares held in a public company.

The relevant provisions of the Alberta Act are sections 53 to 72 inclusive and their principal features may be summarized as follows. Every company is required to keep a register of members in which all transfers of shares and the date and other particulars of each transfer are recorded. Branch registers of members are authorized and the registration of a transfer of a share on a branch register of members is a valid registration for all purposes. A company may appoint a transfer agent and one or more branch transfer agents to keep the register of transfers and any branch registers of transfers. Every shareholder is entitled to a share certificate in respect of the shares held by him and such certificate is prima facie evidence of the title of the shareholder to the shares represented thereby. Shares are transferable "on the register of members of the company" subject to such conditions and restrictions as may be prescribed in the Act or the articles of the company. The Act provides that the transferor shall be deemed to remain the holder of the shares until the name of the transferee is entered in the register of members in respect thereof. The directors may decline to register any transfer of shares, not being fully paid shares, to a person of whom they

approve, and may also decline to register any transfer of shares on which the company has a lien.

The provision in the Alberta Act relating to transfers of shares are at variance with the practices in the financial community and should be substantially changed in order to eliminate the anomalies and inconsistencies which exist between the applicable law and the prevailing practices. The statutory concept is that shares of companies are transferable only "on the registers of the company" a concept which is ignored in practice so far as shares represented by street form certificates are concerned. The company, as the unwilling custodian of the transfer register, is, under certain circumstances, made liable for recording "improper" transfers whereas the liability in most cases should be ascertained as between the transferor and the transferee and not between third parties and the company which is not a party to the transfer transaction but merely the custodian of the transfer books. The role and purpose of the instrument of transfer or power of attorney is not made clear in the statute and consequentially its function is uncertain and obscure. No statutory guidance is given to the effect and scope of endorsements of certificates or guarantees of endorsements nor are guidelines available for transfer agents and the financial community generally as to share transfers involving fiduciaries or minors.

REFORM: OTHER JURISDICTIONS

The Federal Government and the Ontario government have, upon the recommendation of their respective Law Reform Commissions, amended their Companies Acts by deleting the existing provisions relating to transfer of shares and share certificates and substituting therefore a corporate securities transfer code modeled closely upon Article 8 of the Uniform Commercial Code with appropriate changes of terminology. Article 8 can best be described as a "negotiable instruments law for investment securities."

Throughout the remainder of this discussion, the provisions of the Canada Business Corporations Act (hereafter referred to as CBCA) will be used for illustrating the prevailing federal law which is current within Ontario, Manitoba and Saskatchewan. Commentary will be drawn from the Lawrence Report (91) and the National Conference of Commissioners on Uniform State Laws, which body undertook the preparation of a Uniform Commercial Code in conjunction with The American Law Institute (92) in 1940 and out of which Code came Article 8.

By way of introduction, CBCA provisions can be considered as affecting four basic areas of securities law. Firstly, the definition of an "investment security" has been expanded to include not only those securities that previously fell within the requirements "negotiability" under the Bills of Exchange Act (93), but also almost every other type of investment paper actively traded by the business community. Secondly, the concept of negotiability, i. e., the special protections and shelter granted a bona fide purchaser for value, has been extended to all purchases of investment securities even though the security was not in the "negotiable" form previously required to make the negotiable instruments law applicable. Thirdly, defences available to the issuer of a security as to the validity of an issued security against the purchaser

thereof for value and without notice of such defect or defence, have been sharply curtailed. Finally, the CBCA provisions ease and facilitate the transfer of securities. It is in this last area that the CBCA makes the most sweeping and important changes in prior law, simplifying securities transfers by limiting the issuers (or transfer agents) liability for wrongful transfer when it has certain proofs on hand, but at the same time easing the lot of the presenting party by limiting the amount of documentary proof an issuer or its transfer agent can demand with respect to the appropriateness of the transfer.

One aspect of drafting which the OBCA utilized, but the CBCA did not, was the separation of the provisions into four divisions as they relate to various parties and matters in the total transfer transaction. The first division contains the required definitions of terms and presumptions and certain general matters. The second division relates to the company as the issuer of the securities and sets out the duties, obligations, rights and defences available to it or imposed upon it in respect of transfers of securities, including provisions with respect to restrictions on transfer and the authenticating transfer agents, registrars, or trustees. The third division states the legal duties and responsiblilities as between transferors and transferees of securities, the effect and scope of warranties, endorsements and guarantees and statements as to what constitutes delivery and as to the role of the broker. The fourth division provides for the duties of the company and its transfer agent of branch transfer agent, specifying those situations in which liability could be incurred in respect of registrations of transfers and stipulating when a duty to inquire arises and what treatment is to be accorded to lost, stolen, or destroyed securities.

CBCA PART VI: INVESTMENT SECURITIES

Part VI of the CBCA deals solely with investment securities, which are "of a type commonly dealt in upon securities exchanges or markets or commonly recognized in an area in which it is issued or dealt in as a medium for investment.

The definition of security is functional rather than formal, and it is believed will cover anything which security markets, including not only the organized exchanges but as well the "over the counter" markets, are likely to regard as suitable for trading. For example, transferrable warrants evidencing rights to subscribe for shares in a corporation will normally be "securities" within CBCA provision 44(2), since they are

(a) issued 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 term divisible into a class or series of instruments, and

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

On the other hand the definition does not cover anything which is neither "of a type commonly dealt in on the security exchanges or markets" or "commonly recognized. . .as a medium for investment." Therefore investment securities, instruments which evidence long term investments, such as stock certificates,

script certificates, bonds payable to registered holders and other certificates which evidence long term financing would generally be considered securities within this definition.(94) This new (new to us, old to the Americans) stance, embraces the policy embodied in the English Bills of Exchange Act, 1882 (95), which enables "the custom of merchants to develop new negotiable instruments as commercial necessity arises", i. e., common law negotiability. Certain formalistic requirements for investment securities have also been incorporated within the definition, such that it must "be issued in bearer or registered form".

"The share itself is an object of dominion, i.e. of rights in Rem, and not so to regard it would be barren and academic in the extreme." For all practical purposes shares are recognized in law as well as in fact, as the objects of property which are bought, sold, mortgaged and bequeathed. There are indeed the typical items of property of the modern commercial area and particularly suited to its demands because of their exceptional liquidity. (96) There is never any doubt about whether something is a share but there is considerable doubt about what a share is.

The following discussion will examine the effects of Part VI of the CBCA, "investment securities", upon the rights and obligations of the five parties most affected by these provisions and those most closely involved in the ordinary security transaction; (1) the issuer; (2) the stockholder and his rights in relation to (a); the issuing corporation and (b) his transferor or transferee; (3) the transfer agent, be it a corporate agent or issuer acting for itself; (4) the broker when acting as agent for buyer or seller; (5) the bank when acting in various capacities other than as transfer agent.

The Issuer

Under CBCA section 44(2), issuer includes a corporation

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

(b) that directly or indirectly creates a fractional interest in its right or property and that issues securities as evidence of such a fractional interest

and by section 44(6) a guarantor for issuer is deemed to be an issurer to the extent of his guarantee whether or not his obligation is noted on the security.

Corporation, private, public or chartered as an agency of the government, which issue either equity securities or evidences of debt, or any combination of the two, fall directly within the definition of "issuer" as defined above. The scope of this definition is wide enough "to include any security issuing business entity, even a partnership or sole proprietor and will extend to other issuers,...such as joint venture selling fractional interests in oil or gasoline leases, unless excluded by statute." (97) The guarantor of an issuer's debt security is held to all of the obligations of the issuer to the extent of the guarantee, but is relieved somewhat with the availability of any of the defences open to the issuer. Liability attaches whether the guarantee contract is disclosed on the face of the security or not and irrespective of the purchaser's knowledge of the obligation at the time the security was acquired.

Defences the Issuer May Raise

Within CBCA section 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;

(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.

The public assumes that securities traded within the market place are valid and therefore, great responsibility is placed upon issuers, authenticating trustees, registrars and transfer agents, for the validity of securities in circulation. This responsibility is clearly delineated within the provisions set out above and by doing so enlarges the protection and shelter provisions for bona fide purchasers, which in turn promotes greater confidence in the investor and a consequent increase in the liquidy of securities in the market place.

This situation is similar to that found operating with respect to commercial paper and "almost all defences available to the issuer are cut off by affording purchasers for value without notice of a specific deffect. Approximately the same protection is given a holder in due course under the rules relating to commercial paper" (98) and in addition

under the CBCA provisions, this protection extends in almost all cases to initial purchasers as well as later transferees. Once an issuer places his securities within the market place his manner of proceeding is now bound by the CBCA provisions which have eliminated many of the common law defences open to an issuer and the following discussion outlines the few defences left open to the issuer or his transfer agent.

Under CBCA section 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) In Effect of Defences.--All of the 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.

Where a security was made subject to the terms of another document, and its negotiability challenged in the courts,

contrary decisions were sometimes forthcoming as the courts would hold to the common law rule that the promise of payment must be "absolute on its face". Terms contained in underlying documents incorporated by reference were often related to rights in a collateral security (as in the case of a trust indenture) and did not infringe upon the issuer's "unconditional promise to pay", and section 51(1) (1) CBCA provides that the terms set forth in the security bind a holder as to those terms made part of the security by reference to another security. In addition, any terms within the incorporated document which conflict with those terms set out in a security are of no effect, and further, a mere reference does not of itself give notice of a defect going to the validity of a security. (99)

The Defence of Invalidity

When the question of validity of a security is raised a distinction must be made between a defect in the form of the security, which is not fatal, and a defect which arises out of the contravention of a statute, either federal or provincial, or of a by-law provision, or a contravention of a governmental body, for example, a securities commission. The import of section 51(2) (stated above) and section 53(a) (b), CBCA provides:

> 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 a 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 a person referred to in paragraph (a) who in the ordinary course of his duties handles the security

is in effect, to validate the security, or rather, these provisions deny the issuer any defence based on the invalidity of the security once the security is in the hands of a purchaser for value without notice of a particular defect. (100)

Forgeries and Unauthorized Signatures

A security that was not genuine could not be enforced against an alleged issuer, in addition a counterfeit certificate would be valueless in the hands of any holder, and this position is maintained in section 51(3) CBCA with certain exceptions outlined in section 53(a)(b) as indicated above. These sections provide that an unauthorized signature placed on a security "prior to or in the course of issue," is ineffective against the issuer, but, where such a security is acquired by a purchaser for value without notice of the lack of authority, an estoppel is raised on the basis of "apparent authority" and thereby blocks the issuer's ability to raise the defence of lack of authority. Seldom will the purchaser have knowledge of the authority of the signing party or parties, much less the names. Here the loss is borne by the issuer or the issuer's agent or authenticating trustee who in the circumstances is the party most capable of preventing employee frauds. These exceptions will supersede the decisions against some purchasers for value from individuals with "apparent authority" as held in the Rueben v. Great Finegold (101) and the Toronto Dominion Bank v. Consolidated Paper Co. Ltd. (102) cases.

Parallel with the rules prevailing in the commercial paper market, theft of endorsed securities from the possession of either the issuer or its agent, or the delivery of a security which must rely upon a subsequent event to become effective, such as payment therefore, will not provide the issuer with an effective defence against a purchaser for value without notice of the particular defect. This is the general import of section 51(4) of the CBCA as indicated above.

Staleness

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 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;

(b) if he takes the security more than two years after the date set for surrender or presentation of the date on which such performance became due.

With respect to staleness, as indicated above in section 52(a)(b) CBCA, a purchaser of an overdue, matured or called security is charged with notice of ". . .any defect in its issue or defence of the issuer . . . " only after the

lapse of two specific periods of time, in the first situation upon the lapse of one year and in the second situation a lapse of two years.

Where a security provides that after a stated event, either indicated on the security itself or incorporated by reference to some document at the head office, the holder will have the power to demand immediate performance of the obligation evidenced by the security, (either payment of a sum of money, surrender for redemption or exchange) and upon such event happening, and provided the issuer is ready and willing to perform on such date, i. e., has the cash or securities on hand for payment or exchange, then the one-year period begins to run from such date that the issuer is ready and willing to perform.

However, if on the happening of the event or the effective date, the issuer was not prepared to perform then the purchaser or holder is not bound with notice of any defect or defences unless he takes the security more than two years from that effective date or happening. This provides a clock for those issuers who are ready to perform their obligations (allows a certain date after which they may raise defences against stale securities) and this is a disadvantage to those issuers who are not prepared to perform their obligations as they lose the protection of the ability to raise the defence for an additional year. (103)

Restriction on Transfer

CBCA section 45(8) Restrictions.--If a security certificate issued by a corporation or 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

restraint under section 168,

(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.

Provision for the restriction on transfer of stock of a company or for the creation of "constrained shares" is provided in the CBCA. This subsection emphasizes that if a restriction is placed on the transfer of a share, it must be "noted conspicuously".(104) It should be noted however that within the definition provision section 44 of the CBCA there is no definition for what "noted conspicuously" shall be and it is hoped that in the near future amendments will give some guidance as to the proper form to follow for compliance with this section.

Unauthorized Completion or Alteration

CBCA section 54(1) Completion or Alteration.--Where 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.

The import of these CBCA provisions are that as against a purchaser for value without notice of the unauthorized completion, the issuer is prevented from raising the defence of the material alteration or unathorized completion of the security. Unauthorized or incorrect completion of a security can only occur with the negligence of the issuer or the dishonesty or negligence of an employee of the issuer or its agents. As with the rules relating to commercial paper, alterations of the instrument, whether or not material, do not invalidate the security in the hands of the innocent purchaser for value without notice of the defect. This same principle holds true with respect to the purchaser for value without notice of the defect, i.e., a material alteration or unauthorized completion of the security. Therefore, the issuer must recognize the holder and absorb the loss. (105) The theory is similar to CBCA section 51(4) relating to the availability of the defence of non-delivery and section 53 relating to unauthorized signatures.

Over-Issue

CBCA section 48(1) Over-Issue.--Provisions of this part that validate a security or compel its issue or re-issue do not apply to the extent that validation, issue, or re-issue would result in over-issue; but

(a) if a valid security, similar in all respects to the security involved in the over-issue, is reasonably available for purchase, the person

entitled to the validation or issue may compel the issuer to purchase and deliver such 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 over-issue, 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 of 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 a number of securities previously authorized plus the amount of the securities over-issued, the securities so over-issued 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 applies.

With respect to the over-issue situation, the above provisions clarify the measure of damages and set out what steps the issuer must take where an over-issue has occurred and attaches absolute liability for the same. The issuer may remedy the situation by going into the market and acquiring an identical security, or if a security is not "so available" for purchase, then the issuer may pay the purchaser his purchase price based upon the price the last purchaser for value paid for the invalid security. Situations as these will arise where the issuer has accepted for transfer, a security upon which the endorsements have been forged, issued a new certificate and was subsequently called up to issue a

new certificate to the registered owner thereby creating the over-issue. In some situations it might be more appropriate for the company to pass a resolution and thereafter file an application for an increase in the number of authorized shares to cover the amount of the over-issue especially if going into the market at that time involves acquiring a hot issue. (106) As indicated above subsection (3) provides for retroactive validation of those over-issued shares.

Other Matters Concerning the Issuer

Due, Diligence

It goes without saying that the issuer is entitled to expect the highest degree of good faith and due diligence from its authenticating trustee, transfer agent or registrar in performance of the functions of such fiduciary relationships. Good faith and due diligence require the exercise of reasonable care and the observance of reasonable commercial standards. (107) These duties are set out in section 76(1)(a)(b) at 76(2) of the CBCA.

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 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.

Attachment or Levy

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.

For the purposes of attachment, levy and seizure, CBCA section 70 treats the share certificate or evidence of indebtedness as embodying title to the intangible equity or chose in action and thereby, no attempt at attachment or levy upon a security by a creditor of the holder or registered owner shall be effective unless the security is actually seized by the acting officer. (108) This provision maintains the negotiability of the instrument, for to allow otherwise would be to destroy the freedom of the transferability otherwise afforded securities under part 6 of the CBCA provisions.

Effect of Registration

CBCA 44(4) provides,
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.

Upon a person presenting a security for transfer and upon that individual being registered in the books maintained for that purpose, the issuer or its agents is entitled to treat the parties so registered as the owner, until the security is properly presented for transfer. The party will then be entitled to vote, to receive notices and otherwise to exercise all rights of power of ownership. Ownership may pass, but then the purchaser may assert his status at will.

In a situation where the ownership has passed, but the certificate has not been presented for transfer and registration in the name of the new holder; where the issuer receives definite notice that the security has been transferred without actual presentation of a certificate, i.e., notice of an adverse claim; it may require further proof of continuing ownership from the registered owner before paying out to him dividends, other things of value or issuing a new certificate. (109)

Lost or Destroyed Certificates

CBCA provides for this situation in section 75(1) Notice of Lost of Stolen Security.--Where security has been lost, apparently destroyed or wrongfully taken, and the owner fails to notify the issuer of that fact by giving the issuer a 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 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 and transfer, the issuer shall register the transfer unless registration will result in over-issue, in which 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.

Upon the loss of a security or one that has been apparently mislaid or wrongfully taken, the owner must notify the issuer within a reasonable period of time after he has become aware of such occurrence, failing this he will risk the loss of power to assert any claim against the issuer for wrongful transfer of certificates to another and, once it has been transferred to a bona fide purchaser, of any claim for a new security to replace it. The obligations of the issuer are to issue a replacement certificate to the owner upon receipt of an indemnity bond which has been normal corporate practice. Should the lost, or destroyed certificate turn up in the hands of a bona fide purchaser for value, the issuer may then look to the indemnity bond to protect itself from loss in the event the replacement certificate issued to the original owner also turns up in the hands of another bona fide purchaser.(110)

The Shareholder

Bona Fide Purchaser

The foregoing discussion considered controversies arising between the issuer and a holder of a security from the viewpoint of the issuer. Consideration is now given to the

problems encountered by the shareholder both as transferor and transferee by the acquisition of a security and the post-issue sale.

The underlying concept within this discussion is that of the "bona fide purchaser" and the situations which will elevate one to that status on the one hand and which will preclude a purchaser or rather deny a purchaser that status on the other hand. The protection afforded the bona fide purchaser is similar to the metaphorical "shield" which is often used to describe the successful establishment of estoppel in other situations. A "bona fide" purchaser is described in CBCA section 44(2) as 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. (111)

The CBCA by its adoption of the Article 8 provisions makes a distinction between the purchaser for value from the issuer without notice of a particular defect going to the validity of the security, who then takes free of the issuer's defences, and a bond fide purchaser, i. e., one who takes by a formally perfect transfer for value from a prior holder, without notice of any adverse claims. Only a bona fide purchaser takes free of adverse claims that may be asserted by owners or others entitled to possession or ownership of the security. (112)

Thus protection is extended by section 56 of the CBCA;

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. This protection is granted to the bona fide purchaser or any type of security that meets the definition of security set out above, whether or not the security was considered "negotiable" under form of case law. This completes the encircling protection of "full negotiability".

The operative words set out in the definition above, of a "bona fide purchaser" are that such a purchaser in addition to receiving the security in good faith and for value, must also acquire it "without notice of any adverse claim."

To digress for a moment, "adverse claim" is defined in section 44(2) of the CBCA to include "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. Section 57 of the CBCA sets out the factual situations upon whose occurrence the purchaser will be deemed to have notice of an adverse claim.

Section 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 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 is in breach of the fiduciary's duty, the purchaser is deemed to have notice of an adverse claim

The grounds giving rise for application of the first and second provisions are straightforward, in the former "endorsement for collection" or "for surrender" and in the latter an endorsement on a security in bearer form that is clear and unambiguous as to the fact that the security belongs to an individual other than the immediate transferor would serve to immediately put a purchaser on notice. The third situation however requires further clarification. Where the purchaser is receiving a security endorsed to him from a fiduciary (and this fiduciary can be an executor of an estate or treasurer of a corporation) this of itself would not serve to put the purchaser on notice of any irregularities either as to the authority to execute the transfer or as to the application of the proceeds of the transaction. However, the situation will be viewed differently where the purchaser from all of the surrounding facts and circumstance should be aware that the proceeds of

the sale are being applied in breach of the fiduciary's trust, for example, a lender either institutional or individual, who has knowledge that the proceeds are being used or that the security is being pledged either in the former to honour a personal debt or in the latter to collateralize a personal loan, each situation would give rise to a notice of an adverse claim. (113)These are by no means the only fact situations which would give rise to a notice of an adverse claim, and the concept of "excess documentation" is another, which will be discussed at a later point in this paper.

Staleness as Notice

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.

There is a distinction to be made here between staleness as a notice of adverse claim under section 58 of CBCA, and

Staleness as notice of defect, as discussed earlier under section 52 of the CBCA relating to notice of defects in issue or defences available to the issuer. The distinction

lies in the theory that a purchaser taking a security with knowledge that the funds for the redemption of the same have been available for some time should be put on notice that there might be adverse claims of ownership, more likely than there would be a defect in the issue. Therefore, in such situations where a purchaser acquires the security one year after the date for performance, redemption or exchange and six months after the monies are available for such payment on presentation or surrender, then the purchaser is deemed to have notice of an adverse claim.(114) This fact situation would fall within the definition of adverse claims as set out before, i.e., "unambiguous notations of adverse claim on the security itself." This was discussed at an earlier point under defences allowed the issuer.

The Importance of Delivery

A purchaser, prior to receipt of a security containing all the necessary endorsements, may be given notice of an adverse claim which will be binding upon him and bar him from obtaining the status of a bona fide purchaser.(115) A delivery is not complete even though the security has been placed in the hands of a purchaser or his nominee if an endorsement is lacking upon the security. For even though the purchaser may be able to enforce the inscribing of the endorsement, any notice of the adverse claim given to the purchaser before the endorsement is made, will be binding upon him. Completion of the endorsements and delivery are therefore of the utmost importance to the purchaser, in order to determine his status and raise the shield of bona fides. Conversely, where the security is properly endorsed but still in the hands of the transferor, or his agent, this will not constitute a transfer until actual delivery of the security is made to the purchaser.(116) With respect to securitie in bearer form, endorsement will not affect or alter the bearer nature of the security, in addition, such an endorsement will not affect the holder's right to registration

except where the wording of the endorsement is such that the purchaser may be held to have had notice of an adverse claim. This latter situation is considered and provided for in section 63 of the CBCA as follows:

Sec. 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.

With the vast amount of security transfers completed today on the various stock exchanges and the over-the-counter exchanges, under section 66 of the CBCA provision is made to delineate when in fact delivery to a purchaser occurs.

Sec. 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 beloning 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.--The 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.

As the bulk of these transfers are accomplished through the activities of the brokers for the respective parties, therefore, notice to the purchaser's broker prior to the completion of the requirements of delivery as outlined above, will be notice to the purchaser and will therefore bar him from achieving the status of a bona fide purchaser and enjoying the benefits of its protective shield. In these situations the purchaser would be able to demand the security which is not the subject of an adverse claim from his broker, leaving the resolution of the defective security to the broker and the party from whom he received it. (117)

Bona Fides: Its Advantages

Upon obtaining the status of a bona fide purchaser all of the defences open to the issuer are blocked with the exception of counterfeit certificates, over-issue and unauthorize signatures. (118) The shield of bona fides blocks an owner or pric holder from asserting any claims to the security, whether or not a new or re-issued security has been issued to the purchaser. Counterfeit certificates and over-issue as defences were discussed earlier, and the third possible exception, that of unauthorized signature would arise where the prior owner

alleges that his signature was forged and he has done nothing to estop himself from asserting the ineffectiveness of the signature, in which case he may replevy the security from the holder even though he be a bona fide purchaser, until such time as the holder or bona fide purchaser obtains a new,re-issued or re-registered security from the issuer. Once the bona fide purchaser is in receipt of a new re-issued or r registered security, the former owner or holder, must assert his claims against the issuer alone for wrongful transfer.(119) Authority for this is provided for in section 64 and 68 of the CBCA provisions which follow:

64(1) Effect of Unauthorized Endorsement.--The owner of a security may assert the ineffectiveness of an endorsement against an issuer or any purchaser, other than a purchaser for value and without notice of any adverse claim who has in good faith received a new, re-issued 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 security upon an unauthorized endorsement is liable for improper registration.(120)

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 a 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 may be specifically enforced, its transfer may be restrained and the security may be impounded pending litigation. (121)

The Selling Stockbroker

In addition to the warranties a broker makes to his customer, issuer, and purchaser, section 59 of the CBCA provides;

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.

(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.

(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.

(4) Warranties of Pledgee.--A pledgee or other holder for purposes of security who re-delivers 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. (122)

Contrary to that endorsement made by the drawer of a cheque or other form of commercial paper, the transferor by his endorsement does not warrant that a dead security will be paid and this in fact is set out in section 61(8) of the CBCA, as follows:

61(8) Immunity of Endorser.--Unless otherwise agreed, the endorser by his endorsement assumes no obligation that the security will be honoured by the issuer. (123)

The warranties as set out above encompass almost all fact situations which may arise and give the purchaser a claim against a transferor where the transfer and registration

of a security are refused.

An owner, or holder, upon agreeing to sell his security has an obligation placed upon him by section 67 of the CBCA as follows:

67(1) Delivery of Security.--Unless otherwise agreed, if the sale of a security is made on an exchange or otherwise through brokers,

(a) the selling customer fulfills his duty to deliver when he delivers the security to the seller or to a person designated by the selling broker or causes an acknowledgment 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 while 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 delivery a security under 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 acknowledgment to be made to the purchaser that the security is held for him.

(3) Delivery to a 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. Therefore the transferor must deliver a security properly endorsed so that the purchaser, transferee, may with minimal difficulty obtain a transfer and registration of the security

either into his name or his nominees. Provision is made within the above noted sections for the acknowledgment of delivery when the sale and purchase is made through brokers upon a recognized exchange. (124)

69(1) Right to Requisites for Registration.--Unless otherwise agreed, a transferor shall on demand supply purchaser with proof of his authority to transfer or with any other requisite that is necessary to obtain registration of the transfer of security, but if the transfer is not for value a transferor need not do so unless the purchaser pays the reasonable and necessary cost of the proof and transfer.

(2) Recision of Transfer.--If the transferor fails to comply with the demand under subsection (1) within a reasonable time, the purchaser may reject or rescind the transfer. (125)

Therefore, by virtue of section 69 of the CBCA a transferee or purchaser may demand that his transferor provide sufficient proof of his authority to transfer or any further documentation that the transferee is called upon to produce by the transfer agent in order to secure registration. A transferor, seller, or broker is at liberty to deliver any security from a particular or class of securities unless otherwise requested by the purchaser to deliver a specific security from that issue and class held by the seller, transferor. In addition to this, where purchaser buys a security which is part of a fungible bulk of securities, that purchaser is the owner of a proportionate interest in the fungible bulk which is provided for in section 66(3) of the CBCA as quoted earlier. This provision should clarify situations s as occured in the "MacDonald Case" (126) and "Stobie-Forlong-Matthews Case" (127) as discussed earlier.

A seller upon completing the above obligations may, on default of the purchaser, commence an action claiming the purchase price of the securities accepted by the purchaser.

Where the purchaser does not accept delivery, the seller's remedies are damages measured by contract law with the exception of securities for which there are no ready market (private companies) or where resale would be unreasonable (compliance with the Securities Act regulation prior to offering for sale to the public).

Endorsement

Endorsement is provided for in section 44(4) and (5) of the CBCA as follows:

44(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.

No endorsement is required on a bearer security, i.e., one that runs to bearer according to its terms and not by reason of any endorsement. When an endorsement is found upon a bearer security, this may constitute notice of any adverse claim. A security in registered form specifies a person entitled to it and states that its transfer may be registered on the books of the issuer.(128) Normally, upon selling on a stock exchange all transactions are done through brokers, the selling shareholder endorses the form and forwards this to his broker who in turn either forwards this endorsed

certificate to the purchaser's broker or another security suitable endorsed if delivered to the purchaser's broker. This type of endorsement is a simple blank endorsement and is provided for in section 61(3) of the CBCA as discussed earlier.

Where the form is filled in with the name of the transferee or the name of an individual who has power to effect the transfer, or both, under section 61(6) of the CBCA, the endorsement is "special" in form. An endorsement in blank may be converted into a special endorsement by filling in the blanks and conversely a special endorsement may be changed to a blank endorsement by adding the appropriate words of transfer "in blank" and an appropriate endorsement below that of his transferor.

By virtue of section 61(9) CBCA as follows:

Section 61(9) Partial Endorsement.--An endorsement purporting to be only a part of a security representing units intended by the issuer to be separately transferrable is effective to the extent of the endorsement.

An individual may endorse upon security that the transfer is for an amount less than the fractional units indicated on the stock certificates. The special amount of shares to be transferred out of the whole amount indicated on the share certificate is filled in the appropriate blank on the form. The above outlined endorsements need not be made on the reverse side of the share certificate but may be executed upon a separate document sometimes referred to as a "stock power" which bears similar phraseology to the form found on the reverse side of a share certificate.(129)

Unauthorized Endorsement

An unauthorized endorsement will render a transfer ineffective. Subsequently, the unauthorized signature may be ratified by the owner or holder due to certain behaviour or transactions concerning the security itself which may estop them from raising the lack of authority. The true owner may in two situations as set out in section 64 of the CBCA as quoted earlier, commence an action (1) against the issuer if it has wrongfully transferred the security to a bona fide purchaser, or (2) against any holder other than a bona fide purchaser who, without notice of the true owners "adverse claim", has presented this security bearing the forged signature to the issuer or its transfer agent and has not received a new, re-issued or re-registered security. This is a common-sense approach as in most instances an individual deals through a broker on the exchange and seldom handles the security until it is delivered to him registered in his name; to charge him with notice of or reliance upon a forged signature will create an unusual hardship for the average everyday purchaser and certainly intends would intend to slow the movement of the market place. An issuer in this situation is placed in double jeopardy in that the issuer upon being presented with the security which appears to be properly endorsed transfers to the individual a new, re-issued or re-registered security who then takes as a bona fide purchaser free from all defects and then the issuer may be called upon to recompense the true owner for an innocent or wrongful transfer of his security. (130)

Who is an Appropriate Party to Endorse?

Following the discussion regarding unauthorized endorsements a natural question which one may ask and which is of the utmost importance regarding the rights and obligations of those parties presenting securities for transfers, is who is

"an appropriate party" to endorse a security certificate. Those "appropriate" individuals are to be found in the broad definition set out in section 61 of the CBCA provisions. For example, those "appropriate" individuals are defined in relation to fiduciary relationships, parties without capacity to sign, joint ownership arrangements and situations where the beneficial owner is not or cannot be the individual who is to endorse. As any discussion of these provisions is really an integral part of transfers, where attention will be more fully focussed within that discussion.

TRANSFERS

General

With the number of acquisitions and transfer of securities increasing daily, monthly and yearly; on recognized exchanges, over the counter sales, and transfers within closely held corporations representing the transfer of millions of dollars, the law has been called upon to provide clear, calm, efficient and effective means of protecting all parties involved in such transactions without unnecessary expenditures of time and money. The foregoing discussion on common law was illustrative of the fact that development of guidelines has been minimal with no identifiable procedure or rules emerging from the case law. The natural result has been that the exchanges have set up mechanics for transfer which are relatively smooth, but do allow for bottlenecks in certain areas. Where great amounts of money may be lost over improper documentation of a transfer, the practice has developed whereby transfer agents on the exchanges may and do demand excessive documentary evidence more to establish their supervisory efforts (should a court case ensue) than to effectively establish the right of the individual to transfer the security.

Investers in the market place both nationally and internationally have

demanded procedures that facilitate expeditious transfer of securities while affording the issuer, and its transfer agent, the greatest possible protection against liability for wrongful transfer. With the move into the computer age it is necessary to speed up the conservative transfer agent from the ingrained habit of following complex procedures which were established to ensure the rightfullness of the transfer and thereby protect themselves as well as their principles, but in many cases needlessly complicating a transfer beyond limits of caution. The amount of documentation which an issuer or its transfer agent may request, before effecting a transfer, is clearly defined within the CBCA. provisions. They are clear and well ordered, and in fact, where an issuer or transfer agent unduly delays a transfer, they will be liable to the transferee for any loss thereby suffered. The CBCA's approach to simplifying transfer procedures, has been to limit the issuer's demands to guarantees of signatures, appropriateness of person to transfer and tax waivers (with a few minor exceptions).

An issuer where given notice of an adverse claim has a duty to investigate and upon complying may affect the transfer. In the absence of any adverse claim, upon receipt of the necessary proofs, the issuer may transfer the security. Where the issuer has a security presented for transfer with documentation in good order, and it turns out later that the transfer was wrongful, the issuer or transfer agent will be protected from liability either directly or by reason of a right over against their signature guarantors or others. (131)

The general manner of proceeding is governed by sections 71, 72 and 73 of the CBCA as follows:

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 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.

These provisions are not mandatory and an issuer may waive any one or more or them where it has reasonable faith in the integrity of the individual presenting the security for transfer. As stated above, this is the general rule and manner of proceeding and the subsequent discussion of the pertinent provisions within the CBCA will serve to clarify and qualify the amount of documentation which may be requested and what documentation is suitable to allow the issuer or transfer agent to effect the transfer without fear of liability arising at a later time.

PROOFS THE ISSUER MAY REQUIRE

Proof of Appropriate Endorsement

As mentioned earlier, Section 61 of the CBCA provides with great clarity who an appropriate person is in varying relationships and circumstances that occur in a transfer transaction.

Section 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 by the security

(b) if a person described in paragraph (a) is described as a fiduciary but is no longer servicing in the described passage, 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 on 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 of such a person does not become unauthorized for the purposes of this part by reason of subsequent change of circumstances.

(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.

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

(9) Partial Endorsement.--An endorsement purporting to be only a part of a security representing units intended by the issuer to be separately transferrable is effective to the extent of 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.

Where a security is endorsed by a decedent just prior to his death, or by an authorized agent or fiduciary whose authority is later revoked, the endorsement is appropriate and effective provided it was appropriate at the time of the signing, irrespective of the subsequent change in circumstances. (132)

Assurance that the Endorsement is Effective

The provisions set out above define "who" should sign the security but do not define the documentary proofs that an issuer or transfer agent may require of the "authority" of such person to sign. Under the common law, an issuer or transfer agent in some situations was held liable for transfer based on an unauthorized, forged, or inappropriate signature, and therefore developed the practice requiring excessive documentary evidence to prove the effectiveness an authority of a signature. (133) By CBCA section 72 an issuer is still held responsible for such transfers but may only require the following assurances:

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 encumbancy;

(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 Encumbancy" Defined.--"Evidence of appointment or encumbancy" 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 60 days before the date the 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 (4)(b).

(6) No Notice to Issuer.--An issuer is deemed not to have notice of the contents of any document pursuant to subsection (4) except to the extent that the contents relate directly to appointment or encumbancy.

(7) Notice from Excess Documentation.--If an issuer demands assurance additional to that specified in this section for the purpose other than that specified in sub-section (4) and obtains a copy of a trust or partnership agreement by law or similar document, the issuer is deemed to have notice of all matters contained therein affecting the transfer.

Signature Guarantees

It is by use of the signature guarantee that an issuer will be able to indemnify himself should the endorsement be later held to be unauthorized. This is done by requiring that a guarnator guaranteed the signature at the time of presentation. A guarantor may be a broker, a bank, or a trust company, practically, responsible employees of either, who have a personal knowledge of the integrity and identity of the endorser. (134) The warranties that a guarantor of signature undertakes upon guaranteeing a signature are as follows:

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 a person for any loss resulting from any breach of warranty. There is a distinction that must be noted here between the guarantor of signature, who warrants only that the signature is genuine, i. e., not forged in that the party signing is appropriate as set out above and a guarantor of endorsement which is a guarantee in addition to the signature being genuine and the person being appropriate that the transfer by this individual is rightful. There is an immense difference from a liability point of view between the two and the latter guarantee should only be entered into with the utmost caution, advice of counsel, and total knowledge of the individual who is being guaranteed.

Evidence of Appointment or Encumbancy

Up to this point the discussion has covered the guidance

of the issuer as to who is an "appropriate person"; or proofs or assurances the issuer may require to show the endorsement is genuine and effective. In addition, the issuer may require "evidence of appointment or encumbancy". Although the signature guarantee goes to "appropriateness" as well as genuineness, the issue to satisfy itself is entitled to demand proof of appointment or encumbancy by virtue of section 72(4)(5)(6) of the CBCA as quoted earlier.

Some examples of when an issuer may require proofs, i.e., documents evidencing appointment or encumbancy are as follows: executorship or trust, a certified copy of a court order appointing a guardian or trustee; or certified copy of a resolution of a corporation's board of directors authorizing a certain officer as a party to sign; each of which must be received and executed within 60 days of the date on which the security is presented for transfer.(135)

An example of where it might not be possible to obtain such a court order or certificate, is the situation where an inter vivos trust is involved, in which case a written affidavit of the trustee confirmed by a bank, trust company, of broker, should be sufficient. In a situation where a donor transfers shares into a trustee's name, the named trustee's endorsement will be effective until such time as the issuer receives written notice that the trustee is no longer acting in such capacity. This last mentioned written notice would suffice as a notice to an issuer of an adverse claim and involve the issuer in a limited duty of inquiry as provided for in section 73 of the CBCA which will be discussed subsequently.

There is nothing to prevent an overly cautious issuer or transfer agent from requiring further documentary evidence of appointment or encumbancy, however, the CBCA provides a novel method for restraining this over cautious

procedure. Under section 71(2) of the CBCA (mentioned earlier) where the issuer causes undue delay and the transferee suffers financial loss the issuer will be liable for that amount. In addition, under section 72(7) of the CBCA where an issuer or transfer agent demands additional documentary evidence, i.e., trust indenture, copy of the will, which documentary evidence does not relate solely to the question of "appropriate evidence of appointment or encumbancy", then the issuer will be deemed to have notice of all the matters contained therein including any notice of an adverse claim or information which would put the issuer on notice.

Notice of Adverse Claims

As mentioned earlier, an issuer has a duty placed upon him to investigate adverse claims by virtue of section 73 of the CBCA. And this duty of inquiry involves those claims brought by the shareholder who has had his stock certificate destroyed, stolen or has mislaid it and also the situation where an issuer by demanding excessive documentation of proof of appointment or encumbancy has been deemed to have notice of a situation giving rise to an adverse claim. Therefore, in the event of a notice being given, or deemed to have occurred, a transfer will be wrongful and the issuer will be held liable if he proceeds to register the transfer. The shareholder in order to protect his interest must provide the issuer or its agent with notice in writing of his loss, "at a time and in a manner which affords the issuer a reasonable opportunity to act on it", sufficient information to reasonably identify the claimant, the registered owner and the security; and provide an address where the claimant can be reached and upon complying with these the issuer will be placed on notice.

There is one further manner in which an issuer may receive notice of an adverse claim and that is through standard publications of securities commissions, i.e. circulars and notices, in addition to which other appropriate bodies may give notice of a security either being stolen, lost or destroyed. Upon receiving such publications, the issuer shall make appropriate notations within its records so that if the questionable securities presented for transfer at a later date, its taintedness will not be overlooked and appropriate steps taken to discharge the issuer's duty of inquiry. (136)

The Fiduciary Breach

As a general rule of practice, issuers have been most insistant upon receiving adequate proof as to the rightfulness by a fiduciary to affect a transfer and that the transfer was not in breach of the controlling instrument or deed of trust. The following provisions as outlined in Section 73 of the C.B.C.A. are a guide to the issuer to be followed in the discharge of his duties with respect to notices of adverse claims, stop orders or other notices giving rise to suspicion or knowledge that the transfer is not rightful and define the line beyond which requests for documentary evidence will be excessive.

Where the issuer causes undue delay and the transferee suffers financial loss, the issue will be liable for that amount, in addition, since the 72(7) provides that where an issuer or transfer agent demands additional documentary evidence i.e. trust indenture, copy of the Will, by-law regulations, which documentary evidence does not relate solely to the question of "appropriate evidence of appointment or encumbency ", then the issuer will be deemed to have notice of all matters contained therein including any notice of an adverse claim or information which would put the issuer on notice. (137)

73(1) Limited Duty of Enquiry.--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 a new, re-issued 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 sub-section 72(7).

(2) Discharge of Duty.--An issuer may discharge a duty of enquiry 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 30 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 the 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 of 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) The Duration of Notice.--A written notice of adverse claim received by an issuer is effective for 12 months from the date when it was received unless the notice is renewed in writing.

Attention is drawn to the latter part of provision (c) of the above noted sections which says "even though the transfer is made on the endorsement of fiduciary to the fiduciary himself or to his nominee" this absolves an issuer from liability for wrongful transfer. This emphasizes the fact that this rule is designed specifically for breach of fiduciaries and is in contrast to the rule established as to notice of adverse claim between a fiduciary and a subsequent purchaser as indicated in section 57 (2) of the C.B.C.A. earlier.

Discharging the Duty to Enquire into Adverse Claim

Where an issuer is presented with a security for transfer against which is lodged an "adverse claim", at that point, a duty is placed upon the issuer to inquire into the adverse claim. However, this inquiry should not consume undue time (so as to cause the transferee unnecessary financial loss) nor should the issuer become a trier of fact in the matter between the individual who lodged the "adverse claim" and the individual presenting the security for registration of transfer. A clear, and expeditious manner of proceeding is set out under section 73(2) of the C.B.C.A. (as quoted above) which in effect allows the issuer to force the adverse claim and to take action.

Briefly the issuer gives the adverse claimant notice that it intends to transfer the security unless within 30 days a court order is served upon it enjoining the transfer; or an indemnity bond, sufficient in amount to protect the issuer from loss is filed with the issuer by the adverse claimant. This is not the only method of proceeding and the issuer may use any reasonable means to discharge its obligation of inquiry. (138)

Notice of Lost or Stolen Securities

Early discussion was concerned with the manner in which notice of lost, stolen or destroyed securities was to be given to the issuer, transfer agent or other necessary parties. The question has come up, both within the common law and legislative enactments, as to the time period after which these notices would become void or ineffective and no longer bind the issuer There has been much discussion of this matter and reference to Article 8 of the Uniform Commercial Code reveals no set time but only a reference to the case law and the various time limits set by judges. Reference to subsection 4 of section 73 of the C.B.C.A. reveals that a written notice of an adverse claim is effective only for 12 months unless renewed in writing and sent to the issuer This would appear to be compromise between conflicting cases arising out of the common law and it seems strange in any event that an issuer should be able to plead that it had in good faith "forgotten" or "overlooked" a notice. In addition, the manner in which the provision is drafted would seem to imply that it is an individual shareholder who must renew his notice in writing. Does this mean that notice received from circulars of the Securities Commission and other appropriate institutions are valid beyond the 12 month period or must they in addition be renewed after the 12 month period has elapsed?

Liability and Limits of Liability

In balancing the scales on the side of the issuer, section 74 of the C.B.C.A. safeguards the issuer in situations where there has been demonstrable compliance with the Act.

Section 74(1) Limitations of Issuer's Liability.--except an 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 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 over-issue, in which case the issuer's liability is governed by section 48.

Thus in situations where the appropriate endorsements are provided and everything is in order, the issuer will

not be held liable and in any event will have a right against the guarantor. Distinct from these situations, an issuer will only be held liable through its own negligence in overlooking notices it has received.

It is submitted, that compliance with the foregoing provisions by issuers or their agents will decrease the danger of losses for unlawful transfer, and the same provisions place a duty upon the owner of a security who in most situations can effectively protect his interests, to give prompt notice to the issuer of the loss, destruction or theft of his security. The provisions which must be satisfied in order to become a bonfide purchaser provides substantial obstacles to block a dishonest purchaser's attempts to acquire a bonfide status. Lastly, compliance with the C.B.C.A. provisions by the issuer should decrease the amount of paper work that was generated by overly cautious transfer agents in former times and equally, lessen the burden that was placed on the party presenting a security for transfer. (139)

The Broker

Definition of Broker

In the vast majority of security transactions effected each day the broker is an integral working component of the entire transaction, without whom sellers and buyers separated by many thousands of miles would not be able to achieve their desires. The C.B.C.A. under section 44(2) defines such an individual "as 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." (140) A distinction to be made however is that when a broker is purchasing securities for himself, he is not "acting for another". In addition, where the broker

holds securities for a customer in either its street or nominee name, this does not affect the broker's status as agent for his customer.

Broker Warranties

The warranties that a broker undertakes to the issurer. purchaser, his client and other individuals involved in a transfer process were enumerated earlier under section 59 of the C.B.C.A. Rightfully, as a broker, his warranty is to the effect that the security is genuine and unaltered; that he has no knowledge of any impairment of validity; and that the transfer is effective and rightful. In a situation where a purchaser declines delivery due to a defect in the security or subsequent to accepting delivery commencing an action on the warranty, the selling broker must assume the liability with a right over against his customer (save where his customer has disappeared or is insolvent) in which case he will absorb the full liability. Additional duties include obtaining completed endorsements, and ensuring that delivery of the security is completed. In many situations due to the broker's personal knowledge of the seller or buyer he will be called upon to give a guarantee of signature and again, the distinction between a gaurantee of signature and a guarantee of endorsement as mentioned earlier should be brought to the broker's attention. (141)

Notice of Adverse Claim

As was mentioned earlier, a purchaser cannot achieve the status of a bonafide purchaser if notice of an adverse claim is brought to his attention prior to accepting delivery of a security complete in all other details. The provisions outlining what constitutes delivery, constructive or otherwise were reviewed earlier in the chapter on "the shareholder."

These provisions set out with great clarity the manner in which delivery may be completed. In particular subsections 3 and 4 are novel within the business community and essentially they are meant to update the common law. Subsection 3 is meant to protect the purchaser from loss as a result of the broker either going bankrupt, or having tax liens placed against him, whilst he is holding securities for the purchaser which securities form part of a fungible bulk of similar securities. With respect to subsection 4, it imposes upon the broker the duty, upon his customer's request to present him with a clean security where an adverse notice has been received subsequent to delivery to the broker (and therefore to his customer) even though it is of no effect; the broker as a professional is in a better position to provide a clean security and resolve the problems with the security which is now the subject of an adverse notice and claim. Again, as discussed earlier, any notice which the broker has received via a "circular" or "other notice from appropriate body" or the registered owner, will continue as notice to the broker of an adverse claim, the only exception being the lapse of one year since the last written notice without a renewal of the same. (142)

BANKS, AND TRUST COMPANIES

In General

While there is no one provision that specifically covers banks and trust companies, it is submitted that their activities in relation to securities fall within the scope of the various provisions contained in the C.B.C.A. While the following discussion will not be exhaustive of the many functions that could or will come under the C.B.C.A. provisions, an attempt will be made to indicate those functions that a bank, or trust company would perform as an issuer, agent for an issuer, broker, and money lender. Where a bank or trust company issues shares to the public it certainly will come under the definition of issuer and thereby be bound with the obligations and duties. The protections afforded a bonafide purchaser will certainly extend to the bank or trust company that acquires bonds or other forms of security for its own investment portfolios.

At common law when a bank accepted the pledge of a security by the registered owner as collateral security for his loan and the security later turned out to be defective either because of an unauthorized signature or forgery in most instances the bank was left to absorb the full cost(143) Where the facts support their application, sections 53, 54, 55, and 56, of the C.B.C.A., (quoted earlier) would elevate the bank to the position of a bonafide purchaser for value without notice. Essentially, where the bank or trust company receives the security in the same manner as a non-corporate entity, without notice of any defects or other infirmities, there is no good reason why they should not take as a bonafide purchaser with all the attached benefits.

Securities in Control of the Fiduciary

In the day to day business of a bank there are numerous transactions completed between the bank and a fiduciary of either a trust, an estate, or some corporate entity. While the bank must exercise some care in ascertaining that the individual has in fact the authority to endorse a security for transfer, upon satisfying itself by requesting the appropriate documentation, it should not then look at every endorsement as constituting a breach of the fiduciary's trust. However, as mentioned earlier with respect to issuers and transfer agents, any knowledge acquired that the proceeds i.e. the consideration, is to be applied to the personal benefit of the fiduciary should serve to put the bank on notice and enquiries should be made. For example, where the bank is extending a loan to an individual trustee who places securities from the trust with the bank as collateral.(144

Notice of Adverse Claims

The bank is in the same position as the issurer, transfer agent, broker, or other individual who regularly receives circulars listing securities, bonds which have been lost, stolen, or destroyed and receipt of such circulars would constitute notice under the provisions outlined above. Therefore whether a bank is acquiring bonds for its own portfolio or receipting them as collateral security on a loan it is transacting with the holder, the review of the files maintained for such notices will prove a wise and cautionary rule of thumb. This would be so even in the situation where a year has elapsed since the bank received a written notice of a loss.(145)

Bank as Broker

When a bank acquires stock for a customer as agent and holds the same as collateral until such time as the principal

has been repaid, there is little doubt that the bank acting in this role would be characterized as a broker under the definition set out in section 44(2) CBCA. It would therefore become subject to the warranty requirements of section 59 and upon receipt of "circulars and notices" then, by virtue of section 66 the customer for whom it acquired the security would also be bound with notice. This applies of course only in the situation where the bank actually acts as an agent for its customer. (146)

Bank as Registrar, Authenticating Trustee, or Transfer Agent

Where a bank acts in any of the above indicated capacities, it is bound with all of the obligations and duties of the issurer and will be held liable for all improper or wrongful transfers or delays in transfers as discussed earlier. The duties and obligations that an agent accepts and which the bank would be bound by are provided for in section 76 of the C.B.C.A. as quoted earlier.(147)

In addition to setting up proper procedures to reduce the impact of losses occurring due to the negligence of a bank's employees, a bank could negotiate for certain exculpatory clauses within the contract between itself and its customer, and where this cannot be achieved and in any event great emphasis should be placed upon providing adequate procedures to prevent such losses. Finally, certain members of the bank's staff will be called upon to guarantee signatures, and counsel when advising banks as to the proper procedure to follow should emphasize the distinction between a guarantee of signature and guarantee of endorsement and the consequences from a liability point of view should the bank enter into a practice of performing the latter.

C.B.C.A. Provisions Pertaining to Form

Within part 6 of the C.B.C.A., of the 32 sections dealing with security certificates, registers and transfers, there are three sections which are not drawn from the Uniform Commercial Code article 8. Two of these three sections, section 45 and 46 of the C.B.C.A. will be discussed briefly below, as these two sections set out requirements which are drawn from the former Canada Corporations Act (148) and which should therefore be familar to corporate practitioners.

Briefly, section 45 (149) delineates the rights of the shareholder with respect to his entitlement to a security certificate; the assessable fee for the certificate; corporation obligations to joint holders of certificates; rules relating to certificates, manual signatures, continuation of signature; contents of the share certificate, i.e. name of the corporation, certain phraseology complying with statute requirements, and the name of the shareholder and the number and class of shares that the certificate represents. Subsection 8 of section 45 deals with the placing of notice of restriction on transfers on the certificates and was discussed earlier. (150) Other subsections of section 45 pertain to the particulars of the class; duties of the corporation to furnish sufficient information concerning the various class and series of shares issued by the corporation; and finally provisions relating to fractional shares, script certificates and the holders thereof.

Section 46 (151) of the C.B.C.A. sets out the requirements for security records, their contents, ability of the corporation to maintain central and branch registers; location of security registers, the effect of registration within the securities register, and provision for the destruction of certificates, i.e. this last mentioned provision sets a time limit upon the lapse of which the company is at liberty

to destroy cancelled security certificates in its possession. The third and remaining section of the C.B.C.A. to be discussed is section 47 which reads as follows:

47(1) Dealings with Registered Holder.--Before 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, adminstrator, 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 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 enquire into the existence, or see to the performance or observance of any duty owed to a third person by registered holder of any of its securities or by anyone by whom it treats, as permitted or required by this section as the owner or registered holder thereof.

(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.

(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 of its transfer agent

(a) the original grant of probate or letters of administration, or a copy thereof certified to be a true copy by
  (i) the court that granted the probate of letters of administration,
  (ii) a trust company incorporated under the laws of Canada or 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 a 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 the deceased holder
  (i) in case of 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 an assurance the corporation may require under section 72.

Subsection 1 of section 47 is drawn from the Uniform Commercial Code, Article 8 (152) and the concept is also contained in the Canada Corporations Act. (153) Subsection 2 is drawn from the United Kingdom Companies Act (154), which provision was inserted after recommendations made within the Jenkins Report (155), concerning the precarious position of personal representatives and certain oppressive situations which had developed at common law. Essentially, their status viz-a-viz the company and shareholder was in issue, i.e. where the transfer of the shares held by the shareholder was restricted and there was a lack of authority either statuatorily or at common law to allow the personal representative to attend meetings, to vote, to act in all capacities necessary to protect the interests of the shareholder's holdings in the Company.

While this has not been a serious problem within Canadian common law jurisdictions, the Jenkins Report indicated that some legislative protection must be afforded personal representatives, (executors or others) of minority shareholders. An example, illustrative of the situations in which an action under section 210 of the English Companies Act would appropriately be raised to thwart any attempt by directors to oppress personal representatives would be a situation "in which the directors, having the power to do so under the articles, refused to register personal representati in respect of shares devolving upon them in that capacity, and by this expedient (coupled with the absorbtion of profits in payment of the directors remuneration) force the personal representatives to sell shares in their control to the directors at a depressed price." Therefore, within section 47, personal representatives are provided with the authority, mechanics and requirements that have to be met in order to have a fiduciary registered on the books of the company and thereby be in a position to properly advance the best interests of the estate, trust , or whatever, that is being represented.

While subsection 2 would appear to be exhaustive of the individuals who fall into the group, subsection 3, a modified version of Article 8-402(3)(b) provides for any other individual to whom the carriage of securities devolves by operation of law and upon presenting appropriate proofs, accords him the same rights and privileges.

The remaining subsections are drawn from the Canada Corporations Act (156) and are modified somewhat to flow with Part VI CBCA. Subsection 4 states that a corporation need not inquire into nor see to the perfomance of any duty owed to a third person by either the registered holder or the individual that is recognized as the registered holder by virtue of these provisions. Essentially, this means that the company is not bound to indemnify any individual who suffers by reason of a breach of fiduciary duty by any trustee or other fiduciary. Subsection 5 allows for an infant to hold securities and saves the corporation harmless from any later repudiation. Subsection 6 is straightforward and upon receipt of suitable documentation of the death of one joint holder by the other joint holder or others, the corporation may take this into account and act accordingly. Subsection 7,8 and 9 deal with the transmission of securities under probate or letters of administration and essentially set up the requirements which must be satisfied prior to a corporation effecting a change upon its register into the name of the individual making application for such change.

FOOTNOTES

2. The New Webster Encyclopedic Dictionary of the English English Lanuage, Consolidated Book Publishers 1971, Chicago.

3. Modern Securities Transfers: Carlos L. Israels, Egon Guttman; Warren, Gorham & Lamont, Inc. 1967; Boston, Massachusetts 102.

4. Id - P 103.

5. Ibid - N. 3 P 106.

6. J. Shelton, The First Printed Share Certificate: An Important Link in Financial History, 39 History Review 391 (1965).

7. John L. Howard: Property Registration Systems; Uniform Commercial Code, Article 8, Themis 321 (1971).

8. Colonial Bank v. Cady and Williams [1890] 15 A.C. 267 Per Lord Watson at P 275.

9. The Principles of Modern Company Law (3rd edition 1969) CB Gower at P 401, 402.
In the meantime it is clear that, in the case of a sale and purchase, the seller holds as trustee for the purchaser and must account to him for any benefit but is entitled to be indemnified against any obligations and, if unpaid, to exercise voting rights as he thinks will best protect his position. Musselwhite v. Musselwhite & Son Ltd. (1962) Ch. 964.

10. Ibid - N. 7 at P 327.

11. Gower, The Principles of Modern Law 343-47 (3rd ed. 1969); Magnus & Estrin, Companies Law and Practice 82 (4th ed. 1968); Fraser & Stewart, Company Law of Canada 179-80 (5th ed. 1962); Falconbridge, Banking and Bills of Exchange 414 (7th ed. 1969).

12. Townsend v. Ash (1745) 3 Atk 336, 26 E.R. 995 cited in Gower, at footnote no. 9 at P 26.

13. Evans v. Davies (1893) 2 Ch. 216 : 68 L.T. 244 : 62 L.J.Ch. 661.

14. Rene T. Leclerc Inc. v. Perrault et la Banque de la Nouvelle Ecosse (1970) C.A. 141.

15. Hunt v. R. (1966) C.T.C. 474 " 66 D.T.C. 5322 (ExCt.).

16. Id at P 477, P 5325.

17. Gray v. Gray (1944) O.W.N. 399.

18. MacKenzie v. Monarch Life Assurance Co. (1912) 45 S.C.R. 232 (1913) 15 D.L.R. 695.

19. Coplan v. Coplan (1958) O.R. 551 (C.A.).

20. Patrick v. Royal Bank (1932) 2 W.W.R. 257; 45 B.C.R. 437 (1932) 3 D.L.R. 532 (C.A.).

21. Bank of Montreal v. Isbell (1925) 2 D.L.R. 30 (S.C.C.).

22. English Companies Act 1948, 12 & 12 Geo. 6 c. 38.
Canada Corporation Act 1964-65 c. 52 s. 2.
Alberta Companies Act, The Companies Act, R.S.A. 1970 c. 60 s. 1.
Ontario Business Corporation Act 1970, S.O. 1970 c. 25 s. 46.

23. Ibid n. 7 at P 328.

24. Ibid n. 11 at P 343.

25. South London Greyhound Racecourses v. Wake (1931) 1 Ch. 496; 100 L.J.Ch. 169; 144 L.T. 607; R.V. Williams (1942) A.C. 541 (P.C.); (1942) 2 All E.R. 95.

26. Ibid n. 14 at P 141.

27. The Sale of Goods Act, R.S.A. 1955 c. 295 s. 1.

28. M. Banks, Corporations: Stock Transfer Restrictions, 44 Cornell Law Quarterly 133 (1958); L. Painter, Stock Transfer Restrictions: Continuing Uncertainties and a Legislative Proposal, 6 Villanova Law Review 48 (1960).

29. Ibid n. 7 at P 328.

30. Heseltine v. Siggers, 1 Exch 856, 154 English Reports 365 (Ex 1848); Attorney General v. Bouwens, 4 M. & W. 171, 150 English Reports 1390 (Ex 1838); Gorgier v. Mileville, 3 B. & C. 45, 107 English Reports 651 (K.B. 1824).

31. Goodwin v. Roberts, [1875] L.R. 10 Ex. 337 aff'd [1876] 1 A.C. 476.

32. Rumball v. Metropolitan Bank [1877] L.R. 2 Q.B. 194.

33. Edelstein v. Schuler & Co. [1902] 2 K.B. 144; Bechuaualand Exploration Co. v. London Trading Bank Ltd., [1898] 2 Q.B. 658.

34. London Joint Stock Bank v. Simmons [1892] 17 A.C. 201. See also Bentinck v. London Joint Stock Bank [1893] 2 Ch. 120.

35. Bills of Exchange Act, 1882, 45 & 46 Vict. 292, c. 61.

36. Ibid n. 31.

37. Ibid n. 31 [1875] L.R. 10 Ex. 337 at 339.

38. Ibid n. 31 at P 346.

39. Ibid n. 31 at P 353.

40. Ibid n. 33.

41. Ibid n. 33 at P 154.

42. Ibid n. 31.

43A. Monarch Life Assurance Co. v. MacKenzie, 23 O.L.R. 342 reversed 45 S.C.R. 232 reversed 25 O.W.R. 743 (P.C.).

43B. Canadian National Fire Insurance Company v. Hutchings [1918] A.C. 451 (P.C.) "A paid up share of the capital stock of a company is personal property and may be disposed of by the shareholder freely".

43. Patrick v. Royal Bank, Ibid n. 20 and Bank of Montreal v. Isbell, Ibid n. 21.

44. Ibid n. 8.

45. Ibid n. 8 at P 284 per Lord Herschell.

46. Ibid n. 8 at P 275 per Lord Watson.

47. Ibid n. 8 at P 275 per Lord Watson.

48. Ibid n. 8 at P 277 per Lord Watson.

49. Ibid n. 8 at P 277 per Lord Watson.

50. Tough Oakes Gold Mines Ltd. v. Foster (1917) 39 O.L.R. 144; Lovibond v. G.T.R. and C.N.R., [1939] O.R. 305 at P 327 (C.A.) per Masten J.

51. Ibid n. 8 at P 283 per Lord Herschell.

52. Ibid n. 8 at P 285 per Lord Herschell.

53. Ibid n. 8 at P 285 per Lord Herschell.

53A. At English Common Law Corporation under no duty to inquire at to the rightfulness of a particular transfer but only to satisfy themselves that the request came from a fiduciary duly constituted as such. Hartga v. Bank of England, 3 Ves. Jun 56, 30 English Reports 891 (Ch. 1796).
Was embodied in Statute Laws Companies Consolidation Act, 1845, 8 & 9 Vict c. 16 & 20 and hence was adopted in Federal Corporations Act and most Provincial Acts.

54. Fry v. Smellie [1912] 3 K.B. 282 C.A.

55. Id at P 294 per Farwell L. J.

56. Smith v. Rogers (1899) 30 O.R. 256.

57. McLeod v. Brazilian Traction Light and Power Co. Ltd. (1927) 60 O.L.R. 253.

58. Dominion Companies Act, R.S.C. 1906, ch. 79.

59. Ibid n. 57 at P 263.

60. Ibid n. 3 at P 311.

61. Companies Act, R.S.C. 1927, c. 27, s. 77(2) which appears in the present Canada Corporations Act, c. 52 s. 2 chapter C-32 s. 39(2) in which first appeared in the Companies Act of 1906 2 E VII, c. 15, s. 51.

62. Whitehead v. Bridger, Hevenor & Co. Ltd. [1936] 3 D.L.R. 408.

63. Ibid n. 61.

64. Ibid n. 62 at P 410.

65. Ibid n. 57.

66. Miller v. Race (1758), 1 Sm.L.C. 11th ed., P 463.

67. Aitken v. Gardner and Watson et al (1956) 4 D.L.R. (2d) 119.

68. Guaranty Trust Co. and Dennison Mines Ltd. v. James Richardson and Son (1963) 39 D.L.R. (2nd) 517.

69. Id at P 521.

70. Sheffield Corporation v. Barclay [1905] A.C. 392; Betts v. Gibbins (1834), 2 Ad & El 57, 111 E.R. 22; Dugdale v. Lovering (1875), L.R. 10 C.P. 196.

71. Ibid n. 68 at P 530-32.

72. Chartered Trust and Executor Company and Cochenour-Willans Gold Mines Ltd. v. Pagon and Indemnity Insurance Company of North America (1950) O.R. 662.

73. Ruben v. Great Fingall Consolidated (1906) A.C. 439 H.L.

74. Id at P 443 / C.F. Stirling L.J. in the C.A. (1904) 2 K.B. at P 729.

75. Lloyd v. Grace Smith & Co. (1912) A.C. 716 H.L.

76. Kreditbank Cassel v. Scheukers [1927] 1 K.B. 826 C.A.

77. Ibid n. 25.

78. Ibid n. 9.

79. Shaw v. The Port Phillip and Colonial Gold Mining Company Ltd. (1883-84) 13 Q.B.D. 103 - see also: The Jenkins Committee thought that it should be made clear that the company is bound by an act of an officer having apparent authority: Cmnd 1749, paragraph 482.

80. Id at P 106.

81. Toronto Dominion Bank v. Consolidated Paper Corporation Ltd. (1963) 37 D.L.R. (2nd) 424.

82. Id at P 432.

83. In Re MacDonald (1959) 18 D.L.R. (2nd) 731.

84. The Sale of Goods Act, R.S.A. 1955, c. 295 s. 1.

85. Societe Generale de Paris v. Tranways Union Co. (1884) 14 Q.B.D. 424 at P 451.

86. Colonial Bank v. Whinney (1886) 11 Appeal Cases 426 at 439.

87. Macaura v. Northern Assurance Co. (1925) A.C. 619 at PP 626-7.

86. Ibid n. 83 at P 736.

87. Re Wait (1927) 1 Ch. 606 at 637.

89. Ibid n. 83 at P 738.

90. Re Stobie-Forlong-Matthews Ltd. (1931) 3 D.L.R. 170.

91. Interim Report of the Select Committee on Company Law for the Province of Ontario 1967 (The Lawrence Report).

92. Uniform Laws Annotated, National Conference of Commissioners on Uniform State Laws and American Law Institute, Edward Thompson Company 1962.

93. Ibid n. 35.

94. Ibid n. 92 at P 251, see also: Ernest L. Folk, Article Eight: Investment Securities, 44 North Carolina Law Review 654 (1966) at 655.

95. Ibid n. 35.

96. Ibid n. 9 at P 346.

97. A Transactional Guide to the Uniform Commercial Code, Volume 2, William D. Hawkland (Chapter IV (Article 8) by William R. Klaus) American Law Institute 1964, P 863 at 866.

98. Id at 870; see also n. 94 at 668, 673, 675.

99. Carloes Israels: Investment Securities as Negotiable Paper - Article 8 of the Uniform Commercial Code, 13 Business Lawyer 676 (1958) at 679, see also n. 92 at P 261.

100. Ibid n. 92 at P 269, see also n. 94 at P 675.

101. Ibid n. 73.

102. Ibid n. 81.

103. Ibid n. 92 at P 265; see also n. 97 at P 872, 881, and see also n. 99 at P 680.

104. Ernest L. Folk, Article Eight: A Premise and Three Problems, 65 Michigan Law Review, Part 2, 1379 (1966-67) at P 1398, see also n. 92 at P 267, n. 94 at P 680, n. 97 at P 869.

105. Ibid n. 92 at P 271, n. 94 at P 678, and n. 97 at P 874.

106. Ibid n. 92 at P 253, n. 94 at P 668, and n. 97 at P 875.

107. Ibid n. 92 at P 331, n. 97 at P 875, 910, and n. 99 at P 681.

108. Ibid n. 92 at P 310, and n. 97 at P 876.

109. Ibid n. 97 at P 877.

110. Ibid n. 92 at P 329, n. 94 at P 709, n. 97 at P 873, 878, and n. 99 at P 681.

111. Ibid n. 92 at P 251, n. 94 at P 655, n. 97 at P 864, and n. 99 at P 678.

112. Ibid n. 92 at P 278, n. 94 at P 683, n. 97 at P 878, 881, and n. 99 at P 680.

113. Ibid n. 92 at P 283, n. 94 at P 694, n. 97 at P 880, 882, and n. 99 at P 681.

114. Ibid n. 92 at P 285, n. 97 at P 881, and n. 99 at P 680.

115. See section 56(1) CBCA.

116. See section 62 CBCA.

117. Ibid n. 92 at P 302, n. 94 at P 688, 690, and n. 97 at P 883, 903.

118. See CBCA 44(3) and 49, which aid the "Bona Fide Purchaser" by throwing on the party adverse to a person asserting bona fides the obligation to plead unauthorized signatures specifically and to bear the burden of establishing a defense viable against the holder. Section 49 sets out the burden of proof and who it falls upon amongst adverse parties.

119. Ibid n. 92 at P 302, and n. 92 at P 883.

120. Ibid n. 92 at P 298, n. 94 at P 684, n. 97 at P 873, 888, and n. 99 at P 685.

121. Ibid n. 92 at P 307, n. 94 at P 684, 693, and n. 97 at P 884.

122. Ibid n. 92 at P 287, n. 94 at P 692, n. 97 at P 885, 902, and n. 99 at P 683.

123. Ibid n. 92 at P 292.

124. Ibid n. 92 at P 304, n. 94 at P 689, and n. 97 at P 886.

125. Ibid n. 92 at P 309.

126. Ibid n. 83.

127. Ibid n. 90.

128. Ibid n. 92 at P 251, and n. 97 at P 887.

129. Ibid n. 92 at P 292, and n. 94 at P 683, 685.

130. Ibid n. 120.

131. Ibid n. 92 at P 315, n. 94 at P 694, 702, 706, n. 97 at P 877, 883, 890, 896, and n. 99 at P 681, 687.

132. Ibid n. 92 at P 292, n. 94 at P 683, 703, and n. 97 at P 887, 891.

133. Ibid n. 92 at P 318, n. 94 at P 698, 703, n. 97 at P 892, 895, 897, and n. 99 at P 861, 684, 687.

134. Ibid n. 92 at P 300, n. 94 at P 702, n. 97 at P 893, and n. 99 at P 685.

135. Ibid n. 133.

136. Ibid n. 92 at P 324, and n. 97 at P 896.

137. Ibid n. 94 at P 698, and n. 99 at P 681, 688.

138. Ibid n. 136, and n. 137.

139. Ibid n. 92 at P 326, n. 94 at P 684, 687, 694, 698, 709, n. 97 at P 900, and n. 99 at P 681, 689.

140. Ibid n. 92 at P 281, n. 97 at P 876, and n. 99 at P 683.

141. Ibid n. 122.

142. Ibid n. 117.

143. Ibid n. 73, and n. 81.

144. Ibid n. 113.

145. Ibid n. 113.

146. Ibid n. 117, and n. 122.

147. Ibid n. 107.

148. Ibid n. 22.

149. Ibid n. 22, see sections 36(1)(2)(4)(a)(b), subsection 5, 13(3)(11).

150. Ibid n. 104.

151. Ibid n. 22, see sections 182(1)(a)(c)(2), section 110(1)(2)(3).

152. Article 8 - 207(1).

153. Ibid n. 148, see section 39(2).

154. Ibid n. 22.

155. United Kingdom Report of the Committee on Company Law (Jenkins Report) Cmnd 1749 paragraph 210.

156. Ibid n. 22, see sections 37(1), 42(1)(2).

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